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Original: **English**

No.: **ICC-02/04-01/15**
Date: **9 November 2021**

APPEALS CHAMBER

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

SITUATION IN UGANDA

IN THE CASE OF
THE PROSECUTOR v. DOMINIC ONGWEN

Public
with public Annexes A, B and public redacted Annex C

Public redacted version of "Prosecution Response to 'Defence Appeal Brief Against the Convictions in the Judgment of 4 February 2021' (ICC-02/04-01/15-1866-Conf)", 21 October 2021, ICC-02/04-01/15-1882-Conf

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INTRODUCTION

1. Dominic Ongwen was correctly, and fairly, convicted of 62 counts of war crimes and crimes against humanity.[1] Although he was a child when he was abducted and recruited into the Lord's Resistance Army ("LRA"), Ongwen became a fully responsible adult who rose up through the LRA ranks to embrace and implement, and indeed, further develop its policies and crimes. He did not leave the LRA until he was surrendered to the Court in January 2015. He was approximately 24 - 27 years old when he committed the charged crimes, which took place over a period of three and a half years (between 1 July 2002 and 31 December 2005). His contributions were multifaceted, continuous and essential. The lives of thousands of persons were interrupted and ruined as a result of his actions. Those who survived were left with horrific and irreversible scars, and subsequent generations are still affected by his crimes. In short, Trial Chamber IX was correct to find him guilty. Furthermore, the Trial Chamber conducted the proceedings fairly and expeditiously while at all times ensuring Ongwen's rights; correctly interpreted the law; and thoroughly assessed the evidence.[2] Ongwen has not shown that the Trial Chamber erred—either in law,[3] in fact,[4] or procedurally[5] —or that any purported error materially affected the decision.[6] Ongwen's Appeal should be dismissed and his conviction upheld.

CONFIDENTIALITY LEVEL

2. Pursuant to regulation 23bis(1) of the Regulations of the Court ("RoC"), the Prosecution files this response as confidential since it refers to information with the same confidentiality level. The Prosecution will file a public redacted version as soon as practicable.

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[1] The 62 counts comprised 61 war crimes and crimes against humanity: Sentencing Decision, para. 1. The table of contents is contained in Annex A to this brief.
[2] *Ntaganda* AJ, paras. 38, 587 (referring to the trial chamber's duty to assess the evidence holistically).
[3] For the standard of appellate review of factual errors, *see*: *Ntaganda* AJ, para. 39; *Bemba et al.* AJ, para. 91-96; *Lubanga* AJ, paras. 21-27.
[4] For the standard of appellate review of legal errors, *see*: *Ntaganda* AJ, para. 36 (referring to *Lubanga* AJ, paras. 17-18; *Ngudjolo* AJ, para. 20; *Bemba* AJ, para. 36; *Bemba et al.* AJ, para. 99).
[5] For the standard of appellate review of procedural errors, *see*: *Ntaganda* AJ, para. 44 (quoting *Lubanga* AJ, para. 20; and citing *Ngudjolo* AJ, para. 21; *Bemba* AJ, para. 47 and *Bemba et al.* AJ, para. 99) and 46 (quoting *Kenyatta* AO5 AJ, para. 25).
[6] *Ntaganda* AJ, para. 43 (holding that a "trial chamber's decision is materially affected by a factual error if the Appeals Chamber is persuaded that the trial chamber, had it not so erred, would have convicted rather than acquitted the person or vice versa in whole or in part", and "an error and its materiality must not be assessed in isolation; rather the Appeals Chamber must consider the impact of the error in light of the other relevant factual findings relied upon by the trial chamber for its decision on conviction or acquittal").

SUBMISSIONS

I. MANY OF ONGWEN'S ARGUMENTS CAN BE DISMISSED *IN LIMINE*

3. Many of the arguments set out in Ongwen's 90 grounds of appeal should be summarily dismissed on one or more of the following grounds:[7]

I.A. ONGWEN FAILS TO SUBSTANTIATE HIS ARGUMENTS

4. Throughout his Appeal Brief Ongwen makes general or abstract submissions that the Chamber erred without identifying the relevant finding, without providing arguments on why it erred or explaining how the alleged error materially affected the finding or decision.[8]

5. The Appeals Chamber has held that, in addition to satisfying the requirements in regulation 58(2) of the Regulations of the Court ("RoC"), the appellant is obliged (i) to present "cogent arguments" setting out the alleged error and explain how the Trial Chamber erred;[9] and (ii) to demonstrate how the error materially affected the impugned decision under article 83(2).[10] If an appellant fails to meet these requirements, the Appeals Chamber may dismiss the arguments without analysing their substance.[11] This approach is consistent with the jurisprudence of the ICTY Appeals Chamber. For example, in *Krajišnik*, it affirmed that:

> [The Appeals Chamber] has an inherent discretion to determine which of the parties' submissions merit a reasoned opinion in writing and […] may dismiss arguments which are evidently unfounded without providing detailed reasoning in writing. […] In order for the Appeals Chamber to assess a party's arguments on appeal, the party is expected to present its case clearly, logically and exhaustively. […] [T]he Appeals Chamber may dismiss submissions as unfounded without providing detailed reasoning if a party's submissions are obscure, contradictory, vague or suffer from other formal and obvious insufficiencies.[12]

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[7] The Prosecution has identified arguments that merit summary dismissal in at least Grounds 1-3, 5, 6, 9-10, 12, 14-17, 20, 24, 27, 29-31, 34-41, 43, 46, 49, 51, 55, 60, 64, 66, 69-71, 74-79, 83-86, 88, 90. *See below* fns. 8, 14.

[8] *See e.g.* Appeal: Ground 6 (paras. 175, 178-181, 189), Ground 16 (paras. 256-259), Grounds 27, 29, 31, 35-41 (paras. 326, 387-390), Ground 46 (para. 532), Grounds 60, 70 (para. 722), Ground 64 (paras. 655-658), Grounds 74-76 (para. 817), Grounds 71, 24 (para. 736, fn. 916), Grounds 77-79 (paras. 836-838, 857-858), Grounds 83-86 (paras. 894-895, 904, 907), Ground 88 (paras. 965-968).

[9] *Ntaganda* AJ, para. 48 (the Appeals Chamber further held that "[i]n alleging that a factual finding is unreasonable, an appellant must explain why this is the case, for example, by showing that it was contrary to logic, common sense, scientific knowledge and experience" and "parties and participants [will] draw the attention of the Appeals Chamber to all the relevant aspects of the record or evidence in support of their respective submissions relating to the impugned factual finding").

[10] *Ntaganda* AJ, para. 48; and para. 49 ("When raising an appeal on the ground of unfairness under article 81(1)(b)(iv) [..], the appellant is required to set out not only how it was that the proceedings were unfair, but also how this affected the reliability of the conviction decision").

[11] *Ntaganda* AJ, para. 49 (citing *Bemba* AJ Minority Opinion, para. 386); *see also Lubanga* AJ, para. 30.

[12] *Krajišnik* AJ, para. 16.

6. In that case and subsequent ones, the Appeals Chamber of the ICTY developed a non-exhaustive list of types of submissions that, in its opinion, warranted summary dismissal.[13] As will be shown in this Response Brief, many of Ongwen's arguments in the Appeal can be said to fit within these categories of submissions warranting *in limine* dismissal. The Prosecution respectfully requests that the Appeals Chamber rely on these grounds, as appropriate, to summarily dismiss a large number of his arguments.

I.B. ONGWEN INCORPORATES BY REFERENCE ARGUMENTS FROM PREVIOUS SUBMISSIONS

7. In addition, Ongwen frequently incorporates in his Appeal arguments that he has previously made in other filings, merely by referring to those filings but without developing any arguments in this Appeal.[14] Compounding this, some of the referenced filings likewise fail to develop arguments, but rather themselves refer to Ongwen's previous submissions, incorporating them by reference.[15]

8. Such submissions should be summarily dismissed. As the Appeals Chamber has held, "it is impermissible to attempt to incorporate by reference submissions"[16] and "[t]he arguments of a participant to an appeal must be fully contained within that participant's filing in relation to that particular appeal. The filing must, in itself, enable the Appeals Chamber to understand the position of the participant on the appeal, without requiring reference to arguments made by that

[13] *Krajišnik* AJ, paras. 16-27 ((i) arguments that fail to identify the challenged factual findings, that misrepresent the factual findings or the evidence, or that ignore other relevant factual findings; (ii) mere assertions that the Trial Chamber must have failed to consider relevant evidence; (iii) challenges to factual findings on which a conviction does not rely, and arguments that are clearly irrelevant, that lend support to, or that are not inconsistent with the challenged finding; (iv) arguments that challenge a Trial Chamber's reliance or failure to rely on one piece of evidence; (v) arguments that are contrary to common sense; (vi) challenges to factual findings where the relevance of the factual finding is unclear and has not been explained by the appellant; (vii) mere repetition of arguments that were unsuccessful at trial; (viii) allegations that are based on material not in the record; (ix) mere assertions unsupported by any evidence, undeveloped assertions and failures to articulate error; and (x) mere assertions that the Trial Chamber failed to give sufficient weight to evidence or failed to interpret evidence in a particular manner); *see also* *D Milošević* AJ, para. 17; *Lukić & Lukić* AJ, para. 15; *Šainović et al.* AJ, paras. 26-27; *Đorđević* AJ, para. 20; *see similarly* *Nyiramasuhuko et al.* AJ (Vol I), paras. 34-35; *Nchamihigo* AJ, paras. 11-12; *Bagosora et al*. AJ, paras. 19-20.

[14] *See e.g.* Appeal: Grounds 1-3 (para. 15), Ground 5 (paras. 78-79, 111, 119, 139, 148, fns. 140, 148, 158), Ground 6 (paras. 177, fn. 171), Grounds 9-10 (paras. 227 and 233, fn. 230), Ground 12 (paras. 239-240), Grounds 14-15 (para. 247), Ground 17 (paras. 260-262), Ground 20 (para. 281), Grounds 27, 29, 31, 35-41 (fn. 353, paras. 321, 325, 328, 362, 387, 393), Grounds 30, 34, 36, 43 (para. 432), Ground 49 (fn. 611), Ground 51 (para. 556), Ground 55 (para. 593), Ground 64 (para. 652, fn. 791), Ground 69 (para. 705), Grounds 77-79 (para. 857), Grounds 83-86 (paras. 894-895, fns. 1140-1141), Grounds 90, 66 (para. 976).

[15] *See e.g.* Appeal, paras. 119 (referring to Defence Closing Brief, paras. 180-918 (which also refers to previous filings: para. 183 (fns. 273-275)) and Defence Defects Series Part II, paras. 23-78); 652 (referring to Defence Closing Brief, para. 184, where the Ongwen incorporates, by reference, his submissions from the Defence Defects Series Part II, paras 32-49).

[16] Page Limit AD, para. 15.

participant elsewhere."[17] Likewise, arguments incorporated by reference to other filings circumvent the applicable page limit;[18] accordingly, they should be dismissed *in limine*.[19]

I.C. STRUCTURE OF THE PROSECUTION'S RESPONSE

9. Since Ongwen repeats the same legal and factual arguments in several of his 90 grounds of appeal, the Prosecution has structured its response brief in 'sections' which respond to several grounds raising the same arguments.[20] Notwithstanding this structure, it is clear from the headings which grounds the Prosecution is responding to in compliance with regulation 59(1)(a) of the Regulations of the Court.

II. ONGWEN'S FAIR TRIAL RIGHTS WERE RESPECTED: GROUNDS 1-4, 11-18

10. Ongwen alleges in Grounds 1-4 and 11-18 that the Trial Chamber erred in finding that no fair trial violations occurred in his case, and consequently erred in failing to stay the proceedings. He argues that the only appropriate remedy for these errors is a reversal of his convictions. These arguments should be rejected. The Chamber conducted a fair and expeditious trial, giving full regard to Ongwen's rights. Rather than demonstrating any error in the Chamber's findings on the alleged fair trial violations, Ongwen largely repeats the same arguments on appeal that he raised during trial and in his Defence Closing Brief—arguments which the Chamber fairly considered and reasonably rejected. Ongwen fails to demonstrate violations that were of "such importance as to make a fair trial permanently impossible", or to show that any unfairness in his treatment was of such a nature that it "rupture[d] the process to an extent making it impossible to piece together the constituent elements of a fair trial".[21] Moreover, he fails to show on appeal how any alleged unfairness in the proceedings affected the reliability of the Judgment, or how any purported errors materially affected it.[22] Ongwen's request for the reversal of his convictions is without merit.[23]

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[17] *Lubanga* Second Redactions AD, para. 29.
[18] *Bemba et al.* SAJ, paras. 254-255.
[19] *Ntaganda* AJ, para. 901 ("To the extent Mr Ntaganda's arguments are developed in his closing brief, rather than within his appeal brief, the Appeals Chamber will not consider them as to do so would allow the page limit for the appeal to be circumvented").
[20] *See also* Annex A to this brief including the Table of Contents.
[21] Judgment, para. 44 (fn. 91, citing *Lubanga* Jurisdiction AD, para. 39).
[22] *Ntaganda* AJ, paras. 48, 49.
[23] *Contra* Appeal, para. 269.

II.A. ONGWEN'S ARGUMENTS REGARDING THE BREACH OF HIS RIGHTS DURING ARREST AND SURRENDER SHOULD BE DISMISSED *IN LIMINE*

11. Ongwen prefaces the fair trial grounds by alleging that the Chamber erred in finding that neither his right to silence or right to counsel were breached when he was in the custody of the Ugandan and Central African Republic ("CAR") authorities prior to his surrender to the Court.[24] Ongwen argues that the violations are depicted in a video where he appears being questioned by the UPDF while he was in the custody of the Ugandan authorities.[25] These arguments should be dismissed *in limine*. First, they are outside the scope of the Appeal. Ongwen did not include this issue in his Notice of Appeal[26] and never subsequently sought leave from the Appeals Chamber pursuant to Regulation 61 of the RoC to vary his grounds of appeal to add this issue. Nor does Ongwen provide any reason or explanation now supporting the late addition of this argument.

12. Second, even if the Appeals Chamber were to consider this additional argument, it should be equally rejected. Ongwen fails to set out any error or to demonstrate how any purported error materially affected the Judgment.[27] The Chamber correctly found that, contrary to Ongwen's assertion, articles 55(2)[28] and 59[29] of the Statute did not apply to the events shown in the video: the Ugandan authorities did not interview Ongwen pursuant to a request of cooperation from the Court, and CAR (not Uganda) surrendered Ongwen to the Court.[30] Moreover, there was no nexus between the questions posed by the Ugandan authorities to Ongwen in the video and the criminal proceedings against him in this Court.[31] And while Ongwen argues that the Chamber erroneously failed to deem the video inadmissible, the Defence itself submitted into evidence a video recording from the same events.[32] Finally, even though the Prosecution's expert P-0446 relied upon the video in reaching her conclusion that Ongwen did not suffer from mental

[24] Appeal, paras. 8-11.
[25] UGA-OTP-0283-1449.
[26] *See generally* NoA, pp. 5-32, and in particular "Part A: Errors resulting in violations of Appellant's fair trial rights".
[27] *See above*, paras. 4-6.
[28] Article 55(2) of the Statute concerns requests to national authorities made under Part 9 to question a suspect in connection with crimes under the Court's jurisdiction. The Chamber found that the Ugandan and CAR authorities were not acting pursuant to any request for cooperation under Part 9 to question Ongwen in relation to the case, thus article 55(2) did not apply: Judgment, para. 51.
[29] Article 59 of the Statute concerns arrest proceedings in the custodial State, *i.e.* the CAR, in Ongwen's case, whereas the video was taken while Ongwen was in the custody of the Ugandan authorities: Judgment, para. 52. *See also* para. 54.
[30] Judgment, para. 55.
[31] Judgment, para. 60.
[32] Judgment, para. 59.

illness,[33] the video was only one item amongst a wide range of material upon which she based her opinion.[34] Ongwen does not demonstrate how the expert's opinion, or the Chamber's findings regarding mental illness, would have differed if the video had not been relied upon.

II.B. THE CHAMBER CORRECTLY FOUND THAT ONGWEN'S RIGHTS WERE NOT VIOLATED IN THE ARTICLE 56 HEARINGS (GROUNDS 1-3)

13. Ongwen argues in these grounds that the Chamber erred legally, factually and procedurally in finding that there had been no violation of his rights during the article 56 proceedings.[35] The article 56 proceedings, which took place in September and November 2015, elicited the testimony of eight witnesses—seven of which the Prosecution submitted into evidence at trial, and the Chamber found to be victims of SGBC directly perpetrated by Ongwen.[36] Ongwen argues that: (i) the article 56 proceedings violated his right to notice as he was not informed of the charges for which the evidence was taken;[37] (ii) the Single Judge of the Pre-Trial Chamber was conflicted in his role by overseeing the article 56 hearings while also sitting on the bench deciding the confirmation of charges;[38] (iii) the Chamber prejudicially used article 56 evidence outside the scope of the charges to support other convictions;[39] and (iv) other procedural and fair trial violations resulted from the article 56 proceedings.[40] To the extent Ongwen incorporates his submissions from the Defence Closing Brief, this should be dismissed.[41] The Prosecution responds only to the arguments raised in the Appeal,[42] and only in relation to the seven witnesses relevant to Ongwen's conviction as a direct perpetrator of SGBC.[43] Grounds 1-3 should be rejected for the following reasons.

II.B.1. The article 56 proceedings did not violate Ongwen's right to notice

14. The Trial Chamber correctly rejected Ongwen's arguments that his rights under article 67(1)(a) of the Statute to be informed promptly and in detail of the nature, cause and content of

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[33] Appeal, para. 11.
[34] T-162, 17:15-22 ("[] I had an advantage in being provided with an enormous bundle of documentation which gave different perspectives and provided different sources of information on – which reflected on his mental state over a period of time; including the medical records, including witness statements, including video material").
[35] Appeal, paras. 12-49.
[36] The seven witnesses and their relevant testimony are P-0226: T-8, T-9 (15 and 16 September 2015); P-0227: T-10, T-11 (18 and 19 September 2015); P-0101: T-13, T-14 (9 and 10 November 2015); P-0099: T-14 (10 November 2015); P-0214: T-15 (11 November 2015); P-0236: T-16 (16 November 2015); P-0235: T-17 (17 November 2015). Testimony from an eighth witness, P-0198, was also taken in the article 56 proceedings however the Pre-Trial Chamber did not confirm any charges related to P-0198: Confirmation Decision, paras. 125-135.
[37] Appeal, paras. 14-15, 16-25.
[38] Appeal, paras. 21, 26-31; 35-42.
[39] Appeal, paras.45-49.
[40] Appeal, paras. 32-34; 43-44.
[41] Appeal, para. 15. *See above* paras. 7-8.
[42] Appeal, paras. 12-49.
[43] Namely, P-0099, P-0101, P-0214, P-0226, P-0227, P-0235, P-0236.

the charges and the right to prepare his defence had been violated and that the article 56 evidence should have been deemed inadmissible as a result.[44] Ongwen fundamentally misunderstands the purpose and application of article 56. First, the Chamber correctly found in the Judgment that article 56 seeks to preserve evidence for the purposes of trial, and that its application is not limited to any stage of the proceedings. It may be used even before the surrender or voluntary appearance of a suspect.[45] The Chamber had already rejected Ongwen's same argument at trial, when allowing the testimonies to be formally submitted.[46] The Chamber's position accords with both a textual interpretation of article 56 (the article contains no temporal limitation and instead envisages that the Prosecution may use it during "an investigation"), and a contextual interpretation (article 56 is placed in Part 5, *Investigation and Prosecution*). It is also consistent with the practice of other chambers which have allowed testimony to be taken under article 56 before confirmation proceedings have commenced, and even before an arrest warrant against a suspect person has been issued.[47] The Chamber's interpretation is also confirmed by academic commentary.[48]

15. Conversely, Ongwen's interpretation of article 56 would seriously dilute the utility and effectiveness of this provision. His interpretation would mean that the procedure could only be used once an investigation has concluded (or largely concluded) and a person has been charged. This would significantly impede a pre-trial chamber during an investigation from ordering measures to collect evidence which may be at risk of loss or dissipation, in a manner which protects the rights of a suspect or an accused, and thereby ensure the efficiency and integrity of the proceedings.[49] His interpretation would also lead to the somewhat odd result that a pre-trial

[44] Judgment, para. 67. *See also* Article 56 Evidence Admission Decision, paras. 12-15. *Contra* Appeal, paras. 14, 18; Defence Closing Brief, para. 63.
[45] Judgment, para. 64 ("[a]rticle 56 of the Statute, dealing with 'unique investigative opportunity' and placed within Part 5 of the Statute, is not limited to certain procedural stages. [E]vidence may be preserved under that provision even before the surrender or voluntary appearance of the person concerned").
[46] Article 56 Evidence Admission Decision, para. 12 ("Defence submissions that the Article 56 Evidence was preserved in violation of Mr Ongwen's rights under Article 67(1) of the Statute are also unsupported. As found by the PTC Single Judge, there is no requirement that Article 56 measures be taken at any particular time, for example, after notification of the charges or disclosure of evidence").
[47] *See Uganda* Victim Participation Decision, para. 100; *DRC* Article 56 Decision.
[48] Schabas (2016), p. 870 ("Art. 56 is a mechanism […] allowing evidence to be gathered before the trial, and even before an arrest warrant has been applied for, that can subsequently be admitted at trial. It was conceived of as an additional means of protecting the rights of the defence"), p. 871 (the focus is on ensuring that the interests of the defence are ensured at a stage that may arise even before a defendant has been identified); *see also* Guariglia and Hochmayr, p. 1416, nm. 10.
[49] Article 56 requires the Prosecutor (who has the authority to take investigative measures) to inform the pre-trial chamber when he considers that there is an unique investigative opportunity during an investigation, and the pre-trial chamber may subsequently order measures to ensure the efficiency and integrity of the proceedings, in particular, the rights of the defence: *Compare* article 56(1)(a) and (b): *see* Guariglia and Hochmayr, p. 1415, nm.7 ("whereas the Prosecutor has an obligation to notify the Pre-Trial Chamber of the performance of unique acts of

chamber would be able to take evidence-preservation measures under rule 47 during a preliminary examination,[50] and under article 18(6) when an investigation has been deferred (or pending a decision on the deferral request), but not during an active investigation. It would also be at odds with (and potentially restrict the application of) rule 68(2)(c), which allows parties to submit into evidence the testimony of witnesses who are not available to testify orally as long as "the necessity of measures under article 56 could not be anticipated".[51]

16. Second, Ongwen was given ample notice prior to the article 56 proceedings as to the straightforward evidence that the witnesses would give, and had information on the nature and scope of the charges that the Prosecution intended to bring against Ongwen.[52]

17. On 26 June 2015, the Prosecution filed the written statements of P-0226 and P-0227,[53] well in advance of their testimony (P-0226 on 15 and 16 September[54] and P-0227 on 18 and 19 September).[55] Moreover, between 15 May and 2 October 2015, the Prosecution disclosed to Ongwen the written statements of the remaining witnesses (P-0099, P-0101, P-0214, P-0235, and P-0236),[56] also well advance of their testimony on 9, 11, 16 and 17 of November 2015.[57] As the Single Judge observed, the advance disclosure of the witnesses' written statements permitted the Defence to meaningfully participate in the taking of testimonies, as the written statements were "short, linear and clear" as to the facts,[58] and the anticipated subject-matter of the testimony was "straightforward".[59]

18. Moreover, Ongwen had sufficient information regarding the intended charges. Since 28 January 2015, he knew that the Prosecution intended to add SGBC charges, in particular regarding the practice by senior LRA leaders of taking "wives".[60] Moreover and upon the Single Judge's instruction,[61] on 18 September 2015 (four months before the confirmation of charges)

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investigation under subparagraph (a), he or she has the *authority* to seek these measures, and therefore retains sufficient discretion not to do so").

[50] Burundi Article 15 Decision, para. 15.

[51] This requirement seeks to avoid introducing evidence through rule 68(2)(c) when article 56 would have been a viable alternative at an earlier stage: *Bemba et al.* Article 56 Decision, para. 19.

[52] Article 56 Evidence Admission Decision, para. 13.

[53] First Article 56 Request; First Article 56 Request Annex.

[54] T-8; T-9.

[55] T-10; T-11.

[56] Second Article 56 Decision, para. 15.

[57] P-0101: T-13, T-14, (9 and 10 November 2015); P-0099: T-14 (10 November 2015); P-0214: T-15 (11 November 2015); P-0236: T-16 (16 November 2015); P-0235: T-17 (17 November 2015).

[58] First Article 56 Decision, para. 11; *see also* para. 14 (finding that Ongwen had sufficient time to prepare).

[59] Second Article 56 Decision, para. 15.

[60] T-5, 23:16-24:2. *See also* Prosecution Status Conference Material, page 3.

[61] T-6, 10:7-25, 13:4-15, 17:19-18:2.

the Prosecution filed its Notice of Intended Charges against Dominic Ongwen ("Notice"), which contained *inter alia*, a "Concise statement of facts" regarding SGBC crimes directly perpetrated by Ongwen against seven of the article 56 witnesses[62] *and* the legal characterisation of these facts.[63] Ongwen acknowledged that the September filing of the Notice would be sufficient to defend himself against the additional charges at the confirmation hearing.[64] On 5 October 2015, the Prosecution filed a request to supplement the Notice to include an eighth witness, P-0236, as this witness was only interviewed after the Notice was filed ("Supplement").[65] Witness P-0236 provided a similar account of alleged SGBC victimisation by Ongwen to those experienced by the other alleged direct victims of SGBC.[66] The intended charges as set out in the Notice and the Supplement were almost identical to the charges as they were ultimately framed in the DCC, except that the DCC further narrowed certain time frames.[67]

19. Third, during their article 56 testimony, the Defence exhaustively questioned the witnesses on the rapes, sexual slavery, forced marriage and forced pregnancies that they endured. Ongwen was thus demonstrably aware of how the witnesses' evidence would support the charges ultimately brought by the Prosecution and had sufficient opportunity to conduct his defence accordingly.[68] Ongwen never asked to recall any of the witnesses at trial to examine them about topics that he could have not anticipated. This is because there were none.

20. Fourth, the Single Judge ensured that the witnesses testified under conditions similar to testifying in the court room at trial.[69] The witnesses gave evidence under oath before the Single Judge, in the presence of the Prosecution, Defence and Ongwen himself.[70] Defence counsel were given—and fully availed themselves of[71]—the opportunity to question the witnesses and raise any objections to the Prosecution's questioning.[72] The Single Judge also ordered that the

[62] Namely, P-0099, P-0101, P-0198, P-0214, P-0226, P-0227 and P-0235.
[63] Notice of Intended Charges, pp. 25-33.
[64] T-6, 7:23-8:4.
[65] Request to Supplement Notice of Intended Charges, para. 2.
[66] Request to Supplement Notice of Intended Charges, para. 3.
[67] *Compare* Notice of Intended Charges, pp. 31-33 *with* DCC, pp. 49-52.
[68] First Article 56 Decision, para. 13. *See also* Article 56 Evidence Admission Decision, para. 13.
[69] Conduct of Article 56 Proceedings Decision, para. 13.
[70] P-0226: T-8, pp. 1-2; P-0227: T-10, pp. 1-2; P-0101: T-13, pp. 1-2; P-0099: T-14, p.1; P-0214: T-15, pp. 1-2; P-0236: T-16, pp. 1-2; P-0235: T-17, p. 1. *See also* First Article 56 Decision, para. 9; Second Article 56 Decision, para. 10.
[71] P-0226: T-9, 8:5-72:8, 75:25-77:20; P-0227: T-11, 1:25-47:13; P-0101: T-13, 47:19-66:19; P-0099: T-14, 50:1-65:21; P-0214: T-15, 36:5-41:24, 43:3-44:11; P-0236: T-16, 37:23-45:6, 46:2-7; P-0235: T-17, 49:12-65:20, 68:23-71:16.
[72] First Article 56 Decision, para. 11; Second Article 56 Decision, para. 15.

testimony be video recorded and written transcripts made, to be available for any future trial.[73] Ongwen does not explain how these measures were inadequate to enable him to defend himself.

21. Finally, as the Single Judge correctly observed, Ongwen's rights were further guaranteed by the fact that the Trial Chamber could only admit the article 56 evidence if it was satisfied that this would not prejudice Ongwen's statutory rights under article 69(7).[74] In this respect, the Trial Chamber had "no reservation to relying fully on the Article 56 testimonies of these seven women, considering especially that: (i) the Chamber has watched all the recordings of their video-link testimony before the Pre-Trial Chamber and (ii) the Defence had a full opportunity to question these witnesses during the Article 56 proceedings".[75]

II.B.2. The Single Judge was not conflicted in presiding over the article 56 proceedings and in confirming the charges

22. The Chamber correctly rejected Ongwen's arguments regarding the purported conflict of interest of the Single Judge in his "dual role" of presiding over the article 56 proceedings and ruling on that evidence in the Confirmation Decision.[76] Ongwen repeats the arguments he made before the Trial Chamber without identifying any error.[77] At the outset, article 56(2)(e) of the Statute expressly permits such a situation,[78] as Ongwen himself acknowledges.[79] The Pre-Trial Chamber was not required in these circumstances to provide a "reasoned statement providing the legal basis for the appointment of one judge to oversee [the article 56] proceedings"[80] when the legal basis already existed under article 56(2)(e).

23. Ongwen instead alleges that the Single Judge *exceeded* the scope of making recommendations or orders regarding the procedure to be followed by "actively participat[ing]" in the collection of evidence for the confirmation of charges proceedings,[81] encroaching upon the Prosecutor's investigative prerogative in a manner which unduly affected Ongwen's rights,[82] and creating a strong perception of a conflict of interest and lack of independence and neutrality.[83] These allegations are without merit. *First*, the role of a judge in the collection of

[73] First Article 56 Decision, para. 9; Second Article 56 Decision, para. 10.
[74] First Article 56 Decision, para. 12.
[75] Judgment, para. 396.
[76] Judgment, para. 65.
[77] Appeal, paras. 21-31; 35-42; Defence Closing Brief, para. 64.
[78] Article 56(2)(3) of the Statute states that the Pre-Trial Chamber in a case may "nam[e] one of its members or, if necessary, another available judge of the Pre-Trial or Trial Division to observe and make recommendations or orders regarding the collection and preservation of evidence and the questioning of persons".
[79] Appeal, para. 29; Judgment, para. 65.
[80] *Contra* Appeal, para. 30.
[81] Appeal, paras. 21, 38.
[82] Appeal, para. 28.
[83] Appeal, para. 30.

witness statements pursuant to article 56 is to act as a presiding officer who assures that the collection is properly carried out and that both parties can adequately exercise their rights to examine the witness.[84] A judge's questioning of the witness is consistent with this mandate. Just as there is no perceived conflict between a trial chamber's ability to question witnesses during their testimony[85] and its ultimate role of determining whether an accused is guilty, it stands to reason that, by the same token, a judge who oversees the taking of article 56 testimony and participates in the questioning of witnesses is also not conflicted by serving on the Pre-Trial Chamber that determines whether to confirm the charges on the basis of that evidence. A judge's ability to participate in questioning a witness therefore does not automatically give rise to a conflict of interest or lack of independence in assessing that witness's evidence at a later stage—as demonstrated in jurisdictions where the same investigating judge who collects the evidence also assesses that evidence to determine whether or not to charge and/or indict the accused.[86] Ongwen—as the Trial Chamber rightly noted—fails to explain where the purported conflict arises.[87]

24. Second, Ongwen overlooks that *three* judges of the Pre-Trial Chamber confirmed the charges of SGBC directly perpetrated by Ongwen.[88] Thus even if the Single Judge came to the confirmation proceedings with a "tainted predisposition" regarding the article 56 evidence[89]—an allegation which should be rejected—Ongwen has not demonstrated that the Confirmation Decision would have differed in its outcome.

25. Third, Ongwen ignores that he had earlier acceded to the Single Judge's participation in questioning witnesses. When the Prosecution proposed that the Single Judge should apply the *Ntaganda* Conduct of Proceedings Directions to the taking of the article 56 evidence in this

[84] Guariglia and Hocmayr, p. 1417, mn. 15.
[85] Rule 140(2)(c) of the RPE. *See also* *Al Hassan* Conduct of Proceedings Directions, para. 40; *Gbagbo* Conduct of Proceedings Directions, para. 12.
[86] For example, in the ECCC, whose procedural rules were modelled on French and Cambodian criminal procedure, the investigating judges were responsible for carrying out the judicial investigation into the allegations made by the Prosecution, and were empowered to, *inter alia*, interview victims and witnesses and record their statements, and to charge suspects against whom there is clear and consistent evidence that such person may be criminally responsible for the commission of crimes: rule 55, ECCC Internal Rules. Following the conclusion of the judicial investigation, the investigating judges were required to issue an order either indicting a charged person and sending them to trial, or dismissing the case: rule 67, ECCC Internal Rules.
[87] Judgment, para. 65.
[88] Confirmation Decision, para. 103 ("The Chamber notes that [] the testimonies provided by the [] seven women are clear and consistent not only internally with respect to each witness's individual story, but also in combination, as the witnesses describe similar facts in a consistent manner, and, moreover, provide evidence not only of their own, but also of the other witnesses' victimisation").
[89] Appeal, para. 37.

case,[90] Ongwen did not oppose.[91] Relevantly, those directions included that the Trial Chamber "may ask questions of the witnesses at any stage of the testimony, including before the questions from the calling party", which may go beyond "mere clarification".[92] Ongwen's failure to object to the possibility of the Judge's questioning at the time it was proposed undermines his attempt to raise the matter as an error on appeal.

26. Fourth, the limited interventions of the Single Judge during the taking of the article 56 testimony did not amount to "active participation" or "substantive interventions" in the questioning of witnesses which "greatly influenced the confirmation and trial proceedings".[93] None of the four examples cited by Ongwen support this claim:[94] (i) the Single Judge reasonably intervened to resolve an obvious error regarding the year in the Prosecution Senior Trial Lawyer's question to a witness—a discrepancy that the Senior Trial Lawyer himself had realised and meant to correct;[95] (ii) the Single Judge requested the parties to put further questions to a witness to clarify the year in which an incident occurred, which the parties agreed to do;[96] (iii) the Single Judge did not purport to make a finding that a witness was under the age of 18; rather, he confirmed what Prosecution and Defence counsel had already agreed, which was that because the witness was clearly around 12 years of age at the time of the incident she was describing in her testimony and therefore exempt from criminal liability under the Statute, it was not necessary to give her a warning against self-incrimination;[97] and (iv) the Single Judge merely commented on the immateriality of a discrepancy in the witness's answer to Defence Counsel *after* the witness had provided her response to Counsel's question.[98] The Judge's comment therefore could not have influenced the witness.

27. Fifth, the authority that Ongwen cites from the *Yekatom & Ngaïssona* case is inapposite.[99] The cited excerpt makes no reference to the propriety, or otherwise, of judges engaging in the questioning of witnesses.[100]

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[90] Prosecution Conduct of Proceedings Submissions, paras. 1(c), 21.
[91] Apart from in relation to some exceptions—none of which related to the possibility of questioning by the Judge: Defence Conduct of Proceedings Submissions, para. 13.
[92] *Ntaganda* Conduct of Proceedings Directions, para. 23.
[93] *Contra* Appeal, paras. 30, 37, 42.
[94] *Contra* Appeal, paras. 37, 42.
[95] *Contra* Appeal, para. 39. *See* T-13, 29:9-19.
[96] *Contra* Appeal, para. 40. *See* T-15, 41:25-42:8.
[97] *Contra* Appeal, para. 41. *See* T-8, 59:16-60:24.
[98] T-9, 38:15-40:16.
[99] *Contra* Appeal, para. 28, citing *Yekatom & Ngaïssona* Charges Amendment Decision, para. 36.
[100] *Yekatom & Ngaïssona* Charges Amendment Decision, para. 36.

28. Finally, Ongwen mischaracterises the Single Judge's pronouncements in relation to the article 56 proceedings. The Single Judge did not find that the article 56 evidence could only be used at trial;[101] he expressly stated that the parties or the Chamber could rely upon the evidence for the purpose of the confirmation of charges hearing.[102] The Single Judge also did not 'invite' the Prosecution to submit the article 56 evidence for the confirmation proceedings.[103] The quote cited by Ongwen comes directly from the Confirmation Decision itself and merely states the fact that the Prosecution relied upon the article 56 evidence for the purposes of the confirmation of charges hearing that had already taken place.

II.B.3. The Single Judge did not impose a procedural bar to objections on the article 56 proceedings

29. Ongwen incorrectly claims—again[104]—that the Single Judge imposed a procedural bar to objections on the nature, scope and purpose of the article 56 proceedings, which prevented him from raising objections to the article 56 proceedings.[105] Ongwen refers to the Single Judge's statement at the commencement of the first article 56 hearing on 15 September 2015 that, "As all relevant procedural matters were either already addressed in these decisions, in decisions number 277, 287 and 293 confidential, or are for the determination of the Trial Chamber in the course of any trial, I expect no preliminary procedural issues as to the nature, scope and purpose of this hearing".[106] As is readily apparent from the language used, the Single Judge did not prohibit any such objections but merely stated an *expectation* that the parties would not raise any. Moreover, this was a reasonable expectation given that by this date, Ongwen had already made and repeated his objections to the nature, scope and purpose of the article 56 proceedings—including on the issues that it raises now on appeal—in several filings[107] and the

[101] *Contra* Appeal, para. 35.
[102] T-8, 3:24-4:4.
[103] *Contra* Appeal, para. 36.
[104] Defence Closing Brief, para. 3.
[105] *Contra* Appeal, paras. 32-34.
[106] T-8, 4:5-9.
[107] First Article 56 Response, paras. 13, 14-20 (arguing that Ongwen was not placed on proper notice of the alleged counts relating to the proposed article 56 witnesses, thus violating his rights under article 61(4) and 67(1)(a) and (b) of the Statute), 21-35, 36-39; First Article 56 ALA, para. 2 (alleging, *inter alia*, that the Single Judge erred in finding that the witnesses' statements would be enough for the Defence to participate meaningfully in the taking of testimony when there were no related acts described in the Prosecution's application for an arrest warrant); Defence Conduct of Proceedings Submissions, paras. 8 (repeating its objecting to the article 56 procedure), 10-11 (making submissions on the location of the testimony), 12 (concurring with the Prosecution as to the time allotted for the testimony), 13 (agreeing with the Prosecution to adopt the *Ntaganda* decision on the conduct of proceedings, with some exceptions), 14-23 (opposing any witness preparation); 24-28 (opposing the involvement of the OPCV), 29 (requesting the Single Judge to order that standby counsel be available for witnesses).

Single Judge ruled on these objections.[108] Moreover, before the Trial Chamber, which was ultimately responsible for determining whether or not to admit the article 56 evidence and if so, the weight to give to it,[109] Ongwen objected to various aspects of the article 56 proceedings on several occasions,[110] and the Trial Chamber correctly rejected these arguments.[111] Thus, aside from failing to demonstrate the existence of the 'procedural bar' allegedly imposed by the Single Judge, Ongwen fails to demonstrate how this adversely affected his ability to raise objections to the article 56 proceedings and evidence.

II.B.4. The Chamber provided reasons when rejecting Ongwen's submissions

30. Ongwen incorrectly alleges that the Trial Chamber failed to address in its decision regarding the admission of the article 56 evidence his arguments regarding the irregular status of the evidence, the prejudice of its admission and the Trial Chamber's failure to exclude the evidence under article 67(9) of the Statute.[112] However, the Chamber provided adequate reasoning, including when granting the Prosecution's request for article 56 measures, in its decisions rendered during the trial and in the Judgment.[113] In any case Ongwen does not explain how the purported lack of reasoning by the Chamber materially impacted its decision to rely on the article 56 evidence, and his argument may be dismissed on this basis alone.[114]

II.B.5. The Chamber did not prejudicially rely on the article 56 evidence

31. Ongwen finally argues that the Trial Chamber prejudicially relied on article 56 evidence that was relevant to his alleged direct perpetration of crimes, and that was outside the scope of the charges, to convict him on multiple counts under other modes of liability.[115] Ongwen raises these same arguments in Grounds 6, 66, 87, 89 and 90 of his Appeal. The Prosecution submits

[108] First Article 56 Decision, paras. 3, 7, 11-14; First Article 56 ALA Decision, paras. 9-15; Conduct of Article 56 Proceedings Decision.
[109] First Article 56 Decision, para. 12; Article 56 Evidence Admission Decision, paras. 12-15, p. 9.
[110] Second Article 56 Response, paras. 5-19, 20-27 (alleging that the testimony violated Ongwen's right to be informed of the charges and to adequate time and facilities to prepare his defence); 28-42 (the evidence was thus obtained in violation of the Statute and should be excluded pursuant to article 69(7)); 43-48 (the decision as to whether to admit the evidence could be deferred); Second Article 56 ALA, para. 2 (seeking leave to appeal four issues: (i) whether the admission of article 56 material is an exception permitted under article 69(2); (ii) whether articles 69(3) and (4) take precedence over the requirements of article 69(2); (iii) the precise scope of Rule 68 of the RPE with respect to article 56; and (iv) whether the Trial Chamber can sever its assessment of admissibility from its assessment of relevance pursuant to article 69(4)); Defence Closing Brief, paras. 61-72.
[111] Article 56 Evidence Admission Decision, paras. 7-15; Second Article 56 ALA Decision; Judgment, paras. 62-72.
[112] Appeal, paras. 43-44, citing Article 56 Evidence Admission Decision.
[113] Article 56 Evidence Admission Decision, paras. 6-15; Second Article 56 ALA Decision; Judgment, paras. 62-72.
[114] *See above* paras. 4-6.
[115] Appeal, paras. 45-49.

that these arguments should be rejected for the same reasons it sets out in response to those grounds.[116]

II.C. THE CHAMBER DID NOT PROCEED TO TRIAL ON AN ILLEGAL GUILTY PLEA (GROUND 4)

32. Ongwen argues that the Trial Chamber failed to discharge its duty under article 64(8)(a) of the Statute to ensure that Ongwen understood the nature of the charges, and consequently commenced the trial on an illegal guilty plea.[117] Ongwen asserts, *inter alia*, that the abbreviated reading of the charges at the start of trial, the lack of an Acholi translation of the Confirmation Decision, and Ongwen's mental disability prevented him from understanding the charges and entering a voluntary, knowing or informed and unequivocal not-guilty plea.[118] The Chamber correctly rejected Ongwen's claim that he did not understand the nature of the charges against him.[119] This ground of appeal should be rejected.

II.C.1. The Chamber properly ascertained under article 64(8)(a) that Ongwen understood the nature of the charges

33. At the opening of the trial on 6 December 2016, the Court Officer read out the charges, which, in accordance with the Chamber's directions of 13 July 2016, only consisted of reading the numbered counts, minus the statutory provisions referenced, from the operative part of the Confirmation Decision.[120] The Presiding Judge then posed questions to Ongwen to ascertain whether he understood the charges, asking whether he recalled saying at the start of the confirmation of charges hearing that he had read and understood the DCC.[121] Ongwen replied, "I did understand the document containing the – I do understand – I did understand the document containing the charges but not the charges, because the charges – the charges I do understand as being brought against the LRA but not me, because I'm not the LRA. The LRA is Joseph Kony who is the leader of the LRA".[122] Ongwen also confirmed that he received the charges (*i.e.* the DCC) in Acholi.[123]

34. Following this exchange, the Chamber deliberated and concluded that it was satisfied that Ongwen understood the nature of the charges,[124] stating, "Mr Ongwen's remarks that the LRA

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[116] *See below* paras. 116-119, 550-551, 553-558.
[117] Appeal, paras. 50-76.
[118] Appeal, paras. 53-55.
[119] Judgment, paras. 73-82.
[120] T-26, 8:20-15:25. The Chamber gave initial directions on the reading of the charges on 13 July 2016: Directions Conduct Proceedings Decision, para. 6. The Presiding Judge summarised this decision at the commencement of trial: T-26, 8:8-18.
[121] T-26, 16:4-15.
[122] T-26, 16:16-20.
[123] T-26, 16:23-7:2.
[124] T-26, 17:11-13. *Contra* Appeal, paras. 64, 66.

is not him and that the LRA committed these acts demonstrate an understanding of the confirmed charges. Mr Ongwen's remarks are rather a dispute as to Mr Ongwen's responsibility for these alleged acts. And this is precisely a matter to be discussed during trial and is not properly part of an Article 64(8)(a) determination".[125] The Chamber set out the reasons for its decision.[126] The Presiding Judge then asked the parties if they had any remaining objections/observations concerning the conduct of proceedings that had arisen since the confirmation hearing. The Defence only stated that it would raise issues regarding the specificity of the charges in the course of the trial.[127]

35. During the opening of trial, Ongwen's Defence was thus afforded several opportunities to raise with the Chamber any objections or issues concerning the reading of the charges, the translation of the charges and Ongwen's understanding of the charges. However the Defence did not avail itself of these opportunities. Ongwen's claim that his plea was illegal merely repeats the same arguments that Ongwen made before the Trial Chamber for the first time *13 months after* the commencement of the trial.[128] The Chamber reasonably considered and rejected those arguments twice.[129] Ongwen fails to demonstrate any error or any violation of article 64(8)(c).

II.C.2. There was no error in the manner in which the charges were read at trial

36. In arguing that the guilty plea was illegal, Ongwen raises arguments concerning the modalities of the reading of the charges at the start of the trial and the manner in which he was asked whether he understood them.[130] These arguments are without merit. First, Ongwen overlooks that prior to the start of the trial, the Prosecution and Defence made joint submissions to the Chamber as to how the charges should be read out, submitting that "[t]o promote the efficiency of the proceedings" the Chamber should: ask the accused to provide a certification

[125] T-26, 18:8-13, 19:14-15.
[126] T-26, 17:13-18:20 (stating that: (i) Ongwen confirmed to the Pre-Trial Chamber that he had read and understood the charges as set out in the DCC at the confirmation hearing on 21 January 2016; (ii) he acknowledged to the Trial Chamber that he had received the document translated in Acholi and that he had read and understood it; (iii) the charges that Ongwen said he understood in January 2016 were not materially different to those for which he was committed to trial, as all 70 charges brought by the Prosecution were essentially confirmed; (iv) the Confirmation Decision had been fully translated into Acholi for Ongwen's benefit; (v) the Defence had given no indication that Ongwen was having difficulty understanding the nature of the charges or the proceedings more generally, but instead had made several arguments and requests indicating their client did understand; and (vi) Ongwen's alleged lack of understanding came just after the Defence alleged it had evidence to show that Ongwen was not fit to stand trial).
[127] T-26, 20:17-21:14.
[128] Appeal, para. 68. *See* Fair Trial Violations Decision, para. 18.
[129] Fair Trial Violations Decision; Judgment, paras. 73-82.
[130] *Contra* Appeal, paras. 58-68.

before the start of trial that he has read and understands the nature of the charges against him; confirm with the accused at the start of the hearing that he *waives his right to be read the charges*; and *summarise the charges for the public*.[131] As shown above, the Chamber decided to read only the numbered counts, minus the statutory provisions referenced, from the operative part of the Confirmation Decision.[132] Ongwen expressed no objection to, nor sought leave to appeal[133] the Chamber's directions as to the reading of the charges.[134] It is misleading for Ongwen to now claim that the Chamber violated his rights in any way by abbreviating the charges to be read out, when he himself had proposed a waiver of his right to be read them or that they be abbreviated if read.

37. Second, it is in any event immaterial that the Court Officer did not read out the modes of liability for each charge at the commencement of the trial,[135] and incorrect to claim that this meant Ongwen had "no information" as to his alleged role in each crime.[136] Ongwen was long on notice of his alleged mode of participation in each crime through the DCC (filed in English and Acholi)[137] and the Confirmation Decision which confirmed all the counts pleaded in the DCC and set out the modes of liability alleged for each charge.[138] Moreover, the Defence filed lists of evidence,[139] disclosed material,[140] and made submissions prior to the confirmation of charges hearing in relation to the charges, *including* in relation to the alleged modes of liability[141]—all of which it could only have done after taking instructions from Ongwen as to the charged crimes and modes of liability.

38. Third, Ongwen's argument that the Chamber did not ask him if he understood the charges or modes of liability or whether a further reading was necessary is unnecessarily formalistic.[142] It is patently apparent from the exchange between the Presiding Judge and Ongwen at the start

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[131] Joint Prosecution and Defence Submissions on Conduct Proceedings, para. 9.
[132] Directions Conduct Proceedings Decision, para. 6.
[133] Fair Trial Violations ALA Decision, para. 8 ("Importantly, as highlighted by the Prosecution, the 'Defence did not seek leave to appeal [the Initial Directions], and cannot do so now, over 1.5 years later.' Also, no objections were raised regarding the 'abbreviated and incomplete' reading of the charges during or after the commencement of trial").
[134] Directions Conduct Proceedings Decision, para. 6.
[135] *Contra* Appeal, paras. 58, 60.
[136] Appeal, para. 60.
[137] DCC (English); Acholi DCC.
[138] Confirmation Decision.
[139] Defence List of Evidence for Confirmation Hearing; Defence Revised List of Evidence for Confirmation Hearing.
[140] *See e.g.* Defence First Disclosure Communication; Defence Second Disclosure Communication.
[141] Defence Pre-Confirmation Brief, paras. 82-109, 112-127.
[142] Appeal, para. 61.

of the trial that the Chamber sought to ascertain whether he understood the charges.[143] Moreover if Ongwen required the charges to be read to him again, neither he nor his counsel made any such request during the hearing.

39. Fourth, Ongwen relies on similarly formalistic arguments in alleging that the Trial Chamber erroneously relied on Ongwen's understanding of the DCC, not the Confirmation Decision;[144] and that it erroneously found he understood the *confirmed* charges based on a statement of understanding he made in January 2016 when the DCC charges were not yet confirmed.[145] While it is correct that the Presiding Judge asked Ongwen whether he understood the charges that were presented to him at the confirmation hearing[146] (which were based on the charges as presented in the DCC),[147] there is no material difference between the DCC and the confirmed charges in the Confirmation Decision, as the Chamber rightly found.[148] The Confirmation Decision confirmed all 70 counts contained in the DCC and copied it "almost verbatim".[149] The minor modifications to the charges were listed in paragraph 158 of the Confirmation Decision and served only to *narrow* certain details of the charges.[150] It therefore stands to reason that if Ongwen read and understood the charges as framed in the DCC, then he was capable of understanding the charges as set out in the Confirmation Decision.

II.C.3. Ongwen received notice of the charges in Acholi prior to the start of the trial

40. Ongwen claims that when the trial commenced, he was not informed in a language he fully understands and speaks of the charges against him because he had not yet received a full translation in Acholi of the Confirmation Decision.[151] This claim has no basis in the record, as the Trial Chamber rightly found.[152] As set out above, Ongwen had received the DCC in Acholi

[143] *See above* paras. 33-34.
[144] *Contra* Appeal, para. 62.
[145] Appeal, para. 65.
[146] T-26, 16:4-15.
[147] T-20, 5:8-6:14.
[148] Confirmation Decision, para. 158.
[149] Fair Trial Violations Decision, para. 7; Judgment, para. 81.
[150] Confirmation Decision, para. 158 (listing the modifications: deletion of charges of crimes against one victim; in four instances where the DCC specified a time period of a charge as "from 1 July 2002 or September 2002", inclusion of only the latter date, i.e. "from September 2002"; insertion of pseudonyms after the names of victims mentioned; and in four paragraphs that listed Ongwen's contributions to some of the crimes, removal of the words "*inter alia*" so that the charges exhaustively contain all the underlying material facts and circumstances alleged; re-numbering of the paragraphs and sections of the charges in light of the modifications made).
[151] Appeal, para. 59 (stating that by the start of the trial, only up to para. 145 of the Confirmation Decision had been translated into Acholi and there was no translation of Judge Perrin de Brichambaut's Sep. Op.).
[152] Judgment, para. 81.

by 21 December 2015,[153] and confirmed he had read and understood it.[154] The minor differences between the charges set out in the DCC and the Confirmation Decision were listed in paragraph 158 of the Confirmation Decision—a paragraph which Ongwen's Defence team would have had no difficulty explaining to him. Additionally, at the start of the trial, the charges were read out as contained in the operative part of the Confirmation Decision and Ongwen heard it through the Acholi interpretation in the courtroom.[155]

41. Ongwen's claim that he was prejudiced in his ability to understand the charges is further undermined by a number of factors. Ongwen did not raise any objections regarding the lack of a full Acholi translation of the Confirmation Decision by filing any motion prior to the commencement of trial by the date set by the Trial Chamber.[156] Nor did he raise the issue at the commencement of trial when the Chamber asked the Parties whether there were any remaining objections concerning the conduct of the proceedings.[157] Rather, Ongwen raised the issue only on 8 January 2018—more than 12 months after the start of the trial on 6 December 2016.[158] Importantly, and as Ongwen acknowledged,[159] by that time there was already an Acholi translation of the Confirmation Decision,[160] however Ongwen considered this incomplete as the Decision's separate opinion of Judge Perrin de Brichambaut had not been translated.[161] Ongwen fails to explain how he was prejudiced by the lack of translation of the separate opinion, particularly when Judge Perrin de Brichambaut signed the disposition of the Confirmation Decision and agreed that Ongwen must be committed to trial on "the charges *as confirmed*".[162] Tellingly, after the Acholi translation of the separate opinion was completed,[163] Ongwen never sought any remedy alleging a change of circumstances on receipt of the translation.

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[153] *See above* para. 37.
[154] T-20, 6:5-14 (PRESIDING JUDGE TARFUSER: And I'd now ask Mr Ongwen if he is fully aware of the charges the Prosecutor presented against him and if he was notified the charges in the language he fully understands and speaks, meaning Acholi. […] MR ONGWEN: (Interpretation) […] "I've been handed the document translated into Acholi, so I've read and understood it").
[155] T-26, 8:20-15:25.
[156] Fair Trial Violations Decision, para. 8.
[157] T-26, 17:11-19:15, 21:7-14.
[158] Fair Trial Violations Request (requesting the Chamber to make findings on fair trial violations regarding notice and translations and to order a stay of the proceedings until the violations were remedied).
[159] Defence Closing Statement Postponement Request, para. 22.
[160] Acholi DCC Decision, filed 13 December 2017.
[161] Fair Trial Violations Addendum, paras. 8-10.
[162] Confirmation Decision, para. 1. (Emphasis added)
[163] Acholi Judge Perrin de Brichambaut Confirmation Sep. Op., filed on 19 February 2018.

42. Moreover, by the time Ongwen first raised the translation issue on 8 January 2018, he was in court and listening to the real-time Acholi interpretation of the trial proceedings. In this context, the Trial Chamber observed that Ongwen "ha[d] heard the entire trial through Acholi interpretation and ha[d] instructed his defence team throughout the trial without any discernible impediments".[164] The Chamber thus reasonably found that the lack of translation of the separate opinion did not affect Ongwen's rights under article 67(1)(a) of the Statute, nor was it 'necessary for the requirements of fairness' under article 67(1)(f).[165]

II.C.4. Ongwen was not prevented from understanding the charges by any mental disability

43. Ongwen alleges that his mental disability compounded his inability to understand the charges and that the Chamber erroneously ignored this when it refused to halt the commencement of the trial and stated that it would determine for itself whether Ongwen understood the nature of the charges.[166] On appeal, Ongwen does not engage with any of the Chamber's reasoning in support of its decision.[167] Ongwen merely repeats the arguments he previously made before the Chamber,[168] while failing to identify any error in the Chamber's reasoning or its alleged material impact—his arguments may be dismissed on this basis.[169]

44. In any event, the Chamber did not err. Ongwen's own recital of the procedural history confirms that by the start of the trial on 6 December 2016, the Defence had produced no evidence or any "concrete substantiation" to the Trial Chamber that Ongwen suffered from mental illness which prevented him from understanding the charges or the wrongfulness of his conduct during his time in the bush, or that rendered him unfit to stand trial.[170] Further, the Defence had stayed silent on Ongwen's fitness to stand trial during the entire trial preparation phase and only raised the issue on the eve of the trial.[171] In this context, the Chamber reasonably rejected the request to adjourn the trial and reasonably determined that it would determine for itself whether Ongwen understood the charges.[172] The Chamber also took seriously the Defence's allegations regarding Ongwen's mental health by requesting recommendations from the Registry and Parties as to experts who could conduct a psychological and psychiatric

[164] Fair Trial Violations Decision, para. 20.
[165] Fair Trial Violations Decision, para. 21.
[166] Appeal, paras. 69-72 citing Judgment, paras. 79-80.
[167] *See generally* Appeal, paras. 73-76.
[168] *See* Defence Closing Brief, paras. 79-81; T-179, 78:18-79:10.
[169] *See above* paras. 4-6.
[170] Appeal, paras. 70-72. *See also* T-26, 3:19-4:1, 5:20-22.
[171] T-26, 4:5-6:10.
[172] *Contra* Appeal, para. 73. *See* T-26, 6:11-14.

examination of Ongwen, with a view to assessing his *continued* fitness to stand trial.[173] Ongwen fails to demonstrate any error in the Chamber's balanced approach.

II.D. THE CHAMBER RESPECTED ONGWEN'S FAIR TRIAL RIGHTS UNDER ARTICLE 67(1)(F) (GROUND 11)

45. Ongwen's claim that the Chamber violated article 67(1)(f) by failing to provide Acholi translations of key documents—specifically the Confirmation Decision[174]—should be rejected. In relation to the alleged lack of a full Acholi translation of the Confirmation Decision, Ongwen repeats the same arguments he raises in Ground 4 of his appeal, arguing that this violated his right to be informed of the nature, cause and content of the charges.[175] The Prosecution refers to and relies upon its response to Ground 4 in which it demonstrates that Ongwen's ability to understand the charges was not violated by the lack of a full Acholi translation of the Confirmation Decision and Judge Perrin de Brichambaut's separate opinion.[176]

46. In relation to Ongwen's general objections regarding the lack of Acholi translations, which broadly repeat those he made throughout the course of the proceedings, Ongwen ignores that all of his objections were ruled upon by the Pre-Trial and Trial Chambers, which granted him extensions of time where the circumstances warranted it,[177] rejected his requests to exclude evidence or grant extensions where these were not justified and where Ongwen suffered no prejudice,[178] or otherwise exercised oversight and issued orders to ensure that translations were being provided as quickly as possible bearing in mind the Court's limited interpretation and translation resources.[179] In its decisions, the Chambers appropriately balanced Ongwen's right to translated material (which does not entail a right to a full translation of *every* document in

[173] T-26, 6:23-7:12; Appeal, paras. 74-75.
[174] Appeal, paras. 234-238.
[175] Appeal, paras. 235-237; *see* para. 59.
[176] *See above* paras. 40-42.
[177] For example, following Ongwen's request to reconsider the start date for closing submissions due to translation delays (Defence Closing Statement Postponement Request), the Trial Chamber rejected the request to delay the start of closing statements by two weeks as Ongwen did not demonstrate circumstances warranting the exceptional remedy of reconsideration, but nonetheless granted a one week extension to Ongwen for the filing of his closing brief: Defence Closing Statements Reconsideration Decision, paras. 11-14.
[178] For example, following the Defence's request prior to the confirmation of charges hearing to exclude 17 witness statements/transcripts of interviews which were disclosed without Acholi translation (Defence Pre-Confirmation Brief, paras. 58-67), the Pre-Trial Chamber rejected the request, finding that it was untimely as the Defence had waited until the last minute to alert the Chamber of translation issues, and that in any event, there would be no relevant prejudice to Ongwen given the limited amount of material concerned, the limited scope and purpose of the confirmation of charges hearing, and the fact that he has been receiving interpretation services throughout the proceedings: Confirmation Decision, paras. 20-23.
[179] For example, in answer to Ongwen's disclosure submissions in Defence Status Conference Submissions (paras. 14-16), the Chamber invited submissions from the parties at the Status Conference (T-25, 14:9-19:8) and issued a decision setting a time frame for the Prosecution to complete its disclosure of Rule 76(3) statements in Acholi: Status Conference Disclosure Issues Decision, paras. 8-11.

the case)[180] with the need to preserve the expeditiousness of the proceedings—itself a fundamental tenet of fairness.[181] Accordingly in this case, Ongwen received in Acholi those documents that were necessary to meet the requirements of fairness and were thus *essential* to ensuring that he fully understood the nature, cause and content of the charges and could adequately defend himself[182]—specifically, the Warrant of Arrest,[183] the DCC,[184] the Confirmation Decision and Judge Perrin de Brichambaut's separate opinion,[185] and witness statements relied upon by the Prosecution in the proceedings.[186] The Appeals Chamber similarly balanced these interests when granting Ongwen a limited extension to file his Notice of Appeal and appeal brief so that he could receive Acholi translation of the sections of the Judgment prioritised by the Defence,[187] and afforded him the opportunity to seek a variation of his grounds of appeal once he received the full Acholi translation of the Judgment.[188] Ongwen identifies no error in the Chambers' approaches, nor any concrete prejudice that he suffered following the Chambers' decisions.

II.E. THE CHAMBER DID NOT ERR IN REJECTING ONGWEN'S DISCLOSURE OBJECTIONS (GROUND 12)

47. Ongwen argues that the Chamber erred in law by not ruling on his objections to the Prosecution's investigation and disclosure practices.[189] In doing so, Ongwen incorporates and relies upon his Defence Closing Brief and prior pleadings without explaining any of the legal or factual arguments raised therein.[190] Indeed, Ongwen fails to specify a single error by the

[180] Sentence Hearing Schedule ALA Decision, para. 9 ("It is noted that under Rule 144 of the Rules, the right to receive translations of Court documents is not absolute but subject to a concrete assessment of the necessity of such translations to meet the requirements of fairness"); *Bemba et al.* Evidence Translation Decision, para. 6; *X v. Austria*, para. 2 (citing article 6(3) ECHR and stating, "one cannot derive from this provision a general right for the accused to have the court files translated").
[181] *Bemba et al.* Evidence Translation Decision, paras. 10-11.
[182] *Bemba et al.* Evidence Translation Decision, para. 6; *Gbagbo* Translation Decision, para. 12.
[183] Acholi Arrest Warrant; Registry Report on Arrest and Surrender, paras. 6-7; Registry Record of Notification to Ongwen; T-4, 9:3-10-1.
[184] Acholi DCC.
[185] Acholi DCC Decision; Acholi Judge Perrin de Brichambaut Confirmation Sep. Op. .
[186] *See e.g.* Defence Record of Article 56 Acholi Translations (setting out the disclosure of Acholi translations of article 56 witness statements). Throughout the proceedings, the Prosecution disclosed Acholi translations of witness statements and transcripts of interviews: *see e.g.* Material Disclosed 22 December 2015; Material Disclosed 18 April 2016; Material Disclosed 17 May 2016; Material Disclosed 3 October 2016; Material Disclosed 21 October 2016; Material Disclosed 22 November 2016; Material Disclosed 23 November 2016; Material Disclosed 15 December 2016; Material Disclosed 17 January 2017; Material Disclosed 14 February 2017; Material Disclosed 10 March 2017; Material Disclosed 17 March 2017; Material Disclosed 22 March 2017; Material Disclosed 28 March 2017; Material Disclosed 12 May 2017; Material Disclosed 27 June 2017; Material Disclosed 18 July 2017; Material Disclosed 27 October 2017.
[187] *Contra* Appeal, para. 234; *see* Notice of Appeal Extension Decision, paras. 8-14.
[188] Acholi Translation Decision, para. 8.
[189] Appeal, paras. 239-240.
[190] Appeal, para. 240, citing Defence Closing Brief, paras. 108-117.

Chamber or its specific impact on his conviction. Ground 12 of the Appeal should therefore be dismissed *in limine* for the reasons already set out above.[191]

48. In any event, the Chamber did not err. It ruled on all specific violations alleged by Ongwen,[192] "taking into account the rights of the accused and the fairness and expeditiousness of the proceedings",[193] and finding that "the Defence did not suffer any prejudice which would warrant the exceptional remedy of a permanent stay of the proceedings".[194] Ongwen's broad and unsubstantiated claim that disclosure violations prejudiced his ability to prepare his defence amounts to mere disagreement with the Chamber, and should be rejected.

II.F. THE CHAMBER DID NOT ERR REGARDING THE PROSECUTION'S SELECTION OF WITNESSES AND COLLECTION OF EVIDENCE (GROUND 13)

49. Ongwen alleges in this ground that the Chamber erred in fact and law when it rejected his objections to the role of P-0078 in the case.[195] P-0078 was a UPDF officer assigned by the Government of Uganda as a liaison to the OTP and who assisted in locating former LRA members who might serve as witnesses in the case.[196] Ongwen alleged during trial that P-0078 did not impartially select witnesses for the OTP and pressured witnesses to give evidence to the OTP.[197] The Chamber reasonably rejected these objections noting that Ongwen had not made any specific allegation of wrongdoing regarding P-0078 and had not substantiated his claims, but merely asserted that P-0078's role in allegedly facilitating the Prosecution's investigation was proof that the Prosecution did not carry out an impartial investigation.[198] On appeal, Ongwen repeats the same unsubstantiated allegations without identifying any specific factual, legal or procedural[199] error in the Chamber's reasoning. His 13th ground of appeal should be rejected.

50. At the outset, article 54(3)(c) expressly empowers the Prosecution to seek the assistance of domestic government agencies in carrying out its investigation. There is nothing inherently problematic or partial in it doing so.[200] P-0078 was not an OTP staff member; he remained

[191] *See above* paras. 3-8.
[192] Judgment, paras. 103, 105; *see also* Defence Closing Brief, paras. 115, 116.
[193] Judgment, paras. 103-105. *See* Disclosure Remedies Decision; First Disclosure Remedies ALA Decision; Second Disclosure Remedies Decision.
[194] Judgment, para. 105.
[195] Appeal, paras. 242-246.
[196] Judgment, para. 525; UGA-OTP-0263-2689; UGA-OTP-0235-0275.
[197] Defence Evidentiary Regime Request, paras. 31-35; T-179, 63:5-64:23; Defence Closing Brief, paras. 10, 101(iii).
[198] Judgment, para. 525.
[199] While in his submissions Ongwen alleges that the Chamber erred in *fact* and *law* in relation to its findings on his objections to P-0078, the heading for Ground 13 alleges that the Chamber erred in *law* and *procedure*.
[200] *Contra* Appeal, para. 242.

employed and paid by the UPDF and was only reimbursed by the OTP for expenses incurred in providing his assistance.[201] Moreover, contrary to Ongwen's claim, [REDACTED].[202]

51. In that regard, while P-0078 located or may have been in contact with over 40 Prosecution witnesses,[203] the Prosecution only relied upon 24 of those witnesses at trial.[204] None of these were the article 56 witnesses.[205] Accordingly, Ongwen's bare claim that the Chamber should have exercised caution when determining the admissibility of the article 56 evidence due to P-0078's involvement is unfounded.[206]

52. As the Chamber correctly found,[207] Ongwen failed to substantiate his allegations regarding P-0078 with any evidence. He never called P-0078 to testify in the proceedings[208] nor did he elicit any evidence to support his allegations from the "key witnesses relied upon throughout the judgment", including the four that he lists as examples.[209] In fact, of those four witnesses, the Defence did not even question two of them on any contact they may have had with P-0078.[210] The [REDACTED][211][REDACTED].[212] This is also consistent with other evidence the Defence elicited from Prosecution witnesses in cross-examination, which Ongwen cites in a footnote but fails to address.[213] Ongwen cannot allege impropriety when his own efforts to prove it were unsuccessful.

53. Moreover, while Ongwen referred at trial—and does so again on appeal—to a number of investigative reports and correspondence,[214] these documents are inapposite. Specifically, Ongwen does not explain how P-0078's possible misuse of funds or a mobile phone provided

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[201] UGA-OTP-0235-0275.
[202] [REDACTED].
[203] Appeal, para. 242, citing UGA-OTP-0263-2689 (OTP Investigation Report listing 40 witnesses located by P-0078); UGA-D26-0017-0139 (letter from the OTP Senior Trial Lawyer to Counsel listing 31 witnesses whom the Prosecution intended to rely upon in the case and whom the Prosecution was aware had had contact with, or at least had been provided with the contact details of P-0078).
[204] [REDACTED].
[205] The article 56 witnesses relied upon by the Prosecution at trial were P-0099, P-0101, P-0214, P-0226, P-0227, P-0235 and P-0236.
[206] Appeal, para. 244.
[207] Judgment, para. 525.
[208] Judgment, para. 525.
[209] Appeal, para. 245 (fn. 250) (listing witnesses P-0054, P-0070, P-0142 and P-0205).
[210] *See generally* the Defence cross-examination of these witnesses: P-0054: T-94, 2:24-48:25; P-0205: T-49, 2:21-75:13; T-50, 10:11-56:17; T-51, 2:22-35:11.
[211] [REDACTED].
[212] [REDACTED].
[213] Appeal, para. 243 (fn. 245). Ongwen cites (i) P-0038: [REDACTED]. He also stated that once the OTP point out who they want to meet, he lets P-0078 go out to find them (T-117, 45:11-18); (ii) P-0209: This witness confirmed that P-0078 put him in touch with the OTP but stated that he felt no pressure whatsoever to participate in the interview (T-161, 4:6-6:12).
[214] Appeal, paras. 242-243, citing UGA-OTP-0263-2689; UGA-D26-0017-0139; UGA-OTP-0196-0028; UGA-OTP-0263-2681; UGA-OTP-0263-2688; UGA-OTP-0263-2685.

by the OTP[215] or his alleged involvement in Raska Lukwiya's death during a UPDF attack,[216] demonstrate any influence over the testimony of the Prosecution's witnesses at trial. Moreover, Ongwen's claim that P-0078 was found to have pressured witnesses P-0037 and P-0105 to give evidence is misleading.[217] The allegation was based on a hearsay report[218] and was not ultimately established.[219] In any event, the Prosecution did not rely on P-0037 or P-0105 in its case. Ongwen also does not provide any evidence to support his broad claim that "recent LRA returnees were naturally vulnerable to threats or intimidation" such that "the sheer presence of a senior officer […] likely had an effect on the content of any information".[220]

54. Finally, to the extent Ongwen alleges any partiality or impropriety on the part of the Prosecution, he does not substantiate this either. The Prosecution properly discharged its duty by investigating and following up the concerns of P-0078's possible misuse of funds and a mobile phone[221] and the allegation that P-0078 had pressured P-0037 and P-0105 to give evidence,[222] and provided Ongwen frank and prompt disclosure of its inquiries.[223]

55. There was accordingly no clear evidence before the Chamber to demonstrate that P-0078 persuaded or influenced the testimony of any Prosecution witnesses in any way that would have warranted particular measures by the Chamber during trial, or that would have required it to exercise any particular caution when assessing the evidence. Nor had Ongwen requested any concrete or specific remedy at trial for the alleged conduct of P-0078.[224] Ongwen falls far short of demonstrating the "flagrant breach of [his] fair trial rights and a gross miscarriage of justice". His request for the drastic remedy of reversing the convictions should be rejected.[225]

II.G. THE CHAMBER DID NOT DISCRIMINATE AGAINST ONGWEN BASED ON MENTAL DISABILITY (GROUNDS 14-15)

56. Ongwen argues that the Chamber erred in finding that it did not discriminate against him as a mentally disabled person, in particular in relation to its orders on the sitting schedule and

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[215] Appeal, para. 243.
[216] [REDACTED], Appeal, para. 243 (claiming that P-0078 was *directly* involved in Raska Lukwiya's death).
[217] *Contra* Appeal, para. 243.
[218] UGA-OTP-0263-2688 at 2688 [REDACTED].
[219] UGA-OTP-0263-2689 at 2692; UGA-OTP-0263-2685 at 2686.
[220] Appeal, para. 243.
[221] UGA-OTP-0263-2685 at 2685-2686; UGA-OTP-0263-2681; UGA-OTP-0263-2689 at 2690, 2691, 2692-2693.
[222] UGA-OTP-0263-2688; UGA-OTP-0263-2689 at 2692; UGA-OTP-0263-2685 at 2686.
[223] *See* UGA-D26-0017-0139 (letter from the OTP Senior Trial Lawyer to Counsel re: Request for Disclosure from the Prosecution of Rule 77 Material relating to Interpreters, sent 11 May 2017); UGA-OTP-0196-0028 (disclosed 11 September 2015); UGA-OTP-0263-2689, UGA-OTP-0263-2681, UGA-OTP-0263-2685, UGA-OTP-0263-2688 (disclosed 15 and 25 July 2016).
[224] Evidentiary Regime Decision, para. 31.
[225] *Contra* Appeal, para. 246.

regarding Ongwen's right to decide whether or not to testify in his case.[226] In addition to rejecting Ongwen's attempt to incorporate all submissions from the Defence Closing Brief on issues regarding Ongwen's mental health,[227] grounds 14 and 15 of Ongwen's appeal should be rejected for the following reasons.

II.G.1. The Chamber reasonably accommodated Ongwen's needs

57. The Chamber was correct in finding that Ongwen 'fundamentally misrepresented' the facts in alleging that the Chamber discriminated against him as a mentally disabled person by being "eight months late" in implementing the ICC Detention Centre Medical Officer's recommendation that he have a "time-out" from Court on Wednesdays.[228] The Chamber received the Medical Officer's recommendation on 7 March 2018,[229] and the following day, sent an email to the Parties and participants informing them that there would be no hearing on the next scheduled Wednesday, 21 March 2018.[230] Subsequently, *no full five-day weeks were scheduled* in the hearing until its conclusion on 29 November 2019. Moreover, of the 93 sitting days that took place in that time (*i.e.* a period of more than one year and eight months), the Chamber only scheduled hearings on Wednesdays on *five* occasions, as it correctly observed.[231] Of those five Wednesdays: (i) one was a morning session to complete the testimony of a witness and no further hearings were scheduled that week;[232] (ii) two took place in weeks where there were only two sitting days in those weeks (*i.e.* Wednesday and Thursday);[233] and (iii) two took place in in a four-day week.[234] Ongwen does not explain how he was prejudiced by attending court on those five occasions.[235]

58. Moreover, after the Chamber set the first block for the Defence presentation of evidence from 27 September 2018 to 10 October 2019,[236] the Chamber informed the Parties that, cognisant of the Medical Officer's recommendation, it could make further reductions to the

[226] Appeal, paras. 247-255.
[227] Appeal, para. 247 ("The Defence incorporates the arguments in its Closing Brief, at paragraphs 120-146 in this section"). *See above* paras. 7-8.
[228] *Contra* Appeal, para. 250. *See* Judgment, para. 114.
[229] Registrar Submission of Information from the Medical Officer; Registrar Submission of Information from the Medical Officer (Annex).
[230] Email from Trial Chamber IX Communications to the Parties and participants, 8 March 2018 at 14:58, re: schedule for next hearing bloc (Annex C, p. 1).
[231] Judgment, para. 114.
[232] 28 March 2018 (T-168).
[233] 11 April 2018 (T-169); 23 May 2018 (T-177).
[234] 2 May 2018 (T-172); 24 October 2018 (T-187).
[235] *See generally* Appeal, para. 250.
[236] Defence Presentation of Evidence Order, p. 4.

schedule in accordance with it.[237] The Chamber found it was otherwise premature to declare that it would not sit every Wednesday in a five-day week, as the flow of evidence could necessitate designating a different non-sitting day, and this was not in opposition to the reasons behind the Medical Officer's recommendation.[238] In addition, as the Chamber explained, whenever it was presented with information regarding Ongwen's health that warranted a break in the proceedings, the Chamber immediately facilitated the break and instructed the Registry to provide a report as to when Ongwen could resume his attendance at the hearings.[239]

59. The flexibility and reasonableness of the Chamber's approach is evident in the fact that the sitting schedule from March 2018 to November 2019, as shown above, did not implement any full five-day weeks, and only scheduled hearings on Wednesdays on a handful of occasions. Ongwen identifies no error in the Chamber's reasoning, nor can he show any impact in light of the sitting schedule.

II.G.2. The Chamber did not deny Ongwen the right to decide whether to testify

60. Ongwen argues that the Chamber erroneously rejected his third request for a medical examination pursuant to rule 135, which prevented an assessment of his mental condition to ascertain whether he could make an informed decision about whether or not to testify in his case.[240] Ongwen claims that the Chamber decided that he was not a mentally disabled defendant,[241] contrary to the information available from the experts on his mental status.[242] Ongwen mischaracterises the Chamber's decision and the applicable law. In assessing the material relied upon by Ongwen in his request, the Chamber reasonably found: (i) the December 2016 report of Professor de Jong did not contain any new indicia to warrant a medical examination;[243] (ii) the February 2019 report of the ICC Detention Centre's Medical Officer stated that Ongwen was "medically fit to resume the trial process" but that his condition should be continuously monitored;[244] and (iii) while the Defence noted that Ongwen was taking medication that had potential side effects, the Defence did not claim that there were any *actual* side effects which impaired Ongwen.[245] Moreover, even though the Defence did not cite its

[237] Email from Trial Chamber IX Communications to the Parties and participants, 20 August 2018 at 09:48, re: Rest of 2018 Hearing Dates (Annex C, p. 2); Sitting Schedule Decision, para. 5.
[238] Sitting Schedule Decision, para. 7.
[239] Judgment, para. 111. *See e.g.* Second Medical Examination Decision, para. 12.
[240] Appeal, paras. 251-252. *See* Third Medical Examination Request; Third Medical Examination Decision.
[241] Appeal, para. 255.
[242] Third Medical Examination Request, paras. 18-20.
[243] Third Medical Examination Decision, paras. 21-23.
[244] Third Medical Examination Decision, para. 24.
[245] Third Medical Examination Decision, para. 25.

own experts' report, the Chamber considered it, and observed that the Defence experts did not state that Ongwen would not be able to testify, but rather recommended that "caution" should be exercised in case Ongwen testifies.[246]

61. Further, the Chamber's approach was consistent with the Court's jurisprudence. As the *Gbagbo* Pre-Trial Chamber found, the relevant question is "not merely the existence of particular medical conditions, or what their sources are, but primarily whether these medical conditions affect the capacities of the person concerned to meaningfully exercise his fair trial rights" and whether "the negative impact of particular medical conditions can be mitigated by putting in place certain practical arrangements".[247] The Chamber further clarified that in order to be able to take a procedural decision in the case, Ongwen needed not have the same capacity as if he were a trained lawyer, nor did he need to understand the reach and implication of *every* potential question or how each of his answers could be interpreted; he only needed to be able to make an informed decision, with the advice and help of his lawyers, whether under those conditions he would like to exercise his right to testify.[248] Accordingly, the Chamber correctly concluded that there were insufficient indicia to warrant a medical examination pursuant to rule 135.[249] Critically, the Chamber noted that should Ongwen testify, the Chamber would follow the Defence medical experts' advice and exercise all necessary caution during his testimony.[250]

62. Thus, Ongwen's claim that the Chamber had a "disability blind-spot" is untenable.[251] As shown, the Chamber acted reasonably by adjourning hearing days when Ongwen's condition required it; reducing the sitting schedule in accordance with the Medical Officer's recommendation to alleviate the impact of full five-day weeks in court; and requesting the Registry to monitor and report on Ongwen's health throughout the trial.[252] Ongwen fails to identify an error in the Chamber's approach and fails to demonstrate the impact or concrete prejudice of any purported error on his ability to exercise his rights under article 67(1) of the Statute.

II.H. THE CHAMBER DID NOT ERR IN ITS DETERMINATION OF ONGWEN'S APPLICATIONS FOR

[246] Third Medical Examination Decision, para. 28.
[247] *Gbagbo* Fitness Decision, para. 51. *See also* First Medical Examination Decision, para. 13.
[248] Third Medical Examination Decision, paras. 17-18.
[249] Third Medical Examination Decision, para. 29.
[250] Third Medical Examination Decision, para. 28.
[251] *Contra* Appeal, para. 255.
[252] Judgment, para. 111.

LEAVE TO APPEAL (GROUND 16)

63. Ongwen's claim that the Chamber erred in denying all but one of his 43 requests for leave to appeal should be dismissed *in limine*.[253] First, Ongwen does not explain why the Chamber's rejection of his requests for leave to appeal were erroneous; he merely asserts that his requests for leave concerned legal issues which were significant to the fair conduct of the proceedings and which were critical issues in this appeal, and summarises one request by way of example.[254] As the Appeals Chamber has previously held, "the fact that the Pre-Trial Chamber or the Trial Chamber considered that interlocutory appeals against certain procedural decisions were not warranted does not, in and of itself, indicate any error—even less does it substantiate a 'fair trial violation'".[255] Second, the Chamber did not err. In all of its decisions denying leave to appeal, the Chamber provided its reasons for doing so, finding that Ongwen raised issues that, *inter alia*, constituted mere disagreement with the Chamber's reasoning;[256] misrepresented the Chamber's reasoning[257] or otherwise did not arise from the impugned decisions;[258] raised hypothetical issues or sought advisory opinions from the Appeals Chamber which would not materially advance the proceedings;[259] and/or would not affect the fair and expeditious conduct of the proceedings or the outcome of the trial.[260] Ongwen does not specifically challenge any of these findings on appeal. Third, in any event, Ongwen does not explain how the lack of appellate review on the purported interlocutory issues that were the subject of the requests materially affected his final conviction.[261]

64. Finally, Ongwen's requested relief—that the Appeals Chamber rule on the issues presented—falls outside the scope of appellate procedure in this Court.[262] To the extent that the Chamber's interlocutory decisions materially affect his conviction, Ongwen may raise these issues in this appeal against the Judgment[263]—and indeed he does so in numerous instances

[253] Appeal, paras. 256-259.
[254] Appeal, paras. 257, 259.
[255] *Bemba et al.* AJ, para. 659.
[256] First Medical Examination ALA Decision, para. 9; Objections to Report of P-0447 ALA Decision, para. 11.
[257] Understanding of the Charges ALA Decision, para. 6; Denial of D-0036 Testimony ALA Decision, para. 9.
[258] *See e.g.* Confirmation ALA Decision, paras. 12-13; Second Article 56 ALA Decision, para. 12; Additional Defence Resources ALA Decision, para. 7; Fair Trial Violations ALA Decision, para. 10; Third Medical Examination ALA Decision, para. 8.
[259] *See e.g.* Confirmation ALA Decision, para. 14; Additional Defence Resources ALA Decision, para. 8; Sitting Schedule ALA Decision, para. 7; Charging Defects ALA Decision, para. 11.
[260] *See e.g.* Confirmation ALA Decision, para. 38; Article 72(4) ALA Decision, para. 14; Burden and Standard of Proof ALA Decision, para. 10; Defence Expert Witness Testimony ALA Decision, para. 13.
[261] *Bemba et al.* AJ, para. 659.
[262] *Bemba et al.* AJ, para. 660.
[263] *Bemba et al.* AJ, para. 660.

throughout this Appeal.[264] There is otherwise no scope for the Appeals Chamber to conduct a wholesale review of Ongwen's requests for leave to appeal and to rule on the issues presented, and Ongwen's request in this regard should be dismissed.

II.I. THE CHAMBER DID NOT ERR IN FINDING THAT ONGWEN'S FAIR TRIAL ALLEGATIONS WERE UNFOUNDED (GROUND 17)

65. Ongwen argues two categories of error in this ground: (i) a general claim that he was prejudiced by fair trial violations that materially affected the Judgment, as set out in Section II of the Defence Closing Brief;[265] and (ii) that the Chamber erred in rejecting Ongwen's claim that it violated his right to family life.[266] Both should be dismissed *in limine*.

66. First, Ongwen's general claim fails to specify any single error by the Chamber and instead incorporates *all* 127 paragraphs of his fair trial arguments from his Closing Brief.[267] Similarly, his claim regarding the alleged violations of Ongwen's right to family life fails to explain how the Chamber erred, and again incorporates the arguments in the Closing Brief in full.[268] These arguments should be dismissed *in limine* for the reasons already set out above.[269]

67. Second, Ongwen's claim regarding a violation of Ongwen's right to family life falls outside the scope of the Appeal. Ongwen once again side-steps the proper appellate procedure in this Court[270] by amending his grounds to include this issue without seeking the Appeals Chamber's leave pursuant to Regulation 61 of the RoC.[271] Moreover, his justification for including this issue is unpersuasive. Simply because the Judgment addresses the issue of Ongwen's right to family life, as raised in the Defence Closing Brief, is not a sufficient reason to permit the late addition of the issue to the Appeal.[272]

68. Third, and in any event, the Chamber did not err. To the extent that the arguments in the Closing Brief overlap with Ongwen's grounds of appeal, the Prosecution refers to and relies

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[264] *See e.g.* Grounds 1, 2 and 3, alleging errors regarding the Article 56 hearings, previously raised in the Second Article 56 ALA; Ground 5, alleging that the Confirmation Decision was defective, previously raised in the Charging Defects ALA; Ground 11, alleging that the Chamber violated Ongwen's rights under article 67(1)(f), previously raised in Acholi Translations ALA and Closing Brief Schedule ALA; Grounds 14-15 alleging the Chamber discriminated against Ongwen based on mental disability, previously raised in Second Medical Examination ALA, Third Medical Examination ALA and Sitting Schedule ALA; Grounds 27, 29, 31-32, 35-41, alleging that the Chamber failed to correctly apply the standard of proof for article 31(1)(a) defences, previously raised in Article 31 Standard of Proof ALA.
[265] Appeal, paras. 260-261.
[266] Appeal, paras. 262-263.
[267] Appeal, para. 260, citing Defence Closing Brief, paras. 31-158.
[268] Appeal, paras. 262-263, citing Defence Closing Brief, paras. 147-155.
[269] *See above* paras. 3-9.
[270] *See above* para. 11.
[271] Appeal, fn. 266.
[272] *Contra* Appeal, fn. 266.

upon its responses to those specific grounds in this response brief.[273] As to the alleged violation of Ongwen's right to family life, the decisions to impose restrictions on Ongwen's contacts with family members were not arbitrary,[274] but were made on the basis of "specific information concerning the threat of witness interference, in line with Regulation 101(2) of the [RoC]".[275] Moreover, the restrictions were necessary and proportionate to the legitimate aim pursued:[276] the contact restrictions did not prevent Ongwen from contacting specific persons under any circumstances, but rather imposed a system requiring prior authorisation from the Chamber to contact specific persons, and active monitoring of his non-privileged communications.[277] Further, on the two occasions that Ongwen asked to add names to the list of persons that he was allowed to contact, the Chamber granted those requests;[278] and once the Chamber deemed the restrictions no longer necessary, it lifted them.[279] But even if Ongwen's right to family life were violated, Ongwen fails to establish how it would merit the exceptional remedy of a reversal of his convictions.

II.J. THE CHAMBER DID NOT ERR IN REJECTING ONGWEN'S REQUEST TO CALL AN SGBC EXPERT (GROUND 18)

69. The Chamber found that its rejection of the Ongwen's request during the trial to call an SGBC expert, D-0158, did not amount to a violation of his fair trial rights.[280] Ongwen

[273] *Compare* Defence Closing Brief, paras. 41-60 (alleging Ongwen's rights were violated during his arrest and surrender) *with* Appeal, paras. 8-11; *see above* paras. 11-12. *Compare* Defence Closing Brief, paras. 62-65 (alleging the article 56 proceedings and its subsequent use of evidence violated his fair trial rights) *with* Appeal, paras. 12-49; *see above* paras. 13-31. *Compare* Defence Closing Brief, para. 72 (alleging Ongwen was unfairly denied an SGBC expert) *with* Appeal, para. 264-268; *see below* paras. 69-72. *Compare* Defence Closing Brief, paras. 73-82 (alleging that the trial proceeded on an illegal guilty plea) *with* Appeal, paras. 50-76; *see above* paras. 32-44. *Compare* Defence Closing Brief, paras. 83-85 (alleging Ongwen's rights to notice and to prepare a defence were violated) *with* Appeal, paras. 77-197; *see below* paras. 74-119. *Compare* Defence Closing Brief, paras. 86-90 (alleging Ongwen's right to Acholi translations was violated) *with* Appeal, paras. 234-238; *see above* paras. 45-46. *Compare* Defence Closing Brief, paras. 91-96 (alleging the Chamber failed to articulate the standard of proof for affirmative defences) *with* Appeal, paras. 321-322; *see below* paras. 154-157. *Compare* Defence Closing Brief, paras. 97-106 (alleging the Prosecution's disclosure practices violated Ongwen's fair trial rights) *with* Appeal, paras. 298, 303, 306; *see below* paras. 120-134. *Compare* Defence Closing Brief, paras. 108-117 (alleging the Prosecution's disclosure practices violated Ongwen's fair trial rights) *with* Appeal, paras. 239-240; *see above* paras. 47-48. *Compare* Defence Closing Brief, paras. 120-146 (alleging the Chamber discriminated against Ongwen as a mentally disabled defendant) *with* Appeal, paras. 247-255; *see above* paras. 56-62.
[274] *Contra* Defence Closing Brief, paras. 150, 153.
[275] Judgment, para. 118. *See* Contacts Restrictions Decision, para. 6; Communications Restrictions Decision, para. 12; Communications Restrictions Review Decision, para. 18
[276] *Contra* Defence Closing Brief, para. 153. *See* Contacts Restrictions Decision, para. 6; Communications Restrictions Decision, para. 12; Communications Restrictions Review Decision, para. 19
[277] Judgment, paras. 117, 119.
[278] Judgment, para. 119, citing Witness Meeting Decision; Lifting of Communications Restrictions Decision.
[279] Judgment, para. 119; Immediate Release Decision, paras. 30-43.
[280] Judgment, para. 72, referring to Defence Addition of Evidence Request and Defence Addition of Evidence Decision; Defence Closing Brief, para. 72.

challenges this finding on appeal,[281] alleging that the Chamber applied a different (or 'double') standard when, on the one hand, it rejected his request to call an SGBC expert because the proposed evidence "would merely be additional evidence for topics for which direct evidence has already been elicited";[282] yet granted the CLRV's[283] request to call an SGBC expert, stating that the evidence would not be repetitive as "expert evidence differs from a first-hand account by a direct victim".[284] However, Ongwen mischaracterises the Chamber's reasons for rejecting his request to call D-0158 and repeats arguments that were already considered and rejected twice by the Chamber.[285] The Chamber did not err. Ground 18 should be rejected.

70. First, the Chamber's decision granting the CLRV's request to call an SGBC expert "contain[ed] fundamentally different rulings" to its decision rejecting the Ongwen's request, each decision "made in vastly different contexts".[286] Its decisions in both instances were therefore *fact-specific*. The Chamber found that the anticipated testimony of the CLRV's proposed expert differed from first-hand witness testimony because it would "allow the Chamber to assess the impact of rape and SGBC on the lives of victims in a more universal manner, which includes victims who did not provide testimony before [the] Chamber".[287] Moreover, the CLRV's expert would be limited to matters relevant to the personal interests of the victims, such as the harms that they personally suffered or observed others suffering.[288] The Chamber thus correctly found that the CLRV expert's anticipated testimony would not be repetitive of evidence already elicited at trial.[289] By contrast, the topics of the anticipated testimony of Ongwen's proposed SGBC expert, D-0158, amounted to second-hand knowledge of, *inter alia*, the LRA's rules, structure and practices concerning sexual relations and the experience of abducted children within the organisation—topics which had already been discussed by other first-hand witnesses examined or cross-examined by the Defence.[290] In any case, there was no need for an expert to explain or contextualise the testimony of these witnesses

[281] Appeal, paras. 264-268.
[282] Judgment, para. 72.
[283] While Ongwen refers in the Appeal to the LRV's request for an expert witness, it was in fact the CLRV who made the request which was granted by the Chamber: *see* LRV Evidence Decision.
[284] Appeal, para. 266, citing LRV Evidence Decision, para. 35.
[285] Defence Addition of Evidence ALA Decision (considering and rejecting the arguments made in the Defence Addition of Evidence ALA); Judgment, para. 72 (considering and rejecting the arguments made in the Defence Closing Brief, para. 72).
[286] Defence Addition of Evidence ALA Decision, para. 11.
[287] LRV Evidence Decision, para. 35.
[288] LRV Evidence Decision, para. 23; *see also* para. 18, citing T-65, 55:4-56:16, especially 56:3-13.
[289] LRV Evidence Decision, para. 35.
[290] Defence Addition of Evidence Decision, paras. 16-21.

on these topics. The Chamber was thus correct in the different, fact-specific assessments it made of Ongwen's and CLRV's proposed SGBC expert witnesses. It did not apply a double standard.

71. Second, Ongwen ignores the other relevant factors that the Chamber considered when rejecting his request to call D-0158, in particular the untimeliness of his request in light of the advanced stage of the proceedings.[291] The Chamber noted that Ongwen's request to add D-0158 was made more than one year after the deadline to provide his list of witnesses and evidence,[292] and after Ongwen had already called two thirds of its *viva voce* witnesses,[293] with no explanation provided as to the delay and in respect of a witness whose existence he had been aware of for a considerable period of time.[294] This was in stark contrast to the CLRV who filed its request for leave to call the SGBC expert within the timeframe allotted to it.[295]

72. Finally, the Chamber ensured that Ongwen's rights were protected. While it rejected the request to call D-0158 to give testimony, the Chamber permitted Ongwen to submit any existing academic work of D-0158 if he wished to do so and noted the Prosecution's undertaking not to object to its submission.[296] Therefore, and contrary to Ongwen's assertion, the Chamber reasonably rejected his request to call an expert witness. His right to call and examine witnesses under article 67(1)(e) was not prejudiced.

II.K. CONCLUSION

73. Ongwen's allegations of fair trial violations are unfounded. Despite raising 12 grounds of appeal alleging a host of violations, Ongwen ignores the Chamber's reasoning, fails to set out any cogent legal or factual argument to support his claims, and largely repeats his unsuccessful arguments at trial. He fails to meet his burden as an appellant to identify a concrete error and the error's material impact on the Judgment. In any event, as shown, the Chamber did not err. It conducted a fair and expeditious trial, taking into account Ongwen's specific circumstances where warranted. Ongwen's request for the exceptional and drastic remedy of reversing his convictions[297] should be rejected. Grounds 1 to 4 and 11 to 18 should be dismissed.

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[291] Defence Addition of Evidence Decision, paras. 13-21; Defence Addition of Evidence ALA Decision, para. 12.
[292] Judgment, para. 72; Defence List of Evidence Decision, para. 13; LRV Evidence Decision, para. 84 (ordering the Defence to provide its list of witnesses and evidence by 31 May 2018). The Defence Addition of Evidence Request was filed on 10 July 2019.
[293] Defence List of Evidence Decision, para. 13.
[294] Defence List of Evidence Decision, paras. 14-15; *see also* Prosecution Response to Defence Addition of Evidence, para. 8.
[295] LRV Evidence Decision, paras. 1-2 (noting that the CLRV filed its request on the 2 February 2018 deadline).
[296] Defence List of Evidence Decision, paras. 20, 22.
[297] *Lubanga* Disclosure Appeal Decision, para. 55.

III. THE CONFIRMATION DECISION WAS NOT DEFECTIVE AND THE CHAMBER DID NOT EXPAND THE SCOPE OF THE CHARGES: GROUNDS 5 AND 6

III.A. THE CHARGES WERE NOT DEFECTIVE AND ONGWEN RECEIVED ADEQUATE NOTICE (GROUND 5)

74. In his fifth ground Ongwen seeks reversal of his convictions because the Confirmation Decision was purportedly defective and failed to provide him with notice under article 67(1)(a).[298] He also challenges the Court's jurisdiction regarding the mode of liability of indirect co-perpetration and the crime of forced marriage; disagrees with the article 56 process; and disagrees with the Chamber's decision to dismiss *in limine* his arguments on the Charges and his jurisdictional challenges.[299] Ongwen's submissions should be dismissed *in limine* because he largely relies on his submissions from previous filings, which he incorporates by reference. [300] As noted above, this is inappropriate and the Appeals Chamber should summarily dismiss arguments not developed in the Appeal.[301] In any event, should the Appeals Chamber not summarily dismiss these arguments, they should be rejected because: (i) Ongwen misunderstands the law and misreads the Charges; (ii) the Charges included the relevant factual allegations; (iii) indirect co-perpetration is a form of criminal responsibility compatible with the Statute, and recognised and applied in the Court's case law; and (iv) the Chamber correctly dismissed *in limine* Ongwen's undeveloped jurisdictional challenges and submissions on the Charges. Ongwen's arguments regarding article 56 should equally be rejected, as the Prosecution explains in section II.B.1 responding to Ongwen's arguments on fair trial.[302] The Prosecution also refers to its submissions in section XIII.B.1 regarding the statutory basis of the crime of other inhumane acts (forced marriage).[303]

[298] Appeal, paras. 77-173.
[299] Appeal, paras. 77, 95.
[300] Appeal, paras. 78-79, 111, 119, 139, fns. 140, 148. Likewise the Appeals Chamber should dismiss Ongwen's request to rule on Defence's motion Defence SGBC Defects which he incorporates by reference. Although the Appeals Chamber noted that Ongwen could raise arguments regarding the Charges and jurisdictional arguments on appeal (Charging Defects AD, paras. 158, 160), this did not mean that Ongwen would be exempt from substantiating his submissions on appeal; rather, it meant that the Appeals Chamber could rule on these matters as long as Ongwen substantiated his arguments as required in regulation 58(2) of RoC.
[301] *See above* paras. 7-8.
[302] *See above* paras. 10-73.
[303] *See below* paras. 560-565.

III.A.1. Ongwen confuses the Charges with the Pre-Trial Chamber's reasoning in the Confirmation Decision

75. Ongwen argues that the Confirmation Decision should have included the elements of the crimes and the modes of liability;[304] that it should have linked the factual allegations and evidence with the elements;[305] and that it should have used specific terminology.[306] However, from his submissions, it is clear that Ongwen conflates the Charges (the material facts and their legal characterisation) with the Confirmation Decision (which includes the Charges and also the Pre-Trial Chamber's reasoning), based on his misunderstanding of the object and limited purpose of confirmation decisions, and the different roles of trial and pre-trial chambers.

76. A confirmation decision defines the parameters of the charges,[307] and also includes the Pre-Trial Chamber's *reasoning* in support of its conclusion that there is sufficient evidence to commit the suspected person to trial.[308] However, only the charges will bind the Trial Chamber.[309] Because of this distinction between the charges and the Pre-Trial Chamber's reasoning, the Chambers Practice Manual recommends that a confirmation decision should clearly separate the charges from the non-binding parts of the confirmation decision.[310] In this case, the Pre-Trial Chamber followed the Practice Manual by placing the Charges in the operative part at the end of the Confirmation Decision.[311] Thus, as the Chamber correctly ruled in the Judgment, issues related to the Chamber's reasoning have no bearing on whether the charges are properly formulated.[312]

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[304] Appeal, paras. 94, 103, 105, 131, 141, 148, 153, 157, 159.
[305] Appeal, paras. 98-99 (contextual elements), 104 (attempt under article 25(3)(f)), 113, 117 (*mens rea* of article 25(3)(a)), 141, 145 (persecution), 152 (enslavement).
[306] Appeal, para. 125 ("fails to allege that any of the conduct was essential").
[307] *See* 2019 ICC Chambers Practice Manual, paras. 57, 62; *Lubanga* AJ, para. 124; *Ntaganda* TJ, para. 37. *See also* *Bemba et al.* AJ, para. 196; *Bemba et al.* Auxiliary Documents Decision, para. 15; *Bemba* Second DCC Decision, para. 12; *Ruto & Sang* Updated DCC Decision, paras. 13, 18; *Bemba* TJ, para. 32; *Bemba* First DCC Decision, para. 37; *Katanga* Summary Charges Decision, paras. 22-23.
[308] Statute, article 61(7); 2019 ICC Chambers Practice Manual, para. 60 ("[…] in the confirmation decision the charges confirmed by the Pre-Trial Chamber must be distinguished from the Chamber's reasoning in support of its findings").
[309] 2019 ICC Chambers Practice Manual, para. 62 ("The binding effect of the confirmation decision is attached only to the charges and their formulation as reflected in the operative part of decision. No such effect is attached to the reasoning provided by the Pre-Trial Chamber to explain its final determination (narrative of events, analysis of evidence, reference to subsidiary facts, etc.)").
[310] 2019 ICC Chambers Practice Manual, para. 65 ("It is fundamental that the structure of the confirmation decision makes clear the distinction between the Chamber's reasoning, on the one hand, and the Chamber's disposition as to the material facts and circumstances described in the charges and their legal characterisation as confirmed, on the other hand"); *see also* para. 66. The previous version of the Chambers Practice Manual contained the same recommendation: 2017 ICC Chambers Practice Manual, p. 17.
[311] Judgment, paras. 32-33.
[312] Judgment, para. 41. Judge Perrin de Brichambaut's separate opinion, cited by Ongwen in support of his arguments, related to the Pre-Trial Chamber's reasoning, and not to the specificity of the charges and the notice provided: Appeal, paras. 97, 127, 171; *see* Judge Perrin de Brichambaut Confirmation Sep. Op., paras. 2, 10.

77. Further, the Appeals Chamber has found that a pre-trial chamber's role in confirming the charges is confined to a "limited judicial intervention" to verify if "the case is worthy of trial". This is a "light review" compared with the fact finding role of a trial chamber, and a pre-trial chamber must calibrate its review in accordance with its "gatekeeper" function, while proceeding expeditiously.[313] A pre-trial chamber is not required to cite all of the evidence, list the elements of the crimes, or follow a certain structure, to provide adequate reasoning. Moreover, a pre-trial chamber's findings about the elements of a crime or a mode of liability (and the evidence relied upon) serve a limited purpose and do not bind a trial chamber, which is tasked with interpreting and applying the sources of law as codified in article 21 of the Statute.[314] In its "fact-intensive" review, a trial chamber may assess allegations not specifically addressed by the pre-trial chamber, or interpret the law differently or rely on different items of evidence than the pre-trial chamber.[315]

III.A.2. The Pre-trial Chamber provided adequate reasoning

78. In this case the Pre-Trial Chamber, attentive to its role, provided adequate reasoning. The Confirmation Decision, when read as a whole, clearly explains the basis of the Pre-Trial Chamber's conclusions.[316] It referred to relevant evidence and gave its legal interpretation when confronted by novel matters or when ruling upon Defence challenges.[317] Ongwen oversimplifies the Pre-Trial Chamber's reasoning in claiming that certain legal elements were not pleaded or were partially pleaded, and, in any event, does not demonstrate any prejudice.[318] He also ignores that he received notice of the evidence on which the Prosecution intended to rely through several other procedural means. These included the list of evidence provided to

[313] *Al Hassan* Regulation 55 AD, para. 92.
[314] *Yekatom & Ngaïssona* Charges AD, para. 46
[315] *Al Hassan* Regulation 55 AD, para. 106.
[316] *See Lubanga* First Redactions AD, para. 20 ("The extent of the reasoning will depend on the circumstances of the case, but it is essential that it indicates with sufficient clarity the basis of the decision. Such reasoning will not necessarily require reciting each and every factor that was before the respective Chamber to be individually set out, but it must identify which facts it found to be relevant in coming to its conclusion").
[317] As to the evidence, *see e.g.* Confirmation Decision, paras. 46-53 (general assessment), 65-66 (Pajule), 71-72 (Odek), paras. 76-77 (Lukodi), paras. 81-82 (Abok), 102 (direct SGBC), 136-137 (indirect SGBC), 141-142 (conscription and use of children); as to the Pre-Trial Chamber's legal interpretation, *see e.g.* Confirmation Decision, paras. 37-45 (modes of liability), 87-95 (forced marriage), 96-100 (forced pregnancy).
[318] *Contra* Appeal, paras. 170-173.

the Defence before the confirmation hearing,[319] the Pre-Confirmation Brief,[320] the Pre-Trial Brief,[321] the list of witnesses[322] and further details given during disclosure.[323]

79. Accordingly, Ongwen's submissions that the Confirmation Decision was defective with respect to the contextual elements,[324] attempted murder,[325] indirect (co)perpetration under article 25(3)(a),[326] and the crimes of persecution,[327] forced marriage,[328] enslavement[329] and conscription of child soldiers[330] stem from his misunderstanding of the nature of the Confirmation Decision and should be dismissed.

III.A.3.The Charges need not include the elements of the crimes nor the evidence

80. To the extent that some of Ongwen's arguments relate to the *Charges* specifically (as opposed to the Pre-Trial Chamber's reasoning in the Confirmation Decision), they too lack merit. The Court's legal framework does not require that the charges set out the 'elements' of a mode of liability or the crimes, link the material facts with the elements, or use specific terminology, to provide sufficient notice.[331] Rather, the Charges must set out the factual allegations underlying the elements of the crimes and modes of liability, and their legal characterisation. Under article 67(1)(a), an accused has a right "[t]o be informed promptly and in detail of the nature, cause and content of the charge[.]"[332] The 'nature' of a charge has been

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[319] Rule 121(3) of the Rules ("[t]he Prosecutor shall provide to the Pre-Trial Chamber and the person, no later than 30 days before the date of the confirmation hearing, […] a list of the evidence which he or she intends to present at the hearing).
[320] Prosecution Pre-Confirmation Brief, submitted simultaneously with the DCC on 21 December 2015.
[321] Prosecution Pre-Trial Brief.
[322] Prosecution List of Witnesses.
[323] For example, for each item disclosed as "incriminating", the Prosecution provided the Defence with an indication of the relevance of the evidence. The Prosecution identified various bases of relevance such as **1)** Structured, organised, and functioning armed groups; **2)** Existence of an armed conflict (not of an international character); **3)** Attack against a civilian population; **4)** The attack was widespread; **5)** The attack was systematic; **6)** War crime of Attacking Civilians; **7)** Murder; **8)** Inhuman acts/cruel treatment; **9)** Enslavement; **10)** Rape; **11)** Forced Pregnancy; **12)** Sexual Slavery; **13)** Pillaging; **14)** Sexual Violence; **15)** Destruction of Property; **16)** Conscripting or enlisting or using child soldiers; **17)** Any other information relating to the attacks against Pajule, Odek, Lukodi and Abok; **18)** Any other information relating to SGBC involving Ongwen or LRA fighters under his command; **19)** Article 25(3)(a); **20)** Article 25(3)(b); **21)** Article 25(3)(c); **22)** Article 25(3)(d); **23)** Art. 28 Command responsibility; **24)** Any other information relating to Ongwen's individual criminal responsibility; **25)** Expert witness/chain of custody witness/intercept witness/intercept evidence; **26)** Persecution; **27)** Torture; **28)** Forced Marriage; **29)** Outrages upon Personal Dignity; **30)** Attempted murder; **31)** SGBC contextual; **32)** Information showing Dominic Ongwen was not under duress; **33)** Mental Capacity.
[324] Appeal, paras. 97-99.
[325] Appeal, paras. 102-105.
[326] Appeal, paras. 106-137.
[327] Appeal, paras. 139-146; *see also* Defence Defects Series Part IV, paras. 7-23.
[328] Appeal, paras. 147-149.
[329] Appeal, paras. 150-155.
[330] Appeal, paras. 156-163.
[331] *Contra* Appeal, para. 99 (referring to the section on contextual elements of the charges and arguing that "fail to link these facts to the elements articulated in Article 7(1) and Article 8(1)").
[332] *Yekatom & Ngaïssona* Charges AD, para. 38.

referred to as "the precise legal qualification of the offence", while the 'cause' has been described as "the facts underlying it".[333] As to the 'cause', commentators have suggested that "[t]here may be no meaningful distinction between 'cause' and 'content', except perhaps a message of exhaustivity", and that this provision must be read in combination with the very thorough disclosure requirements imposed on the Prosecutor.[334] This is consistent with regulation 52(b) and (c) of the RoC regulating the content of the document containing the charges (DCC), which refers to: (i) a "statement of the facts […] which provides a sufficient legal and factual basis to bring the person[s] to trial" (also referred to as "material facts"), and (ii) the "legal characterisation" of the facts.[335] There is thus no general legal requirement to set out the elements of the crimes or the modes of liability, or for the charges to adopt a certain structure.

81. The Appeals Chamber has already confirmed the correctness of this approach. In dismissing similar arguments in *Yekatom & Ngaïssona*, the Appeals Chamber held that for the purpose of sufficient notice, the legal characterisation of the charges must set out the applicable sub-provision in article 25, and the specific form of participation within that sub-provision.[336] There is no legal requirement—nor does procedural fairness dictate —that the legal elements of the modes of criminal responsibility must be listed in the charges.[337] The same principle applies to the elements of the crimes, which are set out in detail in the Elements and are widely accessible, and need not be listed in the charges for the purposes of notice. Ongwen has not demonstrated that his case merits a departure from these general principles.[338] Moreover, the Appeals Chamber also held in that case that the right to notice does not require that the relevant facts be linked with the applicable legal characterisation, since "the right to be informed does not impose any special formal requirement as to the manner in which an accused is to be informed of the nature and cause of the charges against him".[339] Nor does the right to notice

[333] *Yekatom & Ngaïssona* Charges AD, para. 38; *see also* ICTR, *Ntagerura* TJ para. 29.
[334] Schabas (2016), p. 1029; Schabas and McDermott, p. 1660, nm. 20.
[335] *See* regulation 52(b) and (c) of the RoC. *See Ntaganda* UDCC Decision, para. 37 ("'charges' include a description of the relevant 'facts and circumstances', as well as a legal characterisation of the facts"); T-6, 19:25-20:6. *See also Lubanga* AJ, para. 119; *Lubanga* Regulation 55 AD, para. 97, fn. 163; *Al Hassan* DCC Time Limit Decision, para. 30 (noting that the "facts" include "the time and place of the alleged crimes and provide a sufficient legal and factual basis to bring the person charged to trial"). *See also* 2019 ICC Chambers Practice Manual, para. 35; ICTY Practice Manual, p. 36, para. 9.
[336] *Yekatom & Ngaïssona* Charges AD, para. 43.
[337] *Yekatom & Ngaïssona* Charges AD, paras. 44, 46.
[338] *Yekatom & Ngaïssona* Charges AD, para. 44 (where the Appeals Chamber noted that since clarity and detail are preferable in a charging document and the focus is on role of an accused, in some cases it may be necessary to go beyond the language of the particular forms of responsibility enumerated in the Statute).
[339] *Yekatom & Ngaïssona* Charges AD, para. 54.

require the use of special terminology such as "common plan" or "essential contribution";[340] instead, substance prevails over form.[341]

82. Nor should the charges include evidence. The 'material facts' included in the Charges must be distinguished from the evidence, the Prosecution's submissions, and those facts that the Prosecution relies upon in support (frequently referred to as 'subsidiary facts') and which are functionally *evidence*.[342] The "materiality" of a given fact depends on the nature of the Prosecution's case and cannot be established in the abstract.[343] Moreover, although the confirmation decision defines the parameters of the charges for the purposes of trial,[344] this does not exclude that "further details about the charges, as confirmed by the pre-trial chamber, may, depending on the circumstances, also be contained in other auxiliary documents".[345]

83. The Charges in this case thus complied with the charging requirements under the Court's legal framework. Moreover, the Charges were sufficiently specific—nor does Ongwen argue otherwise since, as noted, his arguments largely relate to purported omissions in the Confirmation Decision of evidence and legal elements. The Charges were divided into three main categories: (i) those relating to crimes committed within the context of four specific attacks against four IDP camps; (ii) those concerning sexual and gender based crimes ("SGBC") directly perpetrated by Ongwen against seven identified women who were in his household between 1 July 2002 and 31 December 2005; and (iii) those concerning crimes which are systemic in nature, namely indirect SGBC against women and girls within the Sinian brigade, and conscription and use in hostilities as Sinia fighters of children under the age of 15 committed in Northern Uganda between 1 July 2002 and 31 December 2005.[346]

[340] *Yekatom & Ngaïssona* Charges AD, para. 60.
[341] *Yekatom & Ngaïssona* Charges AD, para. 60.
[342] *Banda & Jerbo* CD, paras. 36-37; 2019 ICC Chambers Practice Manual, p. 12. *See also* *Bemba* AJ Judges Morrison and Van den Wyngaert Sep. Op., para. 20 (defining 'subsidiary facts' as "intermediate findings that support the material facts").
[343] *Ruto & Sang* Charges Order, para. 11. *See also* *Blaškić* AJ, para. 210; *Kvočka et al.* AJ, para. 28; *Đorđević* AJ, para. 331; *Kupreškić et al.* AJ, para. 89.
[344] *Lubanga* AJ, para. 124. *See also* *Bemba* TJ, para. 32; *Katanga* TJ, para. 12; *Katanga* Summary Charges Decision, paras. 22-23. *See also* 2019 ICC Chambers Practice Manual, para. 57.
[345] *Lubanga* AJ, para. 124. *See also* *Yekatom* Additional Details Decision, para. 34; *Ntaganda* TJ, para. 37; *Ntaganda* AJ, para. 325. Updated DCC, list of evidence and pre-trial brief are auxiliary documents.
[346] Judgment, para. 33.

84. These Charges were sufficiently specific in light of the nature and characteristics of the case,[347] including the scale of criminality and large number of victims;[348] the mode of liability (indirect co-perpetration and indirect perpetration for all the crimes except for direct SGBC);[349] and the nature of the crimes (mostly crimes of systematic nature and/ or continuous crimes where the perpetrators and victims are on the move within a defined geographic area).[350]

85. In conclusion, Ongwen's submissions that the Confirmation Decision (or the Charges) were defective because they did not specifically recite the elements of the crimes and modes of liability; refer to evidence; use specific terminology; or follow a specific structure, should be dismissed.

III.A.4. The Charges contained all relevant factual allegations

86. Insofar as Ongwen argues that the Charges did not include all relevant factual allegations, his submissions also lack merit and should be rejected.[351]

III.A.4.a. Article 25(3)(a)

87. The Charges identified the relevant factual allegations underlying his *mens rea* under article 25(3)(a).[352] For example, regarding the attack on the Pajule IDP camp, for which Ongwen was charged and convicted as an indirect co-perpetrator,[353] the Charges included all relevant factual allegations regarding:

- Ongwen's *mens rea* with respect to his conduct and its consequences, including the criminal nature of the common plan or agreement for the Pajule attack and the commission of the crimes of attacks against the civilian population, murder, torture, cruel treatment, other inhumane acts, enslavement, pillaging and persecution.[354]

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[347] *Ntaganda* TJ, para. 38; T-6, 20:7-9; *Prlić et al.* AJ, para. 28; *Brima et al.* AJ, para. 37, citing *Kupreškić et al.* AJ, para. 89; *Taylor* AJ, para. 40 (stating that whether a non-exhaustive pleading of locations is adequate or defective depends on whether the indictment provides the accused with sufficient notice to enable him to prepare his defence). *See also* 2019 ICC Chambers Practice Manual, para. 38.
[348] *Kupreškić et al.* AJ, paras. 89; *Kvočka et al.* AJ, para. 30; *Brima et al.* AJ, para. 41; ICTY Practice Manual, p. 37, para. 10. Notwithstanding, as the identity of the victims is valuable to the preparation of the Defence case, if the Prosecution is in a position to name the victims, it should do so. *See Kupreškić et al.* AJ, para. 90.
[349] *Lubanga* AJ, para. 122 (quoting the *Blaškić* AJ, paras. 210-213); *Sesay et al.* AJ, paras. 48-49.
[350] *Sesay et al.* AJ, para. 830; *Taylor* TJ, paras. 119, 1018; *Ntaganda* UDCC Decision, para. 31.
[351] Although it is unclear whether Ongwen argues that the Charges do not include the relevant factual allegations, for the sake of completeness, the Prosecution will demonstrate below that the Charges *do* include the relevant factual allegations regarding the issues raised by Ongwen. The 'Charges' are at pp. 71 to 104 of the Confirmation Decision. The Prosecution will not address Ongwen's arguments regarding the lack of pleading of the evidence or the elements of the crimes. As explained in the previous section, the Charges need not include them.
[352] *Contra* Appeal, paras. 112-118.
[353] Appeal, para. 116.
[354] Confirmation Decision, p. 73, para. 15 ("[t]he Pajule co-perpetrators, including Dominic Ongwen, meant to engage in their conduct and intended to bring about the objective elements of the crimes of attacks against the

- Ongwen's awareness of the fundamental features of the LRA, including the Sinia brigade, as an organised and hierarchical apparatus of power,[355] and of the factual circumstances that enabled him, together with the other co-perpetrators, to jointly exercise control over the crimes charged.[356] This part of the Charges must also be read together with the material facts regarding the structure and functioning of the LRA, Ongwen's position of authority, and his own awareness of it.[357]

88. Likewise the Charges included all relevant factual allegations regarding indirect co-perpetration in the context of the attack on Odek IDP camp,[358] indirect SGBC,[359] and the conscription/use of children under the age of 15.[360] The Pre-Confirmation Brief[361] and the Pre-Trial Brief[362] provided additional detail, summarising and providing citations to the underlying evidence.

89. With respect to factual allegations in the Charges regarding Ongwen's power to frustrate the commission of the crimes, the Prosecution refers to its response to ground 65 below.[363] The Charges clearly set out Ongwen's contributions to the different criminal common plans or agreements, and identified the co-perpetrators involved.[364] The Pre-Confirmation Brief[365] and the Pre-Trial Brief[366] provided additional detail, summarising and providing citations to the

civilian population, murder, torture, cruel treatment, other inhumane acts, enslavement, pillaging, and persecution or were aware that they would occur in the ordinary course of events in implementing the Pajule common plan. The victims of these crimes were civilians taking no active part in hostilities. Dominic Ongwen was aware of the factual circumstances that established this status."); *contra* Appeal, para. 116 (citing p. 74, para. 17).

[355] Confirmation Decision, p. 72, paras. 10-11.

[356] Confirmation Decision, p. 74, para. 16 ("[t]he Pajule co-perpetrators implemented the Pajule common plan through the hierarchical apparatus of the LRA deployed for the Pajule attack, which they jointly controlled. Dominic Ongwen was aware of the fundamental features of the LRA and the factual circumstances that enabled him, together with other co-perpetrators, to jointly exercise control over the crimes charged in relation to Pajule.").

[357] Confirmation Decision, p. 73, paras. 10-11.

[358] Confirmation Decision, p. 77, paras. 27-28.

[359] Confirmation Decision, p. 99, paras. 119-120.

[360] Confirmation Decision, p. 102, para. 126.

[361] Prosecution Pre-Confirmation Brief, paras. 89-110 (general discussion of the position of authority of Dominic Ongwen and his awareness of the fundamental features of the organized structure of the LRA and Sinia brigade), paras. 185-217 (Pajule), paras. 270-303 (Odek), paras. 576-610 (indirect SGBC), paras. 648-661 (child soldiers).

[362] Prosecution Pre-Trial Brief, paras. 104-147 (general discussion on Ongwen's position of authority and indirect co-perpetration) paras. 209-211, 246-287 (Pajule), paras. 289, 292, 303, 304, 321, 326, 332-370 (Odek) paras. 502-503, paras. 612-694 (SGBC) paras 704, 710, 712, 716, 730, 737, 739-753 (child soldiers).

[363] *Contra* Appeal, paras. 123-125. *See below* paras. 426-428.

[364] With respect to Ongwen's contributions: *see* Confirmation Decision: regarding Pajule (p. 74, para. 17), Odek (p. 78, para. 29), indirect SGBC (p. 100, para. 123), child soldiers (p. 103, para. 129); with respect to the co-perpetrators involved: Pajule (p. 73, para. 15), Odek (p. 77, para. 27), indirect SGBC (p. 99, para. 119), child soldiers (p. 102, para. 126). *Contra* Appeal, paras. 125-126.

[365] Prosecution Pre-Confirmation Brief, paras. 73-110.

[366] Prosecution Pre-Trial Brief, paras.89-155.

evidence on the execution of the common plans and the roles played by Ongwen and the other co-perpetrators.

90. Finally, with respect to the attack on Lukodi,[367] for which Ongwen was convicted as an indirect perpetrator,[368] the Charges likewise set out the relevant factual allegations as to:

- Ongwen's *mens rea* with respect to his conduct and consequences, including the criminal nature of the common plan for the Lukodi attack and the commission of the crimes of attacks against the civilian population, murder, attempted murder, torture, cruel treatment, other inhumane acts, enslavement, pillaging, destruction of property and persecution.[369]
- Ongwen's awareness of the factual circumstances that enabled him to exercise control over the crimes charged.[370]
- Ongwen's control over the crimes through the LRA fighters who committed the attack.[371]

91. The Charges followed the same approach with respect to the attack on Abok.[372] The Pre-Confirmation Brief[373] and the Pre-Trial Brief[374] provided additional detail regarding the relevant evidence.

92. In sum, the factual allegations underpinning Ongwen's criminal responsibility for indirect co-perpetration and indirect perpetration of the crimes for which he was charged were comprehensively pleaded.

III.A.4.b. Persecution - article 7(1)(h)

93. Ongwen's arguments that the Charges for the crime of persecution were defective are similarly unfounded.[375] The "underlying crimes" of the persecution charges were the crimes committed during the attacks on the four IDP camps. The Charges described these crimes and directly linked them to the charge of Persecution. For example, for Pajule the factual allegations

[367] *Contra* Appeal, para. 117; Ongwen once again refers to the section on the Pre-Trial Chamber's reasoning.
[368] Judgment, paras. 2962-2973.
[369] Confirmation Decision, p. 82, para. 41, read together with paras. 44-52; *contra* Appeal, para. 117 (here Ongwen also complains that there was no evidentiary support for the elements of the *mens rea*).
[370] Confirmation Decision, p. 82, para. 42. This should be read together with the material facts regarding the structure and functioning of the LRA, the position of authority Ongwen held, and Ongwen's own awareness of these matters: Confirmation Decision, p. 73, paras. 10-11.
[371] Confirmation Decision, pp. 82-84, paras. 41-52; *contra* Appeal, paras. 133-137.
[372] Confirmation Decision, pp. 86-88, paras. 54-65.
[373] Prosecution Pre-Confirmation Brief, paras. 313-376 (Lukodi), 377-427 (Abok).
[374] Prosecution Pre-Trial Brief, paras. 371-419 (Lukodi), 430-499 (Abok).
[375] *Contra* Appeal, paras. 139-146.

underlying the persecution charge were clearly set out in the Charges.[376] Likewise, the factual allegations regarding the underlying crimes were set out in the Charges, namely: attack against the civilian population,[377] murder,[378] torture/cruel treatment/other inhumane acts,[379] enslavement,[380] and pillaging.[381] The relevant evidence was contained in the section on Pajule in the Pre-Confirmation Brief. That document contained summaries of the evidence regarding the attack directed against the civilian population,[382] murder,[383] torture/cruel treatment/other inhumane acts,[384] enslavement, [385] and pillaging.[386] The Pre-Confirmation Brief also made clear that these summaries of evidence related to the acts or crimes[387] underlying the charge of Persecution.[388] The Pre-Trial Brief contained similar submissions.[389] The Prosecution took the same approach in describing the factual allegations underpinning the charge of persecution for the attacks on Odek, Lukodi, and Abok IDP camps.

III.A.4.c. Enslavement - article 7(1)(c)

94. Contrary to Ongwen's submissions,[390] the Charges made clear the nexus between the charged crimes (including enslavement) and the contextual elements of crimes against humanity, that is, the relevant LRA attack directed against the civilian population in Northern

[376] Confirmation Decision, pp. 75-76, para. 25 ("LRA fighters severely deprived, contrary to international law, the civilian residents of Pajule of their fundamental rights to life, to liberty and security of person, to freedom of movement, to private property, not to be subjected to torture or to cruel, inhumane or degrading treatment, and the right not to be held in slavery or servitude. The Pajule co-perpetrators, including Dominic Ongwen, targeted this group of civilian residents based on political grounds, as they perceived them to be affiliated with and/or supporting the Ugandan government. They did so in connection with the crimes of attacks against the civilian population as such, murder, torture, other inhumane acts, cruel treatment, enslavement, and pillaging committed by the attackers at or near Pajule.").
[377] Confirmation Decision, pp. 74-75, para. 20.
[378] Confirmation Decision, p. 75, para. 21.
[379] Confirmation Decision, p. 75, para. 22.
[380] Confirmation Decision, p. 75, para. 23.
[381] Confirmation Decision, p. 75, para. 23.
[382] Prosecution Pre-Confirmation Brief, paras. 157-158.
[383] Prosecution Pre-Confirmation Brief, paras. 159-164.
[384] Prosecution Pre-Confirmation Brief, paras. 165-174.
[385] Prosecution Pre-Confirmation Brief, paras. 175-178.
[386] Prosecution Pre-Confirmation Brief, paras. 179-182.
[387] *See* element 4 of the crime against humanity of Persecution (article 7 (1) (h)) in the Elements of Crimes.
[388] Prosecution Pre-Confirmation Brief, para. 183.
[389] Prosecution Pre-Trial Brief, paras. 216-217 (Count 1; attacks directed against the civilian population), paras. 218-224 (Counts 2-3; murder), paras. 225-233 (Counts 4-5; torture), paras. 234-240 (Count 8; enslavement), paras. 241-244 (Count 9; pillaging). *See further* para. 245 (The Pre-Trial Brief also makes it clear that these summaries of evidence relate to the acts or crimes that underlie the charge of Persecution).
[390] Appeal, paras. 150-155; *see also* Defence Defects Series Part IV, paras. 57-58 ("[n]one of these legal elements, and factual support for them is to be found in the CoC Decision").

Uganda.[391] The Charges also set out the factual allegations regarding the mental element for this crime.[392]

III.A.4.d. Conscription/use of children - article 8(2)(e)(vii)

95. Contrary to Ongwen's submissions,[393] the factual allegations in the Charges regarding Ongwen's contributions to the common plan to conscript and use child soldiers, including his orders to abduct children, were clear.[394] The Pre-Confirmation Brief provided further detail.[395] Likewise, factual allegations regarding Ongwen's *mens rea*,[396] including his awareness of the contextual elements,[397] were also set out in the Charges. The Pre-Confirmation brief provided additional detail.[398]

96. Further, the charges need not list all the co-perpetrators or identify them all by name.[399] Some co-perpetrators may be identified by other features, such as their membership in the group or through their role in the commission of crimes.[400] In this case, the co-perpetrators of this crime were identified as "Dominic Ongwen, Joseph Kony, and the Sinia brigade leadership".[401] This was sufficiently specific for pleading the material facts of the common plan in this case since: (i) Ongwen's role in and contributions to the common plan were set out clearly and in detail;[402] (ii) Kony, another co-perpetrator, was identified by name;[403] and (iii) the other co-perpetrators were described as members of a discrete category of persons, "the Sinia brigade

[391] Confirmation Decision, p. 71, paras. 3 and 4 ("[t]he conduct that forms the basis for the charges in this document was committed as part of a widespread or systematic attack directed against the civilian population in northern Uganda"). *See also* Confirmation Decision, p. 29, paras. 63-64.
[392] Confirmation Decision, p. 73, para. 15; p. 74, para. 19; p. 75, para. 23 (Pajule); p. 77, para. 27; p. 78, para. 31; p. 79, para. 36 (Odek), p. 82, paras. 41, 44; p. 83, para. 48; (Lukodi), p. 86, paras. 54, 57; p. 87, para. 62 (Abok), p. 99, para. 119; p. 101, para. 124 (indirect SGBC); pp. 90-97 (direct SGBC).
[393] Appeal, paras. 156-163; *see also* Defence Defects Series Part IV (referred to in fn. 148), paras. 62, 65, 66.
[394] Confirmation Decision, p. 103, para. 129.
[395] Prosecution Pre-Confirmation Brief, paras. 625-627.
[396] Confirmation Decision, p. 102, paras. 126 and 130.
[397] Confirmation Decision, p. 102, para. 125; *see also* p. 71, para. 4 and p. 72, para. 7.
[398] Prosecution Pre-Confirmation Brief, para. 23.
[399] *Contra* Appeal, para. 158; *see also* Defence Defects Series Part IV, para. 62.
[400] *See Katanga* TJ, para.1626 (although for article 25(3)(d): "and the identity of the members of group, although each person need not be identified by name"); *see also cf. Ntaganda* TJ, para. 808 (referring to "Mr Ntaganda and other military leaders of the UPC/FPLC, including Thomas Lubanga and Floribert Kisembo"); *see also Brđanin* AJ, para. 430 (albeit for JCE: "[i]n establishing these elements, the Chamber must, among other things: identify the plurality of persons belonging to the JCE (even if it is not necessary to identify by name each of the persons involved)"); *Sesay et al.* TJ, para. 353 ("the identities of all participants and the continuing existence of the joint criminal enterprise over the entire time period alleged in the Indictment are not elements of the *actus reus* of the joint criminal enterprise that need to be proven beyond reasonable doubt by the Prosecution."); *Popović et al.* TJ, para. 1023 ("[t]he first element is the participation of a plurality of persons in a common purpose. It is not required that each member in the JCE is identified by name: it can be sufficient to refer to categories or groups of persons.").
[401] Confirmation Decision, p. 102, para. 126.
[402] *See*, for example, Confirmation Decision, p. 103, para. 129.
[403] Confirmation Decision, p. 102, para. 126.

leadership". The co-perpetrators *were* therefore properly identified in the Charges by the description of their membership in the Sinia brigade leadership. The Charges made clear that they were the individuals holding leadership positions within that brigade. The Sinia brigade was a discrete, identifiable military unit, with a formal structure and a clearly discernible internal hierarchy which remained stable and unchanged, even if persons holding leadership positions within it changed regularly due to promotions, demotions, death or escape/capture.[404] Consequently, considering the nature, organisation, and functioning of the Sinia brigade, the Charges adopted a sufficiently concrete way to identify the co-perpetrators.

97. The Pre-Confirmation Brief gave additional details showing that "the Sinia brigade leadership" was a discrete and identifiable category of persons. It also identified by name various members of the Sinia brigade leadership in different periods of time.[405]

III.A.4.e. Contextual elements, attempted murder and forced marriage

98. Finally, the Charges set out the relevant facts underpinning the contextual elements of war crimes and crimes against humanity,[406] the perpetrators' attempt to commit the crime of murder in Odek, Lukodi and Abok,[407] and the crime of other inhumane acts (forced marriage).[408] Ongwen's jurisdictional challenge to the crime of other inhumane acts (forced marriage) is addressed below.[409]

III.B. INDIRECT CO-PERPETRATION IS COMPATIBLE WITH THE STATUTE (GROUND 5)

99. Ongwen repeats his trial arguments that indirect co-perpetration "is not found within the statutory language of Article 25(3)(a) and the Chamber does not have the inherent power to add it", and that "the Chamber erroneously found that indirect co-perpetration was not a standalone mode of liability but a form of co-perpetration".[410] However, he does not substantiate his

[404] The Charges further describe the features of the Sinia Brigade: Confirmation Decision, p. 72, paras. 10, 12.
[405] Prosecution Pre-Confirmation Brief, paras. 85, 91 ("Kony said on the radio that Dominic Ongwen was a battalion commander in Sinia brigade, under the command of Buk Abudema and Lapanyikwara, second-in-command of Sinia brigade"), 92 ("On or about 5 March 2004, Dominic Ongwen became the commander of Sinia brigade. He took over the brigade from Labongo, who had been acting commander after Buk Abudema was transferred"), 93 ("Okello Franco Kalalang was initially the brigade Major in Sinia brigade headquarters and then Terwanga battalion commander.") 652 ("Tabuley on 21 July 2002 reported that Lapanyikwara, who was the second-in command of Sinia brigade, had abducted school children", "On 18 August 2002, Lukwiya […] reported that Pokot, a battalion commander in Sinia, abducted many recruits").
[406] Confirmation Decision, pp. 71-72, paras. 2-8. *Contra* Appeal, paras. 99-100 (the Charges need not link the facts with the elements articulated in articles 7(1) and 8(1) of the Statute).
[407] Confirmation Decision, p. 79, para. 34 (Odek), p. 83, para. 47 (Lukodi), p. 87, para. 60 (Abok). *Contra* Appeal, paras. 103-105.
[408] Confirmation Decision, p. 90, paras. 69-70 (P-0099), p. 91, paras. 75-76 (P-0101), p. 92, paras. 84-85 (P-0214), pp. 93-94, paras. 93-97 (P-0226), p. 95, paras. 102-105 (P-0227), pp. 99-101, paras. 119-123 (indirect SGBC).
[409] *See below* paras. 560 -566; *contra* Appeal, paras. 147-149.
[410] Appeal, paras. 121-122.

generic submissions but rather simply refers to his Closing Brief and previous filings.[411] In his Closing Brief, Ongwen did not substantiate his submissions either but simply referred to his previous filings.[412] In none of these previous filings did Ongwen develop his arguments other than generally arguing that this form of participation has no statutory basis, relying on one separate opinion and ignoring the plethora of jurisprudence to the contrary.[413] Accordingly, Ongwen's undeveloped appeal submissions challenging indirect co-perpetration as a mode of liability should be dismissed *in limine* due to lack of substantiation.[414] In any event, for the reasons below, Ongwen's submissions have no merit.

III.B.1. Indirect co-perpetration is consistent with the Statute

100. The Chamber correctly found that "as understood by this Chamber, indirect co-perpetration is nothing more than a particular form of committing a crime 'jointly with another' under Article 25(3)(a) of the Statute".[415] Indeed, article 25(3)(a) expressly provides for three forms of individual criminal responsibility: a person (i) who commits a crime "as an individual", (ii) "jointly with another person" (or "co-perpetration") and (iii) "through another person, regardless of whether that other person is criminally responsible" ("indirect perpetration"). "Indirect co-perpetration" is a combination of the last two. Thus, an "indirect co-perpetrator" is charged with having committed certain crimes 'jointly with another person' *and* 'through another person', and this could also include *through an organisation*.[416] The Court's jurisprudence over the years has confirmed that the simultaneous application of these two variants of individual criminal responsibility is consistent with the Statute, provided that all legal requirements are met.[417]

101. Ongwen neither engages with nor challenges the jurisprudential foundation of indirect co-perpetration. ICC Chambers have interpreted indirect co-perpetration, and co-perpetration more generally, on the basis of the 'control over the crime theory'. This theory requires a

[411] Appeal, para. 119, referring to Defence Closing Brief, paras. 180-198, and Defence Defects Series Part II.
[412] Defence Closing Brief, para. 183 (fns. 273-275).
[413] Defence Pre-Confirmation Brief, paras. 82-84; Defence Defects Series Part II, paras. 26-31.
[414] *See above* paras. 4-8.
[415] Judgment, para. 2787; *see also Ntaganda* TJ, para. 772 ("the concept of indirect co-perpetration entails a form of co-perpetration where the common plan is executed through other persons, who function as a tool of all of the co-perpetrators. In this sense, 'indirect co-perpetration' in this case should not be seen as a stand-alone mode of liability, but as a particular form of co-perpetration, which is compatible with the wording of the Statute"); *see* also Confirmation Decision, para. 38.
[416] *Ntaganda* AJ, Judge Ibáñez Carranza Sep. Op. para. 244.
[417] *Katanga* CD, paras. 492-493, 519; *Ruto & Sang* CD, paras. 290-292; *Kenyatta* CD, para. 297 ; *Ntaganda* CD, paras. 104, 121; *Gbagbo* CD, para. 230, fn. 538; Confirmation Decision, paras. 38-41; *see recently Yekatom & Ngaïssona* Charges Decision, para. 23.

normative assessment of the role of the accused person in the specific circumstances of the case, taking into account the division of tasks, to determine whether by virtue of the essential contributions assessed as a whole, the person has the resulting power to frustrate the commission of the crimes, in the sense that the crime would have not been committed or would have been committed in a significantly different way without the person's contribution.[418] If the answer is in the affirmative, this means that the person committed the crime, rather than that he or she contributed to the crime of another.[419]

102. Since Pre-Trial Chamber I first endorsed the 'control over the crime theory' in the *Lubanga* Confirmation Decision in early 2007, chambers have consistently applied it to interpret article 25(3)(a) in proceedings before the Court.[420] The *Lubanga* Appeals Chamber confirmed the Pre-Trial Chamber's (and the Trial Chamber's) interpretation of 'co-perpetration', and observed that this interpretation is the product of "*interpreting and applying* article 25(3)(a) of the Statute." It dismissed the notion that it would breach article 22 of the Statute or the principle of *in dubio pro reo*.[421] The Appeals Chamber in *Bemba et al.* likewise confirmed this interpretation.[422] Furthermore, since the *Katanga* Confirmation Decision in September 2008,[423] numerous chambers have relied on the variant form of indirect co-perpetration.[424] In *Ntaganda*, the Appeals Chamber recently confirmed Ntaganda's convictions as an indirect co-perpetrator.[425]

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[418] *Lubanga* AJ, para. 473; the Appeals Chamber in *Bemba et al*. and *Ntaganda* further developed the notion: *see e.g. Bemba et al*. AJ, para. 820; *Ntaganda* AJ, para. 1041; *see also* Confirmation Decision, para. 38.
[419] Confirmation Decision, para. 38.
[420] *See e.g*. *Lubanga* CD, paras. 330-348; *Katanga* CD, paras. 519-526; *Abu Garda* CD, para. 160; *Bemba* CD, para. 350; *Banda & Jerbo* CD, paras. 128-149; *Al Hassan* CD, paras. 796-808; *Ntaganda* CD, para. 104.
[421] *Lubanga* AJ, para. 470 (emphasis added).
[422] *Lubanga* AJ, paras. 445-451; 469-473; *Bemba et al*. AJ, paras. 818-820; *see also Bemba et al*. TJ, para. 64.
[423] *Katanga* CD, paras. 488-539.
[424] *Ruto & Sang* CD, paras. 290-292; *Kenyatta* CD, para. 297; *Ntaganda* CD, paras. 104; *Gbagbo* CD, para. 230 (fn. 538); Confirmation Decision, paras. 38-41; *see also Al Hassan* CD, paras. 809-814. *See Ntaganda* TJ, para. 772 (noting that "indirect co-perpetration in this case should not be seen as a stand-alone mode of liability, but as a particular form of co-perpetration, which is compatible with the wording of the Statute"); Ambos, p. 997, mn. 14 (explaining that "indirect co-perpetration […] does not constitute a new (fourth) mode of attribution, but is only the result of the 'factual coincidence of two recognized forms of perpetration [co-perpetration and indirect perpetration]'. Consequently, this form of perpetration easily fits into subpara.(a)").
[425] On 30 March 2021 the Appeals Chamber, by majority, confirmed Ntaganda's conviction as indirect co-perpetrator and dismissed the Defence arguments against indirect co-perpetration in grounds 13 to 15: *Ntaganda* AJ, paras. 960, 1027, 1144, 1170; *see also* paras. 920 and 925 (endorsing *Ntaganda* TJ, para. 772). Judges Morrison and Eboe-Osuji appended separate opinions. Judge Eboe-Osuji would have quashed Ntaganda's conviction as indirect co-perpetrator because he disagreed with the 'control over the crime' theory, which he considered unnecessary in legal systems such as that of the ICC that do not draw such distinctions between principals and accessories for the purposes of attributing blameworthiness and punishment; he also considered it difficult to apply in cases of complex criminality: *Ntaganda* AJ, Judge Eboe-Osuji Sep. Op.. Judge Morrison expressed his concern with the loose application of indirect co-perpetration in certain factual circumstances—particularly those involving complex crimes committed by armed groups. Notwithstanding his views on the mode of liability, he stated that he

103. In a persuasive separate opinion to the *Ntaganda* appeal judgment, Judge Ibáñez Carranza elaborated on the Majority's position regarding indirect co-perpetration and the "control over the crime theory". She emphasised that indirect co-perpetration is compatible with a textual reading of article 25(3)(a), the principle of legality and the rights of the accused.[426] Notwithstanding that there is no "hierarchy of blameworthiness" among the different modes of liability in article 25(3), Judge Ibáñez Carranza considered that indirect co-perpetration is a mode of liability which best reflects scenarios of large-scale and mass criminality where an individual has a controlling role in the commission of the crime and the person committing the crime has submitted to the will of the controlling individual.[427] She considered that the 'control of the crime' theory is the appropriate lens through which the criminal responsibility of those who control the crimes (by virtue of their hierarchical position in the organisation and the automaticity of its functioning) can be assessed given the functional control such persons exercise over the crimes directly perpetrated by the replaceable agents.[428] Judge Ibáñez Carranza noted that even in instances where the accused person is remote from the scene of the crime, criminal responsibility may nonetheless be established if there is a high degree of organisational control by the leadership in the apparatus.[429] She also noted that the control over the crime theory has not only been consistently applied in this Court[430] but also in other jurisdictions.[431]

104. In conclusion, while some judges have issued separate opinions on certain aspects of the 'control over the crime' theory,[432] or regarding the manner in which indirect co-perpetration was applied in certain cases,[433] no Chamber has expressly departed from the Court's

would have not set aside Ntaganda's convictions as an indirect co-perpetrator because he considered that Ntaganda was responsible, that it would not be justified in light of the standard of review on appeal, and that the Chamber followed the existing Court's jurisprudence *Ntaganda* AJ, Judge Morrison Sep. Op..

[426] *Ntaganda* AJ, Judge Ibáñez Carranza Sep. Op., para. 299; *see also* para. 222.

[427] *Ntaganda* AJ, Judge Ibáñez Carranza Sep. Op., paras. 246, 278-283, 287-288, 292, 300. She argued the other modes in article 25(3)(b) to (d) reverse these roles, whereby the control or decision-making regarding the commission of the crime rests with the physical perpetrator.

[428] *Ntaganda* AJ, Judge Ibáñez Carranza Sep. Op., para. 246; *see also* paras. 225-232, 310.

[429] *Ntaganda* AJ, Judge Ibáñez Carranza Sep. Op., paras. 269-273, 277; *see Katanga* CD, pp. 496-498, *Katanga* TJ, paras. 1403, 1406, 1411.

[430] *Ntaganda* AJ, Judge Ibáñez Carranza Sep. Op., para. 230, and references in fn. 308.

[431] *Ntaganda* AJ, Judge Ibáñez Carranza Sep. Op., paras. 239-243.

[432] *Lubanga* TJ, Judge Fulford Sep. Op.. Judge Fulford considered that PTC I's interpretation imposed "an unnecessary and unfair burder on the prosecution" and disagreed with the requirement that the contribution be essential (paras. 3, 17); he did not disagree with the notion of common plan or agreement (para. 15).

[433] *Ngudjolo* TJ, Judge Van den Wyngaert Sep. Op., para. 64 (stating that "the concept of "indirect coperpetration", *as interpreted by Pre-Trial Chamber I*, has no place under the Statute as it is currently worded") (emphasis added); *but see* para. 62 (where Judge Van den Wyngaert accepted indirect co-perpetration through one person/organisation: "I accept that different forms of criminal responsibility under the Statute may be combined, as long as all the elements of each form are proven. Accordingly, when A and B commit a crime through C by

interpretation of co-perpetration.[434] Most recently, the Trial Chamber in *Yekatom & Ngaïssona*, confirmed the Court's jurisprudence when the issue was expressly raised.[435]

III.B.2. The Chamber correctly interpreted article 25(3)(a)

105. Accordingly, the *Ongwen* Trial Chamber adopted an interpretation of article 25(3)(a) that was consistent with the language of the Statute and reasonably foreseeable.[436] The Pre-Trial Chamber had likewise adopted the same interpretation in confirming the charges against Ongwen.[437] Ongwen was thus on notice, and could anticipate, the Chamber's interpretation and application of article 25(3)(a). Furthermore, he was afforded the right to make submissions on this legal issue throughout the proceedings. Ongwen made brief submissions before the Pre-Trial Chamber, which were ruled upon in the Confirmation Decision.[438] He also made belated submissions before the Trial Chamber,[439] which were correctly dismissed under rule 134(3) because they were untimely. Although he could have advanced his interpretation of article 25(3)(a) in his closing submissions,[440] he chose not to provide substantive submissions and merely referred to his previous filings.[441] In sum, no unfairness arises from the Chamber's approach and Ongwen has not suffered any prejudice.

106. Nor does Ongwen present reasons to depart from the consistent jurisprudence of the Court.[442] Most significantly, the concerns expressed in other cases about indirect co-

jointly subjugating the latter's will, I would have no problem in holding A and B jointly responsible for C's behaviour (Article 25(3)(a) second plus third alternative)". Judge Van den Wyngaert disagreed with indirect co-perpetration as applied in *Katanga & Ngudjolo* where two persons (Katanga and Ngudjolo) used their respective organisations (FNI and FPRI). The *Ntaganda* and *Ongwen* factual scenarios (where two persons use one organisation to commit crimes) differs from *Katanga & Ngudjolo*.

[434] The Prosecution notes that in *Yekatom & Ngaïssona*, Pre-Trial Chamber II did not use the term 'co-perpetration' and simply used the statutory language of article 25(3)(a). Although it made some remarks with respect to the notion of 'common plan', the Pre-Trial Chamber did not expressly depart from the Court's jurisprudence, nor did it provide an alternative interpretation of article 25(3)(a): *Yekatom & Ngaïssona* CD, paras. 56-60, and p. 103 (setting out the modes of liability). However, in *Abd-Al-Rahman* CD the same PTC confirmed the Charges referring to 'co-perpetration': paras. 82-89, 118-125.

[435] Yekatom & Ngaïssona Charges Decision, paras. 23, 26.

[436] *Yekatom & Ngaïssona* Charges AD, para. 47.

[437] Confirmation Decision, para. 39.

[438] Confirmation Decision, para. 41.

[439] Defence Pre-Confirmation Brief, paras. 82-89; Defence Defects Series Part II, paras. 26, 28-31.

[440] Charging Defects Decision, para. 35.

[441] Defence Closing Brief, para. 183, fns. 273-275.

[442] Although pursuant to article 21(2) the Appeals Chamber is not bound by its prior decisions, it has stated that it does not change its jurisprudence lightly and would not depart from it "absent convincing reasons". *See* *Gbagbo* Victims Participation Decision, para. 14. This approach has been adopted in all international tribunals due to, among other reasons, the need for predictability and legal certainty. *See* *Aleksovski* AJ, paras. 107-109; *Karadžić* AJ, para. 13; *Šešelj* AJ, para. 11; *Rutaganda* AJ, para. 26; *Beirut S.A.L. and Ali Al Amin* Jurisdiction AD, para. 71. Notably, despite article 59 of the ICJ Statute, "the ICJ has looked to its prior holdings as evidence of relevant rules and principles of law" as a matter of practice. *See* deGuzman (2016), p. 945, mn. 44*; see also* *Croatia vs. Serbia*, Preliminary Objections Judgment, para. 53.

perpetration do not arise in this case where Ongwen's role and contributions to all the crimes for which he was convicted were critical and proximate.[443] His convictions for indirect co-perpetration relate to two different categories of crimes: (i) crimes committed during two specific attacks against two IDP camps (Pajule and Odek) where he was directly involved in their planning and implementation, including by physically participating in the attack (Pajule) and moving with the attackers towards the camp (Odek);[444] and (ii) *systemic* crimes concerning indirect SGBC and conscription and use in hostilities of children under the age of 15 committed in Northern Uganda between 1 July 2002 and 31 December 2005. Ongwen was geographically proximate to the crime sites, and was personally and intimately involved in the different phases of their commission.

107. In conclusion, Ongwen's unsubstantiated arguments regarding the statutory basis of indirect co-perpetration should be dismissed.

III.C. NO PREJUDICE ARISES FROM THE CHAMBER'S DECISION TO DISMISS ONGWEN'S CHALLENGES *IN LIMINE* (GROUND 5)

108. The Chamber correctly dismissed *in limine* Ongwen's repeated submissions regarding purported defects in the Charges, and his jurisdictional challenges against indirect co-perpetration and forced marriage.[445] In his Closing Brief, Ongwen merely referred to and repeated his previous filings—as he does now on appeal.[446] During the trial, the Chamber had likewise correctly dismissed Ongwen's submissions regarding the Charges pursuant to rule 134(2) because they were filed belatedly without prior leave, and since Ongwen did not provided sufficient reasons justifying leave.[447] The Chamber also correctly dismissed Ongwen's jurisdictional challenges for being untimely under article 19(4).[448] The Appeals Chamber confirmed the Trial Chamber's decision.[449]

109. In his Closing Brief, rather than advancing substantive submissions, Ongwen incorporated his previous pre-trial and trial filings in footnotes and simply referred to them.[450]

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[443] Sentencing Decision, para. 385.
[444] Judgment, paras. 144-158 (Pajule). In Odek, although Ongwen moved with the attackers in the direction of the camp, he did not enter: Judgment, paras. 159-177.
[445] Judgment, paras. 37-41; *contra* Appeal, paras. 164-169.
[446] *See* Defence Closing Brief, paras. 40, 183-185, 189, 471, 491; Appeal, para. 119.
[447] Charging Defects Decision, paras. 26-30, 36.
[448] Charging Defects Decision, paras. 31-35, 37. The Chamber dismissed four filings: Defence Defects Series Part I, Defence Defects Series Part II, Defence Defects Series Part III and Defence Defects Series Part IV. The Chamber also noted that Ongwen could raise those arguments in the context of stating its interpretation of the existing law in his closing brief.
[449] Charging Defects AD, paras. 5, 140, 142-143, 153, 158-163.
[450] Defence Closing Brief, fns. 23-26 (Charges), 273-275 (indirect co-perpetration) and fn. 774 (forced marriage).

He did not develop why the Charges were defective, or which legal interpretation the Chamber should have adopted. Nor did Ongwen demonstrate any prejudice or unfairness. Had Ongwen presented additional arguments, or provided substantive submissions in the Closing Brief, the Chamber may have proceeded differently.[451] But he did not. Against this backdrop, the Chamber's decision in the Judgment to dismiss *in limine* the same trial arguments incorporated by reference was reasonable, and correct.

110. Further, even assuming *arguendo* that the Chamber erred in dismissing *in limine* Ongwen's closing submissions, the Chamber's error has no impact. Ongwen's submissions regarding the defects in the Charges and his lack of notice are, as demonstrated above and confirmed by the Appeals Chamber, based on his misunderstanding of the Court's legal framework. Moreover, in dismissing his arguments at trial, the Chamber already considered whether considerations of fairness required it to entertain Ongwen's belated submissions. The Chamber did not identify such considerations.[452] With respect to Ongwen's jurisdictional challenges, before convicting him as an indirect co-perpetrator, and for the crime of forced marriage, the Chamber had to ensure that it had jurisdiction under article 19(1) of the Statute. Its reasoning in this regard fully accorded with the Statute and previous jurisprudence.[453]

111. In conclusion, Ongwen's fifth ground of appeal should be dismissed.

III.D. THE TRIAL CHAMBER DID NOT EXPAND THE SCOPE OF THE CHARGES OR PREJUDICIALLY RELY ON EVIDENCE OF UNCHARGED ACTS (GROUND 6)

112. Ongwen argues in his sixth ground of appeal that the Confirmation Decision was internally inconsistent and deficient, and that the Trial Chamber impermissibly expanded the scope of the charges, and conflated and relied on different categories of uncharged acts to convict him or to support the conviction, or to reject his affirmative defences.[454] Ongwen incorporates and relies upon the submissions in the Defence Closing Brief—which should be rejected for the reasons outlined above.[455] His arguments are without merit and should be rejected.

[451] The Chamber indicated that Ongwen was entitled to challenge indirect co-perpetration and forced marriage "in the context of stating its interpretation of the existing law. Such arguments are best reserved for final briefs and closing statements […]": *see* Charging Defects Decision, para. 35; *see also* Charging Defects AD, paras. 158-160.
[452] Charging Defects Decision, para.30; Charging Defects AD, paras. 139, 145, 147, 153.
[453] Judgment, paras. 2786-2788 (indirect co-perpetration) and 2741-2753 (forced marriage).
[454] Appeal, paras. 174-197.
[455] Appeal, para. 177 (fn. 171, citing Defence Closing Brief, paras. 84-85, 90, 93, 96, 98, 171, 179, 184, 185, 186, 188, 214, 203, 303, 304, 510). *See above* paras. 7-8.

III.D.1. The Confirmation Decision was not inconsistent as to the scope of the case

113. There is no inconsistency in the Confirmation Decision, or the Charges, as to the geographic and temporal scope of the case.[456] As explained in Ground 5, the charges in this case were clearly defined for three categories of crimes, with sufficient specificity.[457] In attempting to demonstrate a purported inconsistency, Ongwen selectively refers to a few paragraphs of the Confirmation Decision without further explanation. Ongwen's arguments should be summarily dismissed for lack of substantiation. In any event, Ongwen is incorrect because those paragraphs relate to different aspects of the Pre-Trial Chamber's findings which cannot be compared with one another. First, Ongwen cites statements by the Pre-Trial Chamber for the purpose of determining that the Court had jurisdiction in the case pursuant to article 19(1) of the Statute.[458] It was fitting for this purpose for the Pre-Trial Chamber to refer to the broadest parameters of the charges that fell within the Court's jurisdiction (*i.e.* conduct taking place from 1 July 2002 to 31 December 2005, in northern Uganda). These parameters differed from the *scope of the charges* which were defined according to the three categories of crimes, as set out above.[459] Provided each charge fell within the jurisdictional parameters—which they did in this case—there is no inconsistency.

114. Second, Ongwen selectively cites three paragraphs of the operative part of the Confirmation Decision (*i.e.*, the Charges) where the Pre-Trial Chamber provided context and generally described when and where three victims of SGBC directly perpetrated by Ongwen were subjected to the alleged criminal conduct, which took place both within and outside the jurisdictional parameters of the case.[460] In the subsequent paragraphs, the Pre-Trial Chamber then provided further detail regarding the timeframes of the different criminal acts that occurred within Uganda and within the temporal scope of the Charges.[461] Thus it is clear that Ongwen was only charged for crimes which were committed within the temporal and geographic parameters of the Charges, and not for any crimes committed outside Uganda and/or outside the period 1 July 2002 to 31 December 2005—as further evidenced in the legal characterisation

[456] *Contra* Appeal, paras. 175, 178-181, 189.
[457] *See above* para. 83.
[458] Appeal, paras. 179 (fn. 173), 188 (fn. 186), citing Confirmation Decision, paras. 2-4, 105.
[459] *See above* para. 83.
[460] Appeal, para. 180, citing Confirmation Decision, p. 90, para. 67 (re P-0099); p. 91, para. 73 (re P-0101); p. 92, para. 82 (re P-0214).
[461] Confirmation Decision, pp. 90, paras. 69-70 (re P-0099); p. 91, paras. 75-79 (re P-0101); p. 92, paras. 84-88 (re P-0214).

of the facts.[462] Moreover, Ongwen was only convicted for the crimes which occurred within the temporal and geographical parameters of the Charges,[463] while the criminal conduct that occurred outside the charging period was correctly considered as relevant evidentiary considerations or as relevant context.[464] There is no error or inconsistency in this approach.

115. Finally, Ongwen cites a statement in the non-operative part of the Confirmation Decision related to the Chamber's factual analysis of SGBC *not* directly perpetrated by Ongwen—a different group of crimes which cannot be compared with the facts regarding the SGBC directly perpetrated by Ongwen or any other group of crimes.[465] Ongwen ignores that the Pre-Trial Chamber, consistently with this statement, only set out in the "material facts" for these crimes, acts occurring "from at least 1 July 2002 to 31 December 2005".[466] Thus, Ongwen's attempt to demonstrate inconsistency in the Charges should be rejected.

III.D.2. The Chamber did not expand the scope of the case or prejudicially rely on uncharged allegations

116. The Trial Chamber correctly adhered to the facts and circumstances of the Charges when convicting Ongwen.[467] Each conviction it entered against Ongwen (comprising 62 counts of crimes against humanity and war crimes)[468] fell within the scope of their respective Charges as described above.[469] In assessing the evidence, the Chamber correctly held that while its judgment could not exceed the facts and circumstances described in the Charges, it could rely upon evidence outside the parameters of the Charges as circumstantial evidence to establish the facts and circumstances described in the Charges or to contextualise and fully articulate the facts of the Charges, including those relevant to modes of liability, SGBC, the conscription of children under the age of 15 years, and the use of such children to actively participate in

[462] *See* Confirmation Decision, pp. 97-99 (setting out for each crime against each victim of SGBC directly perpetrated by Ongwen the timeframe of the alleged crimes—all falling within the period 1 July 2002 and 31 December 2005).
[463] Judgment, paras. 3026, 3034, 3043, 3049, 3055, 3062, 3068, pp. 1068-1076.
[464] *See below* paras. 550-551, 553-559.
[465] Appeal, para. 181, citing Confirmation Decision, para. 136.
[466] Confirmation Decision, p. 99, paras. 119, 120.
[467] Article 74(2), Statute; *Ntaganda* AJ, para. 324 ("Pursuant to [article 74(2) of the Statute], the trial chamber may enter a conviction only with respect to allegations that fall within the factual scope of the charges, as confirmed or amended").
[468] Amounting to 61 crimes.
[469] *Compare* Judgment, pp. 1068-1076 *with* Confirmation Decision, pp. 76-77 (counts 1-10), 80-81 (counts 11-23), 84-85 (counts 24-36), 88-89 (counts 37-49), 97-99 (counts 50-60), 101-102 (counts 61-68), 103-104 (counts 69-70).

hostilities.[470] The Chamber provided reasons for its determination on several occasions[471]—it was not required to repeat them further.[472]

117. In arguing that the Chamber expanded the scope of the case and prejudicially relied on uncharged allegations, Ongwen again conflates both the Pre-Trial Chamber's reasoning (and evidence) in the Confirmation Decision with the Charges, and the scope/parameters of the Charges with the evidence that a Trial Chamber can consider to make findings (and enter convictions) with respect to crimes which occurred within those parameters.[473] The Court's legal framework distinguishes between the *charges*—which are binding on the Trial Chamber—and the *submissions, narratives of relevant events, factual analysis and evidence* relied upon by the Prosecution to substantiate the charges and assessed by the Pre-Trial Chamber in the Confirmation Decision.[474] As explained above, those latter aspects of the Confirmation Decision were not binding on the Trial Chamber. Rather, the Trial Chamber was only bound by the parameters of the Charges and could rely on different evidence,[475] provided it was relevant to the Charges—as the Chamber rightly observed.[476] In that context, while Ongwen makes a general claim that the evidence of "uncharged acts"/"acts outside the scope of the charges" did not meet the threshold of relevance, credibility and independence, he identifies no concrete example to support his claim.[477] He also ignores that he received notice of the evidence on which the Prosecution intended to rely, both at the confirmation hearing and at trial.[478]

118. The Court's jurisprudence confirms that there is no prohibition on a trial chamber relying upon facts occurring outside the scope of the charges to prove the charges.[479] Nor is a chamber limited to relying on such evidence solely to prove the contextual elements of crimes against humanity.[480] In arguing otherwise, Ongwen takes out of context the *Bemba* Appeal Judgment,

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[470] The Chamber made this finding on several occasions during the trial: T-85, 7:15-8:8; Bar Table Decision, para. 7; T-111, 63:2-7; T-131, 53:20-24; T-147, 7:2-14; T-95, 8:17-25. *See also* Judgment, paras. 2009 (in the context of SGBC directly perpetrated by Ongwen), 2094-2096 (re evidence of SGBC not directly perpetrated by Ongwen), 2404 (re Ongwen's intent and knowledge regarding the presence of children in the LRA soldier ranks). *See below* paras. 550-551, 553-559.
[471] *Contra* Appeal, para. 194. *See above* fn. 470
[472] *Contra* Appeal, para. 177.
[473] *Contra* Appeal, paras. 182-187; *see above*, paras. 75-77.
[474] *See above* paras. 75-77, 82.
[475] *Contra* Appeal, paras. 188-196. *See* 2019 ICC Chambers Practice Manual, paras. 36, 62. *See also above* paras. 75-77.
[476] Bar Table Decision, para. 7.
[477] Appeal, para. 193.
[478] *See above* para. 78.
[479] *Contra* Appeal, paras. 188-196.
[480] *Contra* Appeal, paras. 190-191.

in which the Majority held that while the Trial Chamber erred in *convicting* Bemba for certain criminal acts which it considered to be outside the scope of the charges in that case, it was nonetheless possible to rely on those same acts as evidence to prove the contextual elements.[481] This was not a general pronouncement on the limitations of a Trial Chamber's ability to rely on evidence outside the scope of the charges; it was a case-specific determination relevant to one aspect of the charges in that case.[482] In any event, other cases in this Court have confirmed no such limitation applies. For example, in *Bemba et al*, the Appeals Chamber recognised that an accused's participation in an agreement or common plan as a co-perpetrator may be inferred from all the circumstances,[483] with inferences being drawn from the evidence backwards or forward in time.[484] In *Ntaganda*, the Trial Chamber considered facts regarding the accused's participation in the UPC/FPLC pre-dating the charged period to ascertain his membership of the common plan, pursuant to which he was convicted as an indirect co-perpetrator.[485] Nor does the evidence need to relate directly to the accused in order to be relevant;[486] the Appeals Chamber has recognised that inferences regarding the accused's participation may be drawn from the conduct of persons alleged to have functioned as tools of the accused,[487] or from the conduct of third-parties outside the common plan.[488] This is also consistent with the jurisprudence of the *ad hoc* tribunals,[489] and the ECCC,[490] and with the practice in certain

[481] *Contra* Appeal, para. 190, citing *Bemba* AJ, paras. 116-117.
[482] Appeal, para. 190, citing *Bemba* AJ, paras. 116-117.
[483] *Bemba et al.* AJ, para. 763 (confirming that the agreement or common plan between the co-perpetrators may be inferred from the circumstances). *See also Blagojević and Jokić* TJ, para. 699 ("The existence of an agreement or understanding for the common plan, design or purpose need not be express, but may be inferred from all the circumstances").
[484] *Bemba et al.* AJ, para. 1306; *see also Ntaganda* AJ, para. 918 (holding that the subsequent concerted action of the co-perpetrators may be a relevant factor in determining whether the co-perpetrators acted with a common purpose.)
[485] *Ntaganda* AJ, para. 920.
[486] *Contra* Appeal, paras. 181, 187, 196.
[487] *See e.g. Ntaganda* AJ, para. 920.
[488] *See e.g. Bemba et al.* AJ, para. 764.
[489] *See e.g. Popović et al.* AJ, para. 933 (where the Appeals Chamber recognised that the question of whether a common plan formed during a meeting could be inferred from factors including "the prior and subsequent actions" of the meeting participants); *Kupreškić et al.* AJ, para. 321; *Strugar* Defence Objections Decision (admitting evidence of events not charged in the indictment, recognising that such evidence may be relied upon to prove an issue relevant to the charges such as motive, opportunity, intent, preparation, plan, or knowledge).
[490] Case *002/01* AJ, paras. 221 (where the Supreme Court Chamber considered evidence of participation in a joint criminal enterprise occurring *before* the period of the charged crimes), 215 (stating that, "where crimes are committed by persons acting jointly with a common criminal purpose, the acts of those who devise the common criminal purpose and who contribute in a relevant manner to its implementation form a cluster of interrelated transactions with the acts of those who personally carry out the *actus rei* […]. From the perspective of the substantive law […] it would be unnatural to break up such a protracted and complex transaction as it is only intelligible if all of its components are considered together. This approach remains valid notwithstanding any truncation in pronouncing on the responsibility for the crime as may be necessitated by limits on exercising jurisdiction, such as statute of limitation, age of the perpetrator, temporal limitations, etc.").

domestic jurisdictions where evidence of an accused's prior uncharged conduct or crimes may be admitted in certain circumstances.[491]

119. Thus, consistently with this jurisprudence, the Trial Chamber correctly ensured that its findings on the material facts on which his convictions were based did not exceed the facts and circumstances of the Charges,[492] and permissibly relied on evidence outside the scope of the Charges to establish those findings. Accordingly, the Chamber did not err in relying upon: evidence that related generally to the LRA or its policies;[493] evidence regarding events that pre-dated the charged crimes and which proved the occurrence of continuing/repeated crimes such as the SGBC committed by Ongwen and other LRA members (as the Prosecution develops further in response to grounds 66 and 87-90)[494] or the conscription and use in hostilities of children under the age of 15;[495] and evidence regarding events that pre-dated the charged crimes and which were relevant to Ongwen's mode of participation in the crimes or the elements of the crimes.[496] Ongwen fails to show any error. His sixth ground of appeal should be rejected.

IV. THE CHAMBER'S PROCEDURE FOR SUBMISSION OF DOCUMENTARY EVIDENCE WAS CONSISTENT WITH THE STATUTE AND PROPERLY APPLIED: GROUNDS 9, 10, 23

IV.A. THE CHAMBER'S "SUBMISSION REGIME" ACCORDS WITH THE STATUTE (GROUND 23)

120. Ongwen challenges the procedure for submission of documentary evidence adopted by the Chamber and repeats previous submissions that the Chamber already dismissed.[497] Since he does not explain how the Chamber erred, the Appeals Chamber should dismiss ground 23. In any event, for the reasons set out below, the Chamber did not err.

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[491] United States: Federal Rules of Evidence, s. 404(b)(1) and (2) (stating that evidence of any crime, wrong or act not charged, while not permissible to prove a person's character in order to show that on a particular occasion, the person acted in accordance with the character, may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or lack of accident); United Kingdom: Criminal Justice Act 2003, ss. 101, 103 (providing that evidence of an accused's bad character is admissible if, *inter alia*, it relates to the question of whether the accused has a propensity to commit offences of the kind with which s/he is charged (except where such propensity makes it no more likely that s/he is guilty of the charged offence) or the question of whether the accused has a propensity to be untruthful (except where it is not suggested that the accused's case is untruthful in any respect)); Australia: Evidence Act 1995, s. 97 (stating that evidence of the character, tendency, reputation or conduct of an accused is admissible to prove that person's tendency to act in a particular way or to have a particular state of mind, provided the party seeking to adduce the evidence gives notice of their intention to adduce the evidence and the court thinks the evidence will have significant probative value).
[492] Judgment, paras. 122; *see* paras. 123-225.
[493] *Contra* Appeal, paras. 181, 187, 191, 196; *see* Judgment, para. 2096.
[494] *See below* paras. 550-551, 553-559.
[495] *Contra* Appeal, paras. 183, 186, 191.
[496] *Contra* Appeal, para. 186.
[497] Appeal, paras. 298, 303, 306; *see* Defence Closing Brief, paras.105 (referring to Defence Evidentiary Regime Request, paras. 36-43).

IV.A.1. The Appeals Chamber has confirmed the statutory foundation of the "submission regime"

121. Ongwen misunderstands the relevant law and jurisprudence and disregards that the Appeals Chamber has already ruled on and rejected these arguments.[498] In the *Bemba et al* case, the Appeals Chamber, by majority, conducted an in-depth analysis of the Court's legal framework, drafting history and commentary, and confirmed the compatibility of the procedure for submission of documentary evidence with the Rome Statute. This Chamber endorsed that approach.

122. The Appeals Chamber explained that article 74(2) of the Statute expressly provides that the decision on an accused's guilt may only be based on evidence which has been 'submitted' and 'discussed' at trial, but does not require that such evidence has been 'admitted'.[499] It held that for items of documentary evidence to be considered for the purposes of article 74(2), a trial chamber has discretion either: (i) to recognise the "submission" of the evidence by a party without making a ruling on its relevance and/or admissibility and to consider its relevance and probative value as part of its holistic assessment of all evidence submitted at the end of the trial when deciding on the accused's guilt (the "submission regime"); *or* (ii) to rule, under article 69(4), on the relevance and/or admissibility of the evidence as a pre-condition for its admission, and to assess its weight at the end of the proceedings as part of its holistic assessment of all evidence (the "admission regime").[500] The two procedures thus differ in that the latter requires a chamber to make an affirmative (but preliminary and *prima facie*) determination of the relevance and probative value of an item of evidence during the trial.[501] They are however both possible under the Statute because rulings on the relevance and admissibility of evidence under article 69(4) are *discretionary*.[502]

123. Accordingly and contrary to Ongwen's submissions, under the Court's legal framework, parties do not have a predetermined right to obtain a ruling on all items of evidence submitted.[503]

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[498] Judgment, para. 241.
[499] *Bemba et al.* AJ, para. 576. Articles 69(3) and 64(8)(b) and rules 63, 64, 140 and 141 indicate that the act of "submission" of evidence is a procedural act performed by the parties); *see* Judgment, para. 233.
[500] *Bemba et al.* AJ, para. 598; Judgment, para. 234.
[501] Judgment, para. 235.
[502] Statute, art. 69(4) ("The Court may rule on the relevance or admissibility of any evidence […]"). Judgment, para. 235; *see* *Bemba et al.* AJ, paras. 584-590. The Court's evidentiary regime thus differs from the ad hoc tribunals (which adopts the "admission regime") and was a deliberate choice by the drafters: *Bemba et al.* AJ, paras. 577, 579-580.
[503] *Contra* Appeal, paras. 302, 305; Judgment, paras. 242-243, 245 (noting that the Defence is not left in the dark as to the relevance and probative value of the evidence since the Prosecution filed a Trial Brief and indications as to the relevance/probative value of the evidence was also given in the filings submitting the evidence).

Rule 64(2) does not curtail a chamber's discretion under article 69(4) and only stipulates that "[a] Chamber shall give reasons for any rulings it makes on evidentiary matters". The provision says nothing about *when* and *under what circumstances* evidentiary rulings *may* or *shall* be rendered. Nor does it mandate a trial chamber to issue such rulings at all.[504]

124. Ongwen instead misunderstands a chamber's duty to issue "a full and reasoned statement of [its] findings on the evidence and conclusions" under article 74(5).[505] While a chamber must assess all evidence submitted, not every item of evidence eligible to be used for the Chamber's determination must be explicitly mentioned in the judgment.[506] Trial Chambers have a degree of discretion as to what evidence to address explicitly in their reasoning so long as they "indicate with sufficient clarity the grounds on which they based their decision".[507] In these circumstances, "it is to be presumed that the trial chamber evaluated all the evidence before it, as long as there is no indication that [it] completely disregarded any particular piece of evidence".[508] This presumption may be rebutted "when evidence which is *clearly relevant* to the findings is not addressed by the Trial Chamber's reasoning".[509] This approach is also consistent with human rights jurisprudence.[510] Notably, Ongwen does not point to any such item of evidence that the Chamber allegedly disregarded.

125. Moreover, both procedures provide safeguards to ensure the accused's—and the Parties'—rights. For both procedures a trial chamber is obliged to rule on certain "procedural bars" (or exclusionary rules) at the time of the submission or admission of evidence, and before deciding on the accused's guilt; this is the case for article 69(7), rule 68 and rules 71-72.[511] In addition, both procedures require that the status of each item of evidence as 'submitted' or

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[504] *Bemba et al.* AJ, para. 596.
[505] Appeal, para. 305.
[506] Judgment, para. 247.
[507] *Bemba et al.* AJ, para. 102-103 (quoting *Lubanga* First Redactions AD, para. 20); Judgment, para. 247. *See also* Trifferer and Kiss, p. 1850, mn. 65 ("what is required is that reasons are fully and transparently provided to clearly show how the evidence evaluated by the judges supports all the findings of the Chamber underpinning the decision").
[508] *Bemba et al.* AJ, para. 105, citing *Halilović* AJ, paras. 121, 188. *See Čelibići.* AJ, para. 498; *Kvočka et al.* AJ, para. 23; *Kalimanzira* AJ, para. 195; *Simba* AJ, para. 152; *Case 002/01* AJ, para. 304.
[509] *Bemba et al.* AJ, para. 105 (emphasis added), citing *Kvočka et al.* AJ, para. 23 and *Kalimanzira* AJ, para. 195. *See also Perišić* AJ, para. 90; *Case 002/01* AJ, para. 304.
[510] The ECtHR has held that while courts are not required to give detailed answers to all arguments raised (*Van de Hurk v. Netherlands*, para. 61), "relevant" submissions that require express reply (*Ruiz Torija v. Spain*, para. 30; *Hiro Balani v. Spain*, para. 28), or "crucial" evidence related to the "crux" of a party's complaint must be addressed (*Kuznetsov and others v. Russia*, para. 84; *see also Ajdaric v. Croatia*, paras. 36-53). Likewise, the IACtHR has held that the duty to provide a reasoned decision "does not require giving a detailed answer to each and every one of the parties' arguments, but to the main and essential arguments related to the crux of the issue so as to ensure that the parties have been heard" (*Caso Flor Freire vs. Ecuador* Sentencia, para. 186 ; *see also Caso Apitz Barbera y otros v. Venezuela* Sentencia, para. 90).
[511] *Bemba et al.* AJ, paras. 580-581; Judgment, para. 237.

'admitted' is clear:[512] under both procedures, the parties will know that evidence which is 'submitted' or 'admitted'—and thereby not excluded—is presumed not to be inadmissible under any applicable exclusionary rule and may be relied upon by a chamber to decide on the accused's guilt.[513]

126. Finally, the Appeals Chamber in *Bemba et al* did not confine its holdings solely to article 70 proceedings.[514] To the contrary, the Appeals Chamber assessed the relevant statutory provisions which apply to *both* article 5 and article 70 crimes.[515] That the Rules have a full chapter for article 70 offences is irrelevant, since rule 163 (*Application of the Statute and the Rules*) clearly prescribes that the entire procedural framework in the Statute and the Rules applies *mutatis mutandis* to the investigation, prosecution and punishment of article 70 offences, with only a few exceptions (Part 2 and Part 10). These exceptions are unrelated to the evidentiary regime, which is set out in Part 6 of the Statute and applies equally to article 5 crimes and article 70 offences.[516] The Chamber correctly dismissed Ongwen's same unfounded arguments in the Judgment.[517] He does not present new arguments on appeal.

IV.A.2. The Court's jurisprudence is consistent

127. Contrary to Ongwen's submissions, the *Bemba et al* Appeal Judgment does not contradict the earlier *Bemba* interlocutory appeal decision.[518] The Appeals Chamber has already held that these decisions are consistent.[519] The Trial Chamber recalled this jurisprudence when dismissing Ongwen's arguments at trial.[520] Indeed, in the *Bemba* interlocutory appeal decision, the Majority did not state that a trial chamber must *rule* on the relevance or admissibility of each item of evidence; rather, it held that a trial chamber must always *consider* (or assess) the relevance, probative value and potential prejudice of the evidence submitted and the issues raised by the parties.[521] This assessment can be done during the trial proceedings, *i.e.*, in rulings on the relevance and/or admissibility of the evidence during the trial with the (under the "admission regime"). But it can also be done entirely at the end of the trial as part of its holistic assessment of the evidence (under the "submission regime").[522] Ongwen thus confuses a

[512] *Bemba et al.* AJ, para. 599; Judgment, paras. 234, 235.
[513] *Bemba et al.* AJ, para. 599; Judgment, paras. 233, 236.
[514] *Contra* Appeal, para. 301.
[515] *Bemba et al.* AJ, paras. 576-611.
[516] Rules, rule 163.
[517] Judgment, fn. 252.
[518] Appeal, para. 299.
[519] *Bemba et al.* AJ, para. 594.
[520] Decision ALA Evidentiary Regime, para. 17.
[521] *Bemba et al.* AJ, para. 594; Decision ALA Evidentiary Regime, para. 17; *Bemba* Admissibility AD, para. 37.
[522] *Bemba et al.* AJ, para. 594 (quoting *Bemba* Admissibility AD, para. 37); *see also* para. 598.

chamber's *discretion to issue rulings* under article 69(4), and its *duty to assess* the relevance and probative value of the evidence. Moreover, a chamber's rulings under article 69(4), when rendered during trial proceedings, are by definition preliminary and *prima facie*; a definite assessment can only be done at the end of the trial, holistically and in light of all the evidence submitted and discussed in the trial.[523]

IV.A.3. The Chamber correctly applied the "submission regime"

128. Ongwen does not demonstrate how the Chamber's application of the "submission regime" in this case prejudiced him. From the start of the trial, the Chamber clearly adopted the "submission regime" and decided, generally, not to exercise its discretion under article 69(4) to make separate rulings on the relevance and admissibility of documentary evidence submitted by the parties other than on "procedural bars".[524] Ongwen in fact requested the Chamber to adopt the "submission regime".[525] Moreover, the status of the items of evidence as 'submitted' was clear in the e-Court metadata—nor does Ongwen allege that it was not.[526] Likewise, the relevance and probative value of the Prosecution's documentary evidence submitted in the context of witness testimony was self-evident, and the Prosecution provided specific indications in its filings submitting the documentary evidence.[527] Ongwen was entitled to respond and provide observations.[528]

129. Ongwen does not demonstrate why the circumstances of this case would have required the Chamber to issue individualised rulings on the evidence. The number of submitted items of documentary evidence—which was comparable to other proceedings[529]—is not on its own a sufficient reason.[530] There is no indication that the Parties abused their statutory right to submit evidence,[531] nor does Ongwen argue that this was the case. Moreover, as the Chamber correctly pointed out, chambers must exercise their discretion to rule on the relevance and probative value of items of evidence individually during the proceedings with caution and restraint, since the

[523] *Contra* Appeal, para. 302 (Ongwen erroneously argues that "parties [] assigned [to] a trial chamber that adopts an admission approach, [] will know with certainty the outcome of the evidentiary rulings").
[524] Judgment, para. 237 (fns. 259-266); *see in particular* Directions Conduct Proceedings Decision, paras. 24-26.
[525] Joint Prosecution and Defence Submissions on Conduct Proceedings, paras. 50-51. Ongwen never appealed the Directions Conduct Proceedings Decision but unsuccessfully challenged the regime three years later: *see* Defence Evidentiary Regime Request and Evidentiary Regime Decision and Decision ALA Evidentiary Regime.
[526] Judgment, para. 237; *see Bemba et al.* AJ, paras. 9, 599.
[527] Judgment, para. 245.
[528] Judgment, paras. 248-250.
[529] Judgment, fn. 252 (noting that the amount of documentary evidence in the *Bemba et al.* case was even larger than in the present case, although in a comparable range).
[530] *Contra* Appeal, para. 304.
[531] Judgment, para. 245

relevance and probative value of an item of evidence may only become apparent when all the evidence is submitted and considered.[532]

130. Finally, that different chambers have adopted different evidentiary procedures for documentary evidence does not create unfairness or prejudice to the parties, as long as the procedure of each chamber is clearly set out from the outset and is compatible with the Court's legal framework.[533] The drafters deliberately gave broad discretion to Trial Chambers to organise the conduct of their trial proceedings.[534] The procedure for the submission of documentary evidence adopted in this case is now firmly established in the Court's practice and has been adopted in all subsequent trial proceedings.[535]

131. In conclusion, Ongwen's submissions challenging the Chamber's application of the "submission regime" should be dismissed and ground 23 rejected.

IV.B. THE CHAMBER DID NOT ERR BY NOT EXCLUDING PARTS OF PCV-0001'S REPORT (GROUNDS 9-10)

132. In Grounds 9 and 10 Ongwen challenges some of the Chamber's decisions in an attempt to demonstrate that he was prejudiced by the evidentiary regime. His arguments lack merit and do not demonstrate that the procedure for submission of documentary evidence was unfair.

133. First, the Chamber did not err by rejecting Ongwen's request to dismiss a portion of PCV-0001's expert report in an oral ruling of 14 May 2018.[536] Although Ongwen makes this argument in the context of challenging the fairness of the evidentiary regime, he disregards that the Chamber would have made the same finding regardless of the evidentiary procedure adopted. Thus, as pointed out by the Chamber, whilst Ongwen might disagree with the decision to reject his objections to the admissibility of part of the expert's report, any purported prejudice on account of the adopted evidentiary regime is inapposite. [537]

134. Moreover, the Chamber did not rely on PCV-0001's evidence for any of its findings in the Judgment. It explicitly stated that PCV-0001's evidence "does not directly underlie any part of the Chamber's analysis as to whether the facts alleged in the charges are established".[538]

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[532] Judgment, para. 239.
[533] *Contra* Appeal, para. 302.
[534] Judgment, fn. 276.
[535] Judgment, para. 241 (fn. 273, citing *inter alia* to *Yekatom & Ngaïssona* and *Al Hassan*). Since the Judgment the Trial Chamber in *Abd-Al-Rahman* and the Single Judge in *Gicheru* have also adopted the submission regime: *Abd-Al-Rahman* Trial Directions, paras. 24-33; *Gicheru* Trial Directions, paras. 10-19).
[536] *Contra* Appeal, para. 228-232.
[537] *See* Judgment, para. 100.
[538] Judgment, para. 600.

Thus, even if the Chamber had erred by not excluding parts of PCV-0001's report, Ongwen has not suffered any prejudice.

135. In any event, the Chamber's oral ruling of 14 May 2018 was reasonable and correct. The Chamber specifically noted the limited purpose of PCV-0001's evidence and emphasised that any references using terms with a legal connotation, such as rape, would be fully and only assessed by the Chamber.[539] Nothing in the case record or the Judgment suggests that the Chamber proceeded differently in its deliberations. Notably, the excerpts of testimonies referred to in the contested section of PCV-0001's report were part of the case record and known to Ongwen. PCV-0001 merely used these excerpts to illustrate his conclusions in the preceding part of his report.[540]

136. Second, Ongwen's undeveloped reference to his Closing Brief with respect to P-0078 should be dismissed *in limine* for the reasons set out above.[541] In any event, Ongwen's submissions on P-0078 were considered and rejected by the Chamber.[542] As explained above, Ongwen's submissions are unfounded, not supported by any concrete indicia in the record and unrelated to the procedure by which documentary evidence was submitted in this case.[543]

137. In conclusion, Grounds 9 and 10 should be dismissed.

V. THE CHAMBER CORRECTLY ENTERED ALL PERMISSIBLE CUMULATIVE CONVICTIONS: GROUNDS 20-22

138. The Trial Chamber correctly entered all permissible convictions.[544] It correctly stated and applied the established test governing the permissibility of cumulative convictions (the *Čelebići* test),[545] endorsed by the Appeals Chamber,[546] and applied uniformly by other Trial Chambers at this Court[547] and the *ad hoc* international criminal tribunals.[548] While in one respect the Trial

[539] T-175, 11:14-13:3.
[540] UGA-PCV-0001-0020 at 0021.
[541] Appeal, para. 227; *see above* paras. 7-8.
[542] Evidentiary Regime Decision, para. 31. *See also* Judgment, paras. 101, 525.
[543] *See above* paras. 49-55; Judgment, para. 101.
[544] Judgment, paras. 2792-2797, 2818-2820, 2834-2837, 2890-2893, 2943-2946, 2989-2992, 3035-3055, 3078-3087, 3116.
[545] Judgment, paras. 2792, 2795. *Čelebići* AJ, para. 412 ("[…] Multiple criminal convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other. Any element is materially distinct from another if it requires proof of a fact not required by the other.")
[546] *Bemba et al.* AJ, para. 750 (finding no error with the Trial Chamber's application of the *Čelebići* test); *Ntaganda* SAJ , paras. 131-132 (noting the *Čelebići* test).
[547] *Katanga* TJ, para. 1695; *Bemba* TJ, paras. 746-751; *Bemba et al.* TJ, paras. 950-956; *Ntaganda* TJ, paras. 1202-1203.
[548] *See e.g.*, ICTY: *Čelebići* AJ, paras. 412-427; *Jelisić* AJ, paras. 78-83; *Kordić and Čerkez* AJ, paras. 1040-1044; *Stakić* AJ, paras. 355-367; *Strugar* AJ, paras. 321-333; *Popović et al.* AJ, paras. 537-539; ICTR: *Musema* AJ,

Chamber departed from the consistent practice by going beyond the strict application of the *Čelebići* test (based only on materially distinct legal elements) to acknowledge further situations of impermissible concurrence *based on the facts*—following *obiter dicta* from the *Bemba et al* Appeals Chamber,[549] this amounts to a harmless error, with no impact on the decision. The Chamber nonetheless entered permissible convictions under the Statute. It correctly entered cumulative convictions for analogous crimes against humanity (article 7) and war crimes (article 8), for rape and sexual slavery as crimes against humanity (article 7(1)(f)) and as war crimes (article 8(2)(e)(vi)), and forced marriage (as an underlying act of the crime against humanity of other inhumane acts under article 7(1)(k)) and sexual slavery (article 7(1)(g)).[550] Further, it correctly found that cumulative convictions could not be entered for torture and cruel treatment as war crimes (article 8(2)(c)(i)) and for torture and other inhumane acts as crimes against humanity (articles 7(1)(f) and (k)).[551] It also correctly found that cumulative convictions for enslavement and sexual slavery on the same facts (articles 7(1)(c) and (g)) were impermissible.[552]

139. Ongwen's challenge must fail.[553] His attempt to rely on his earlier filing by reference should be dismissed summarily.[554] Moreover, his arguments challenging the established test for cumulative convictions are incorrectly based on article 20 of the Statute.[555] Finally, in alleging that the Chamber erred in finding permissible concurrence between war crimes and crimes

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paras. 358-367 (adopting the *Čelebići* test at the ICTR); *Nahimana et al.* AJ, paras. 1018-1036; *Gatete* AJ, paras. 259-266; *Karemera et al.* AJ, paras. 710-713; *Bagosora et al.* AJ, paras. 412-417; *Ntabakuze* AJ, paras. 259-261; SCSL: *Brima et al.* TJ, paras. 2099-2111; *Sesay et al.* AJ, paras. 1190-1200 (adopting the *Čelebići* test at the SCSL); *Taylor* AJ, paras. 575-578; *Brima et al.* AJ, para. 212; ECCC: *Case 001* AJ, paras. 287-336 (adopting the *Čelebići* test at the ECCC); *Case 002/01* TJ, paras. 1055-1060; Case *002/02* TJ, paras. 4330-4341.

[549] Judgment, para. 2796 (noting *Bemba et al.* AJ, para. 751, and stating "there may be situations in which crimes requiring *in abstracto* different legal elements may nevertheless be in impermissible concurrence, and bears this in mind in its analysis […]."), 2837, 2891, 2944, 2990, 3309, 3078; *Bemba et al.* AJ, para. 751 ("[…] it is arguable that a bar to multiple convictions could also arise in situations where the same conduct fulfils the elements of two offences even if these offences have different legal elements, [*e.g.*] if one offence is fully consumed by the other offence or is viewed as subsidiary to it."), without "dwelling" further on the question.

[550] Judgment, paras. 2818-2820, 3021-3026, 3035-3049, 3069-3071, 3078-3084.

[551] Judgment, paras. 2834-2835, 2890-2893, 2943-2946, 2989-2992 (the legal elements of cruel treatment were encompassed in torture, with an additional element in the latter; other inhumane acts were residual in nature and subsidiary to other crimes against humanity, its underlying acts were not different from torture). The Chamber erred (Judgment, paras. 2837, 2891, 2944, 2990) by considering the underlying acts of other inhumane acts (instead of the legal elements), the convictions for torture and other inhumane acts ((articles 7(1)(f) and (k)) were nonetheless impermissible. Element 1 of article 7(1)(k) (great suffering or serious injury) is subsumed in article 7(1)(f) (element 1, severe physical or mental pain or suffering), with torture additionally having elements 2 and 3.

[552] Judgment, paras. 3044-3055, 3078-3087, 3085-3087.

[553] Appeal, paras. 277-297.

[554] Appeal, para. 281; Defence Concurrence Request, paras. 1-45; Prosecution Concurrence Response, paras. 1-39; Concurrence Decision, paras. 4-6 (dismissing the request *in limine*).

[555] Appeal, paras. 277-288.

against humanity, and between rape and sexual slavery as crimes against humanity and as war crimes, his submissions disregard settled law and practice.[556] They should be dismissed.

V.A. ONGWEN INCORRECTLY RELIES ON ARTICLE 20 OF THE STATUTE AND A "CONDUCT-BASED" APPROACH

140. Ongwen's submissions that the Chamber erred in its assessment of cumulative convictions are legally incorrect and unsupported.[557]

141. First, he incorrectly insists that article 20 of the Statute (and his interpretation of the principle of *ne bis in idem*) is the basis to determine cumulative convictions[558]—misunderstanding its rationale and disregarding the Appeals Chamber's express opinion rejecting it as a proper legal basis.[559] Nor, given its unequivocal view, does the Appeals Chamber need to consider this issue further.[560] Article 20 "regulates consecutive trials for the same conduct" and "protects persons from being unduly subjected to criminal proceedings twice [and] the finality of judgements and thus the integrity of the legal system".[561] On the other hand, concurrence concerns whether a Chamber can cumulatively convict for different crimes (based on the same underlying conduct) *within the same trial.*[562] Ongwen's reliance on a few varying practices in domestic jurisdictions does not assist him: they are inapposite.[563]

142. Second, Ongwen misinterprets the Appeals Chamber's approach to cumulative convictions.[564] Although Ongwen seeks to replace the *Čelebići* test with a "conduct-based" test, the Appeals Chamber, in endorsing the *Čelebići* test, has already settled this question.[565] While

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[556] Appeal, paras. 289-297.
[557] Appeal, paras. 277-288.
[558] Appeal, paras. 277-282; Defence Concurrence Request, paras. 9-23.
[559] *Bemba et al.* AJ, para. 748 ("[…] arguments relating to article 20(1) of the Statute are misplaced. [It] concerns the question of whether a person may be tried more than once for the same conduct. At issue, here, however, is the question of whether a trial chamber…may enter multiple convictions if the same conduct fulfils the legal elements of more than one offence."); Judgment, paras. 2794-2795; *contra Katanga* TJ, para. 1694; *Bemba* TJ, para. 745.
[560] *Contra* Appeal, para. 278 (fn. 288) (arguing that the Appeals Chamber had not considered if article 20's language guides the cumulative convictions test).
[561] Judgment, para. 2794; Tallgren and Coracini, p. 914 (mn. 22) ("[paragraph 1], defining *idem* by the same historical facts *[prohibits] a subsequent trial* for a different qualification based on the same historical facts.") (emphasis added); ECHR: *Zolotukhin v. Russia*, paras. 18-25, 82-84, 94 (*ne bis in idem* for two different proceedings); *Contra* Defence Concurrence Request, paras. 9-17.
[562] *Čelebići* AJ, paras. 412-413; *Bemba et al.* AJ, para. 748.
[563] Appeal, paras. 279-280 (relying on some national practices to argue that *ne bis in idem* regulates concurrence within the same trial), 287; *Bemba et al.* AJ, para. 574 ("domestic systems differ greatly […] and are influenced by their own underlying culture."); *Čelebići* AJ, para. 406 ("National approaches vary with respect to cumulative convictions'); *Case 001* AJ, para. 290 ("[…] when looking to general principles of law common to all major national legal systems […] there are 'divergent and often seemingly incompatible conceptualizations found in national legal orders' as to the legal *consequences* of that concurrence."); *Stakić* AJ, paras. 357 ("the test is clear" and "it was unnecessary to deal with the peripheral submissions […] concerning tests in domestic jurisdictions").
[564] Appeal, paras. 283-288.
[565] *Bemba et al.* AJ, para. 750.

Ongwen bases his argument on the single sentence (and *obiter dicta*) from the *Bemba et al* Appeal Judgment theorising whether further bars to multiple convictions beyond the *Čelebići* test were possible,[566] the Appeals Chamber, in its own words, "[did] not dwell" on that question.[567]

143. Third, to the extent that the Trial Chamber sought to modify the *Čelebići* test (based on its reading of the *Bemba et al* Appeal Judgment), it erred, but without impact.[568] As established in the case law of the *ad hoc* tribunals, the *Čelebići* test focuses on the legal elements of each crime, and not the underlying conduct.[569] Accordingly, when ICTY/ICTR Trial Chambers exercised their discretion *not* to enter cumulative convictions (despite the requirements of the *Čelebići* test), or qualified the application of the *Čelebići* test or mis-applied it, the ICTY/ICTR Appeals Chamber found this an impermissible exercise of discretion and a reversible error on appeal.[570] When the *Čelebići* test is properly applied, a Chamber has no further discretion to assess or to deny the entering of convictions.[571] It must enter convictions for all distinct proven crimes, to fully reflect the criminality of the convicted person.[572]

144. Further, the *Čelebići* test already accounts for the principles that the Trial Chamber relied on to justify going beyond it[573] The test crafts a careful balance between competing concerns of fairness: it safeguards the convicted person's rights *and* the need to fully reflect his or her culpability.[574] Moreover, any residual concerns arising from overlapping underlying facts can

[566] Appeal, paras. 283-288; *Bemba et al.* AJ, para. 751.
[567] *Bemba et al.* AJ, para. 751; *contra* Appeal, para. 283.
[568] Judgment, paras. 2795-2796.
[569] *Strugar* AJ, para. 322; *Stakić* AJ, para. 356.
[570] *Stakić* AJ, para. 358 ("further qualifying" the test, stating "[the Chamber would] convict only in relation to the crime that most closely and most comprehensively reflects the totality of the accused's criminal conduct."); *Strugar* AJ, paras. 323-324 (applying the *Čelebići* test to the "particular circumstances" of the case); *Popović et al.* AJ, para. 538 (finding that "the full criminality" is accounted for by a conviction for genocide" only, when conspiracy to commit genocide is a distinct crime.); *Karemera et al.* AJ, para. 711 (considering unwarranted factors).
[571] *Stakić* AJ, para. 358 ("[the test] does not permit […] discretion to enter one or more of the appropriate convictions, unless the two crimes do not possess materially distinct elements."); *Strugar* AJ, para. 324.
[572] *Gatete* AJ, para. 261; *Popović et al.* AJ, para. 538.
[573] Judgment, para. 2796 (on the principles of consumption and subsidiarity); *But see Stakić* AJ, para. 366; *Bagosora et al.* AJ, paras. 416, 736; *Ntabakuze* AJ, para. 261; *Case 001* AJ, para. 334 (all applying the *Čelebići* test to a situation of subsidiarity, to recognise that the elements of murder are subsumed in extermination as crimes against humanity); Stuckenberg, p. 844 ("Obviously, many instances of subsidiarity can also be understood as cases of inclusion (specialty) or consumption").
[574] *Čelebići* AJ, para. 412; *Case 001* AJ, paras. 295-300 (finding no undue prejudice to the convicted person, "the resulting stigma is an appropriate consequence of lawful convictions", "the test guarantees, at a minimum, that offences are sufficiently distinct to be adjudicated concurrently", "[a single conviction] fails to protect the different societal values at play with respect to different crimes"), 327-332; *Bemba* TJ, paras. 747-748; *Jelisić* AJ Judge Shahabuddeen Dis. Op, para. 42.

be adjusted in sentencing.[575] This, in the Prosecution's respectful view, is the more appropriate approach. Applying the *Čelebići* test, concurrently with other principles that assess the concrete facts, is incompatible with its rationale, and could lead to a real risk of its unequal application and uncertain outcomes.[576] Reducing the potential scope of the convicted person's culpability (by limiting/denying convictions *beyond* the strict application of the *Čelebići* test) would dilute recognition of the full scope of harm to the victims, potentially even affecting the type and amount of reparations awarded.[577] Further, failing to enter the full range of convictions would not properly reflect the protected values of crimes in the sentence imposed.

145. Since Ongwen fails to demonstrate error, his submissions should be dismissed.

V.B. CONVICTIONS FOR CRIMES AGAINST HUMANITY AND WAR CRIMES ARE PERMISSIBLY CUMULATIVE

146. In arguing that his convictions for crimes against humanity and war crimes were impermissibly cumulative,[578] Ongwen overlooks settled law, repeated in multiple decisions from the Court and elsewhere.[579] It is permissible to enter convictions for crimes against humanity and war crimes based on the same underlying criminal conduct. They each have materially distinct elements, and protected interests.[580] Their respective contextual elements serve to distinguish crimes within the Court's jurisdiction from ordinary crimes, and cumulative convictions in this respect were legislatively intended.[581] Ongwen's interpretation of the *Brima et al.* holding is inapposite.[582] His submissions should be dismissed.

V.C. CONVICTIONS FOR RAPE AND SEXUAL SLAVERY, AND FOR OTHER INHUMANE ACTS

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[575] *See e.g.*, *Čelebići* AJ, paras. 428-429, 769; *Gatete* AJ, paras. 263 (fn. 642) (citing *Ntakirutimana* AJ, para. 562), 265; *Kunarac* TJ, para. 855; *Stakić* AJ, paras. 367, 428; *Case 001* AJ, para. 295, 297; *Mucić et al.* SJ, para. 42; *Mucić et al.* SAJ, paras. 20-27; *Ntaganda* TJ, paras. 1202-1203, 1205; *Ntaganda* SJ, paras. 26, 94.

[576] *E.g:* When the two approaches are applied sequentially (as the *Ongwen* TC did), it leads to circular reasoning. Step 1: Analyse the facts to determine if the crimes are based on the same underlying conduct; Step 2: If yes, examine the legal elements under *Čelebići* to see if they are materially distinct; Step 3: notwithstanding the outcome of Step 2 (different legal elements not subsumed), examine the facts *again* to verify if an offence is fully consumed by or subsidiary to another.

[577] *Lubanga* Reparations AD, para. 32 (a reparations order must "define the harm caused […] *as a result of the crimes for which the person is* convicted […]") emphasis added; *contra* Appeal, para. 297.

[578] Appeal, paras. 289-293.

[579] *Katanga* TJ, para. 1696; *Bemba* TJ, paras. 749-750; *Ntaganda* TJ, para. 1203; *Jelisić* AJ, para. 82; *Galić* AJ, para. 165; *Musema* AJ, para. 362; *Bagosora et al.* AJ, para. 415; *Ntagerura et al.* AJ, paras. 427-428.

[580] Judgment, para. 2820; *Bemba* TJ, para. 749 ("[crimes against humanity] require the existence of a widespread or systematic attack against a civilian population and a nexus between the perpetrator's conduct and the attack"; "[war crimes]"require the conduct to be connected to an armed conflict."); *Ntaganda* TJ, para. 1203; *contra* Appeal, para. 290 (arguing that protected interests are identical).

[581] Judgment, para. 2820 (war crimes protect persons in times of armed conflict, crimes against humanity protect persons when there is an attack against a civilian population); *Bemba* TJ, para. 750; *Kunarac* AJ, para. 178.

[582] Appeal, para. 292; *but see Brima et al.* AJ, para. 202 (finding no bar to cumulative convictions for war crimes and crimes against humanity); *e.g.*, Onsea and Narayanan, paras. 12-19 (the *Brima et al.* AC erred in its approach).

(FORCED MARRIAGE) AND SEXUAL SLAVERY, ARE PERMISSIBLY CUMULATIVE

147. Finally, in arguing that his convictions for rape and sexual slavery were impermissibly cumulative, Ongwen misinterprets the crimes and the Judgement.[583]

148. First, Ongwen's submissions contradict settled law.[584] Second, the Chamber was not obliged to consider "the intentions" or "the protected interests" behind each crime, when they each have materially distinct legal elements not required by the other—as it correctly found.[585] Further, in describing sexual slavery as a "more intensive form of rape", Ongwen mischaracterises the crime, overlooking the interests protected by separately criminalising the perpetrator's exercise of ownership over the victim.[586] Third, while the Chamber erred in further assessing the facts after it had found that the two crimes had different legal elements, this error was harmless, as convictions were entered nonetheless.[587]

149. Fourth, in alleging that the Chamber should have found cumulative convictions for forced marriage and sexual slavery impermissible, Ongwen misinterprets forced marriage as a standalone crime, rather than as an underlying act of the crime of other inhumane acts.[588] The crimes of other inhumane acts and sexual slavery have materially distinct elements, warranting cumulative convictions.[589] In any event, the underlying facts and protected values arising from the exclusive conjugal union imposed by the crime of other inhumane acts (forced marriage) are sufficiently distinct from that of sexual slavery.[590] Ongwen fails to show error. His submissions should be dismissed. For the reasons above, Grounds 20-22 should be dismissed.

VI. THE CHAMBER APPLIED THE CORRECT STANDARDS: GROUNDS 7-8, 10 (*IN PART*), 25, 45

150. Ongwen argues that the Chamber: (i) erroneously applied a standard of 'ample evidence', instead of the 'beyond reasonable doubt' standard;[591] (ii) erroneously applied the 'beyond

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[583] Appeal, paras. 294-297.
[584] *Ntaganda* TJ, paras. 1203-1204; *Taylor* AJ, paras. 575-578; *Kunarac* AJ, para. 186 (enslavement, even if based on sexual exploitation, is a distinct offence from rape).
[585] *Contra* Appeal, para. 294; Judgment, paras. 2708-2710, 2715-2716, 3037 (rape requires invasion of the body by penetration, however slight, while sexual slavery can be committed by any sexual act; sexual slavery requires the exercise of ownership over the victim, which is not required for rape), 3078.
[586] Appeal, para. 295; *Katanga* TJ, paras. 975-978.
[587] Judgment, paras. 3039, 3078. Factual overlap in conduct is relevant to sentencing, not convictions (*Ntaganda* TJ, paras. 1203-1207). *See above* paras. 143-144.
[588] Appeal, paras. 286, 296; *see below* paras. 561-565.
[589] Elements of sexual slavery (exercise of ownership over the victim, cause victims to engage in sexual acts, article 7(1)(g)) are not found for other inhumane acts (article 7(1)(k)). The latter requires "great suffering, or serious injury to body or to mental or physical health", not found in article 7(1)(g).
[590] Judgment, paras. 2741-2753, 2715-2716.
[591] Appeal, paras. 200-207.

reasonable doubt' standard to affirmative defences;[592] and (iii) erroneously rejected his request to dismiss P-447's rebuttal report.[593] The Chamber did not err; instead, Ongwen misreads the Judgment and disregards the case record. Grounds 7-8, 10, 25 and 45 should be rejected.

VI.A. THE CHAMBER CORRECTLY ARTICULATED, AND APPLIED, THE 'BEYOND REASONABLE DOUBT' STANDARD

151. Ongwen argues that the Chamber only made "one finding in respect to the evidence and reasonable doubt", and otherwise applied a different standard of 'ample evidence'.[594] This is incorrect. Ongwen misreads the Judgment. The Chamber correctly articulated the standard of proof and made findings 'beyond reasonable doubt' with respect to the facts essential to his conviction. The Chamber sometimes used 'ample evidence' as a shorthand form to refer to the wealth of reliable evidence underpinning its factual findings and which was detailed and assessed in the Judgment. Ongwen fails to show an error.

VI.A.1. The Chamber correctly articulated the standard of proof

152. The Chamber correctly articulated the standard of proof 'beyond reasonable doubt'. The Chamber clearly explained that "[t]he beyond reasonable doubt [standard] is to be applied to any facts indispensable for entering a conviction, namely those constituting the elements of the crimes or modes of liability charged".[595] This is fully consistent with the jurisprudence of the Court[596] and of the *ad hoc* tribunals.[597] Conversely, a chamber does *not* need to apply this standard to "any other set of facts introduced by the different types of evidence", nor to the evidence itself.[598] Nor can "reasonable doubt" consist of imaginary or frivolous doubt or of the possibility that unavailable evidence may include exculpatory information; rather, it must be grounded "in reason", and must have "a rational link to the evidence, lack of evidence or inconsistencies in the evidence".[599] Ongwen does not demonstrate that the Chamber erred in the articulation of the standard.

153. Further, the Appeals Chamber has held that when a trial chamber correctly articulates the burden and standard of proof, it must be assumed that it proceeded on the basis of the correct

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[592] Appeal, paras. 208-219.
[593] Appeal, paras. 220-226.
[594] Appeal, paras. 200-202.
[595] Judgment, para. 227.
[596] *Ntaganda* AJ, para. 37; *Bemba et al.* AJ, para. 868; *Ngudjolo* AJ, para. 125; *Lubanga* AJ, para. 22.
[597] *Stanišić & Simatović* TJ, para. 8 ("This standard requires the Prosecution to prove each element of the alleged crimes and of the mode of liability with which an accused is charged, as well as any fact, which is indispensable for a conviction, beyond a reasonable doubt"); *Šljivančanin* AJ, para. 220; *Ntagerura et al.* AJ, para. 174, nm.356.
[598] *Bemba et al.* AJ, para. 868 (citing *Lubanga* AJ, para. 22).
[599] Judgment, para. 228.

understanding of those concepts.[600] The Trial Chamber did proceed on these correct legal concepts and correctly applied the standard throughout the Judgment.[601] The Chamber correctly exercised its fact-finding function:

- First, the Chamber clearly identified the facts with respect to which it made factual findings.[602]
- Second, the Chamber correctly articulated the 'beyond reasonable doubt' standard and the principles underlying its evidentiary assessment, including with respect to testimonial and documentary evidence.[603]
- Third, the Chamber set forth its general considerations regarding the credibility of the witnesses who provided evidence and the reliability of their testimony;[604] it clarified that those sections had to be read together in light of the totality of the judgment.[605]
- Fourth, the Chamber thoroughly explained its evidentiary assessments underpinning each of the factual findings which it had identified at the outset of the Judgment.[606]
- Fifth, the Chamber found that the constitutive elements of the crimes and the relevant modes of liability had been proven beyond reasonable doubt,[607] including that no ground excluding the accused's criminal responsibility applied[608] and that, accordingly, Ongwen was criminally responsible for the charged crimes.[609]

154. Ongwen takes the Chamber's reference to "ample evidence" in some paragraphs of the Judgment out of context;[610] it did not refer to an applicable standard but rather to the *quantity* of reliable evidence underpinning the Chamber's findings which it thoroughly assessed in the Judgment.[611] Ongwen's arguments must be dismissed.

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[600] *Ntaganda* AJ, para. 594.
[601] *Contra* Appeal, paras. 201, 207.
[602] Judgment, section III (Findings of Fact).
[603] Judgment, section IV(A) (paras. 226-231), (B) (paras. 227-262, 613-849).
[604] Judgment, section IV(B) (paras. 263-612).
[605] Judgment, para. 261.
[606] Judgment, section IV(C: Evidentiary analysis for findings of fact: paras. 851-2672). In the written Judgment the relevant factual finding was the heading relevant the evidentiary assessment; in addition, the electronic version hyperlinked the factual findings with the evidentiary assessment.
[607] Judgment, section V (Legal Findings: paras. 2673-3115).
[608] Judgment, section IV (D: Grounds excluding criminal responsibility: paras. 2448-2580 (finding that a ground excluding criminal responsibility under article 31(1)(a) does not apply to Ongwen), 2668-2670 (finding that the first element of duress is not met, that is, there is no basis in the evidence to hold that Ongwen was subjected to a threat of imminent death or imminent or continuing serious bodily harm to himself or another person at the time of his conduct underlying the charged crimes)); *contra* Appeal para. 212.
[609] Judgment, section VI.
[610] *Contra* Appeal, para. 202.
[611] *See* Judgment, paras. 2542, 612, 894, 1107, 1464, 1484, 1492, 1497, 1746, 1845.

VI.A.2. The Chamber correctly applied the standard of proof

155. Ongwen selectively refers to a few paragraphs of the Judgment to demonstrate that the Chamber did not consider all the relevant evidence and did not correctly apply the standard of proof.[612] However, Ongwen takes those paragraphs out of context. The Chamber thoroughly assessed all the relevant Prosecution and Defence evidence before making its findings. In particular:

- Although not detailed in the sections assessing D-0133's and D-0121's credibility, the abundant evidence underpinning the Chamber's finding that escape from the LRA was relatively common,[613] and that civilians were abducted from Abok and rescued by government soldiers, respectively, was assessed elsewhere in the Judgment.[614]
- The Chamber assessed the abundant evidence underpinning its finding that food was looted from Odek just paragraphs before and after assessing P-0314's evidence.[615]
- Likewise, the Chamber assessed the evidence supporting its conclusion that the LRA indiscriminately killed civilians in Odek just paragraphs before and after assessing P-0085's evidence.[616]
- The Chamber also assessed the evidence supporting its conclusion that Ongwen was informed of, and reported on, the Lukodi attack just paragraphs before and after its assessment P-0142's testimony.[617]
- The Chamber clearly explained why it did not rely on D-0085's testimony that more LRA fighters went to attack Abok than Pajule. The Chamber correctly relied on the testimony of two LRA fighters who fought in Abok and were in a position to know how many LRA fighters were sent to the attack (P-0406, P-0330) as well as its assessment and conclusion that a multitude of LRA forces were sent to Pajule.[618]

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[612] *Contra* Appeal, paras. 203-206; paragraph 447 of the Judgment does not relate to P-0250.
[613] Judgment, paras. 972, 2619-2642; *contra* Appeal, para. 203 (referring to Judgment, para. 612). As noted above, while the Chamber set out some "general considerations" with respect to some witnesses at the outset of the Judgment, it emphasised that those assessments had to be read in conjunction with the evidentiary discussion provided below: Judgment, para. 261.
[614] Judgment, paras. 203, 1994 (fn. 5385); *contra* Appeal, para. 204 (referring to Judgment para. 542).
[615] Judgment, paras. 1454-1470 (*see e.g.* P-0352, P-0264, P-0340, P-0268, P-0269, P-0270 and P-0275, P-0309, P-0340 and P-0252); *see also* para. 165; *contra* Appeal, para. 204 (referring to Judgment, para. 1464).
[616] Judgment, paras. 1476-1550; *see also* para. 169; *contra* Appeal, para. 204 (citing Judgment, paras. 1484, 1491); *see also below* paras. 397-400 (responding to Ongwen's submissions on cross-fire).
[617] Judgment, paras. 1838-1857; *see also* para. 189; *contra* Appeal, para. 204 (referring to Judgment, para. 1845).
[618] Judgment, paras. 1881 (on Abok) and 1234-1235 (on Pajule); *contra* Appeal, para. 205 (citing to Judgment, fn. 4970, where the Chamber also explained that D-0085 had a minor role in the Abok attack, and that P-0304 and P-0306's evidence that 104 soldiers participated in the attack was hearsay from the same source).

- The Chamber correctly assessed the evidence indicating that LRA fighters killed civilians in Lukodi IDP camp.[619]

156. In conclusion, Ongwen fails to show that the Chamber erred in applying the standard of proof correctly. His arguments in this respect must be dismissed.

VI.B. THE CHAMBER CORRECTLY INTERPRETED, AND APPLIED, THE STANDARD OF PROOF FOR AFFIRMATIVE DEFENCES

157. Ongwen appears to agree with the Chamber's articulation of the burden and standard of proof regarding grounds for excluding criminal responsibility[620] but he disagrees with the Chamber's *application* of the standard.[621] Ongwen misunderstands the Chamber's fact-finding process and the scope and operation of the Prosecution's burden of proof at trial. Although the Prosecution does not have the burden to "disprove" the "elements" of the grounds excluding an accused's criminal responsibility under article 31,[622] it must prove the elements of the crimes and modes of liability (including mental elements) and, in order to do so, must address, and rebut, the Defence's allegations and evidence under article 31. This is consistent with the Prosecution's duty to establish the truth, to investigate exculpatory evidence and to establish beyond reasonable doubt the facts essential to a conviction. Contrary to Ongwen's submissions, the Chamber clearly found that the Prosecution had satisfied its burden to prove the mental elements of the crimes and modes of liability[623] because, among other reasons, the grounds of mental defect and duress under articles 31(1)(a) and (d) alleged by the Defence did not apply to Ongwen.[624] Indeed, the Chamber did not consider that there was a (reasonable) possibility on the evidence that, at the time material to the charges, Ongwen suffered a mental disease or defect, or acted under duress, in order to conclude that there was a ground to exclude his criminal responsibility.

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[619] Judgment, paras. 1725-1779; *see also* paras. 182-184; *contra* Appeal, para. 206 (citing Judgment, para. 1746).
[620] Appeal, para. 209; *see* Judgment, para. 231 ("According to Article 66(2) and (3), the burden of proof (incumbent on the Prosecution) and the standard of proof (beyond reasonable doubt) relate to the 'guilt of the accused'. When a finding of the guilt of the accused also depends on a negative finding with respect to the existence of grounds excluding criminal responsibility under Article 31 of the Statute, the general provisions of Article 66(2) and (3) on the burden and standard of proof equally apply, operating (as is always the case for the determination on the guilt or innocence of the accused) solely with respect to the facts indispensable for entering a conviction, namely, in this case the absence of any ground excluding criminal responsibility and thus the guilt of the accused."); *see also* paras. 2453-2455, 2588.
[621] Appeal, para. 208. To the extent that Ongwen relies on his submissions in the Defence Closing Brief and in previous filings, those arguments should be dismissed *in limine*. Further, the Prosecution addresses the Chamber's factual findings relevant to article 31(1)(a) and (d) in section VII of this Brief; *contra* Appeal, paras. 213-215.
[622] *Contra* Appeal, para. 211.
[623] Judgment, paras. 2865-2873 (Pajule); 2919-2926 (Odek); 2965-2972 (Lukodi); 3012-3019 (Abok); 3025, 3032, 3042, 3048, 3054, 3060, 3067 (direct SGBC); 3096-3099 (indirect SGBC); paras. 3112-3114 (child soldiers).
[624] Judgment, paras. 2448-2580, 2668-2670; *contra* Appeal para. 212.

158. Further, the Prosecution's burden is different from the Defence's "evidential" burden to raise, and substantiate, grounds under article 31.[625] Similar to other allegations that it decides to advance at trial, the Defence must substantiate its allegations that an accused is not criminally responsible. This does not mean that the burden of proving the subjective and objective elements of crimes and the accused's criminal responsibility shifts from the Prosecution to the Defence. The arguments and evidence adduced by the Defence simply weigh against the arguments and evidence presented by the Prosecution. The more probative the evidence presented by the Defence is, the more difficult it will be for the Prosecution—who retains the burden of proof regardless of any Defence allegation and evidence—to establish the mental elements of the crimes and the modes of liability,[626] and for the Chamber to conclude that those elements are met beyond reasonable doubt. This process does not entail a reversal of the burden of proof. The Appeals Chamber has endorsed this approach in a different context,[627] and the Defence appeared to agree with it in its Closing Brief.[628]

159. Finally, the Chamber correctly found that Ongwen was not prejudiced because it did not set out its interpretation of article 31 during the trial.[629] The Chamber stated that the Defence "has no right to receive a full legal interpretation by the Chambers on the law at a specific point in the proceedings".[630] It noted that the Defence had had every opportunity to provide legal submissions and to submit evidence (including in rejoinder of the Prosecution evidence) to substantiate its allegation under article 31, and that the Defence had availed itself of such opportunities.[631]

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[625] Defences Standard Decision, para. 15 ("As concerns the presentation of the evidence, the Defence itself has maintained that it is under an evidential obligation to raise the grounds for excluding criminal responsibility under Articles 31(1)(a) and (d) of the Statute"); *contra* Appeal, para. 218.
[626] Once the Prosecution presents evidence meeting the 'beyond reasonable doubt' standard, if the accused does not present evidence capable of raising (reasonable) doubt, he can be convicted: *Ntaganda* AJ, paras. 586, 600.
[627] *Al-Senussi* Admissibility AD, para. 167 ("even though the State bears the burden of proof in general, the Appeals Chamber considers that the Pre-Trial Chamber was reasonable in placing an "evidential" burden on the Defence sufficiently to substantiate the factual allegations it was making. This is because, if it were otherwise, the proceedings could potentially be significantly delayed by the need to consider and rebut all factual allegations, including those for which there is no sufficient substantiation"), confirming PTC I's finding in *Al-Senussi* Admissibility PTC Decision, para. 208 ("although Libya carries the burden of proof, any factual allegation raised by any party or participant must be sufficiently substantiated in order to be considered properly raised").
[628] Defence Closing Brief, para. 533 (where the Defence referred to the five expert reports, expert testimonies and rejoinder).
[629] Judgment, para. 90; *contra* Appeal, para. 219.
[630] Judgment, para. 88.
[631] Judgment, para. 91; *see* Defence Closing Brief, para. 533 (referring to the evidence presented); *see also* Defence Request for Defences Standard.

160. In sum, Ongwen does not demonstrate an error in the Chamber's application of the standard of proof with regard to the application of article 31.

VI.C. THE CHAMBER CORRECTLY ALLOWED P-0447'S REPORT INTO EVIDENCE

161. Ongwen's argument that the Chamber erred in law by allowing P-0447's Rebuttal Report[632] should be rejected. The Chamber fully complied with regulations 43 and 44 of the RoC when it allowed the rebuttal evidence. Whilst the Chamber permitted rebuttal and rejoinder evidence before the Prosecution had made a formal request to present rebuttal evidence, the Prosecution had already indicated that a request was "almost inevitable" since its expert witnesses had not had the opportunity to address new diagnoses raised by the Defence experts in their Second Report.[633] The Prosecution had also already informed the Chamber how it intended to proceed with its prospective rebuttal evidence, and even proposed a timeline for the submission of the rebuttal report.[634] The Chamber, mandated by regulation 43 to make the questioning of witnesses and the presentation of evidence fair and effective and to ensure the effective use of time, was fully within its powers to consider presentation of rebuttal evidence and rejoinder evidence in advance of formal requests by the Parties. The Chamber's timely determination of the matter was beneficial for all Parties and participants, since it allowed them to timely prepare for eventual rebuttal or rejoinder evidence.[635]

162. Further, the Chamber *did* consider the legal requirements for rebuttal evidence before allowing it.[636] In the relevant decision, the Chamber stated that the subject matter of the evidence was of high importance in the case and that the rebuttal evidence was necessary in light of the content of the Defence experts' Second Report and their expected testimony, which were not foreseeable to the Prosecution. It also found that the need for rebuttal evidence was not caused by any negligence or fault of the Prosecution and emphasised that it would only allow it for points and facts previously not addressed by the Prosecution's expert witnesses.[637] Moreover, the Chamber specifically referred to the rights of the accused under article 67 and authorised, in advance, rejoinder evidence in response to the prospective rebuttal evidence.[638]

163. Likewise, Ongwen's challenges to P-0447's Rebuttal Report should also be rejected. The Rebuttal Report was not repetitive of P-0447's evidence during the Prosecution case. P-0447,

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[632] Appeal, paras. 220-226.
[633] Prosecution Request Date Testimony, para. 5.
[634] Prosecution Request Date Testimony, para. 7-8.
[635] *See also* Defence Experts Decision, para. 13.
[636] *Contra* Appeal, para. 221.
[637] Defence Experts Decision, para. 16.
[638] Defence Experts Decision, para. 17.

conscious of the Chamber's ruling that it would not allow any repetition of evidence,[639] specifically identified which parts of the Defence experts' Second Report and which part of their testimony he was commenting on.[640] The fact that P-0447 *in response to new opinions* refers to a diagnosis he had previously made did not make his evidence repetitive. The Prosecution Experts, including P-0447, had testified in March-April 2018 and the Defence experts' Second Report was produced only after their testimony, in June 2018. This set out, *inter alia*, new diagnoses regarding the accused's mental state that could not have been anticipated before. P-0447's Rebuttal Report and testimony were therefore the first opportunity for the Prosecution to address this new material.

164. Ongwen attempts to demonstrate alleged repetitiveness by counting references to PTSD in P-0447's initial evidence and his Rebuttal Report.[641] This is inapposite. The number of references to PTSD in the text of the Report does not demonstrate anything but the fact that the diagnosis of PTSD was an issue in P-0447's evidence, and that of the Defence experts, throughout the proceedings. Moreover, even if, *arguendo*, P-0447's evidence was repetitive, Ongwen fails to demonstrate how this caused him any prejudice. As the Chamber noted,[642] Ongwen had the right to present rejoinder evidence to address the entirety of P-0447's Rebuttal Report and his testimony. He exercised this right by submitting D-0042's Rejoinder Report and calling him to testify in rejoinder proceedings.[643]

165. In conclusion, for the reasons above, Grounds 7-8, 10, 25 and 45 should be dismissed.

VII. THERE WERE NO GROUNDS EXCLUDING ONGWEN'S CRIMINAL LIABILITY: GROUNDS 19, 26-27, 29-44, 46-58, 61-63[644]

VII.A. ONGWEN DID NOT SUFFER FROM A MENTAL DISEASE OR DEFECT UNDER ARTICLE 31(1)(A) (GROUNDS 19, 26 (IN PART), 27-43, 47 (IN PART))

166. At trial, Ongwen argued that his criminal responsibility was excluded by reason of mental disease or defect under article 31(1)(a)—specifically, "'severe depressive illness, post-traumatic stress disorder […] and dissociative disorder (including depersonalization and multiple identity disorder) as well as severe suicidal ideation and high risk of committing suicide', and […] 'dissociative amnesia and symptoms of obsessive compulsive disorder'."[645]

[639] Defence Experts Decision, para. 16.
[640] UGA-OTP-0287-0072.
[641] Appeal, para. 224.
[642] T-252, 8:6-8:9.
[643] UGA-D26-0015-1574; T-254; T-255.
[644] In his Appeal Ongwen does not refer to Ground 59: *see* NoA, p. 21. However, Grounds 26, 28 and 47 appear to encompass Ongwen's intended submissions in Ground 59 regarding the circumstances of Ongwen's abduction.
[645] Judgment, para. 2450.

These claims primarily relied on the evidence of Defence experts Dr. Akena (D-41) and Prof. Ovuga (D-42), although the Defence also cited Chambers expert Prof. De Jong (who assessed Ongwen's mental state at trial, but not at times material to the charged crimes).

167. However, based on the opinion of Prosecution experts Prof. Mezey (P-446), Dr. Abbo (P-445), and Prof. Weierstall-Pust (P-447), and the corroborating evidence heard at trial, the Chamber concluded that Ongwen suffered from no such mental disease or defect at the times material to the charges.[646]

168. The Chamber's findings were correct and reasonable. It correctly directed itself that, for a mental disease or defect to be relevant for the purpose of article 31(1)(a), it must either have destroyed the capacity of the accused person "to appreciate the unlawfulness or nature of his or her conduct" or the "capacity to control his or her conduct to conform to the requirements of law".[647] These are questions of fact, and thus the Chamber determined that it must find the (reasonable) possibility of the existence of such a mental disease or defect in order to conclude that there is a ground to exclude criminal responsibility.[648] This is without prejudice to the onus on the Prosecution to prove the guilt of the accused, and the Court to convict on the charges only if convinced of the guilt of the accused beyond reasonable doubt.[649]

169. The Chamber's analysis of the expert evidence was nuanced and detailed.[650] To provide context for the arguments raised by Ongwen on appeal, the principal conclusions of the Chamber are first set out in the following paragraphs. Ongwen's claims are then addressed in turn. None shows any error in the Chamber's reasoning or conclusions. Accordingly, the grounds of appeal relating to article 31(1)(a) should be dismissed in their entirety.

VII.A.1. The Chamber reasonably assessed the evidence and entered findings

170. The Chamber reasonably weighed all the evidence submitted to it. It carefully assessed the evidence of each of the experts, and made clear findings as to their reliability. In considering

[646] Judgment, para. 2580.
[647] Judgment, para. 2452.
[648] Judgment, para. 2453. *See also* paras. 2454 ("the Chamber emphasises that the fact to be determined is the *possible presence* of a mental disease or defect, and the effect of such mental disease or defect on the relevant mental capacities of the accused, at the time of the relevant conduct", emphasis added, and any inferences must be "clearly explained and reliable"), 2456 (analysis must be based on the relevant evidence).
[649] Judgment, para. 2455.
[650] *See generally* Judgment, paras. 2470-2478 (Prof. Mezey), 2479-2485 (Dr. Abbo), 2486-2496 (Prof. Weierstall-Pust).

the opinion of the Prosecution experts, the Chamber took into account two issues with a "general bearing on the consideration of the evidence at hand."[651]

- First, the three Prosecution experts did not "repeatedly minimize[]" or dismiss cultural factors in assessing Ongwen's mental health at the material times.[652] To the contrary, while noting that "there was general agreement among all experts that the cultural context must be taken into account in assessments of mental health", the Chamber recalled the evidence (including from Defence expert Dr. Akena) that "at the same time the standard criteria to determine mental disorders were universally accepted."[653]
- Second, the Defence was "factually incorrect" to assert that the Prosecution experts had failed to recognise as a shortcoming in their assessment that they were unable to interview Ongwen (who refused their requests to do so).[654] They all did.[655] Since Ongwen refused to talk to them, and since the Prosecution experts "used the information provided by […] Ongwen to other experts whom he did agree to speak" and "clearly laid out" the basis for the information on which they relied, the Chamber had no "methodological concerns".[656]

VII.A.1.a. Professor Mezey's evidence

171. Prof. Mezey's evidence was "of great assistance to the Chamber in making its findings" because it was "clear and convincing, and her testimony in the courtroom impressive", and consistent with the corroborating evidence heard at trial.[657]

172. Prof. Mezey did not consider there was evidence to show that Ongwen suffered from any significant mental illness or disorder, either at trial or the times material to the charges. She recognised that Ongwen exhibited "mild" transient depressive symptoms during his incarceration.[658] She explained that exposure to trauma does not automatically result in post-traumatic stress disorder, nor is this generally associated with persistent violent behaviour.[659]

173. In particular, having considered all the evidence, Prof. Mezey stressed that "'the presence of […] severe and incapacitating mental disorders would have been incompatible with Mr

[651] Judgment, para. 2458.
[652] Judgment, paras. 2459, 2461-2463.
[653] Judgment, para. 2461. *See also* para. 2463 (addressing the issues raised by the Defence).
[654] Judgment, paras. 2464-2465, 2469.
[655] Judgment, paras. 2465-2468.
[656] Judgment, para. 2469.
[657] Judgment, para. 2478. *See also* para. 2475 (describing Prof. Mezey's explanation of her opinion as "clear, detailed and logical").
[658] Judgment, para. 2471.
[659] Judgment, para. 2472.

Ongwen not only functioning adequately, but actively thriving within the LRA for over twenty years'."[660] This conclusion was informed by the functional impairments caused by such disorders themselves. As Prof. Mezey explained:

- Post-traumatic stress disorder is defined in part by "significant clinical distress associated with the symptoms", with symptoms "so severe and so intrusive that they stop the individual from being able to carry on with their normal day-to-day functioning";[661]
- Depressive disorder is "characterised by a persistent severe lowering of mood, sadness, hopelessness, despair", "often [with] a high risk of suicide", potentially including "disruptions in the individual's physical health and functioning", "social[] withdraw[al]", and "often a disruption to the individual's cognitions so that they are unable to concentrate well" with a lack of "spontaneity in terms of both expressing themselves, but also in terms of their facial expressions or ability to verbalise or vocalise";[662]
- Dissociative identity disorder "characteristically involves a disruption to the person's identity, and what you see are two or more distinct personalities operating" with neither "know[ing] of the other person's existence". Typically, "marked discontinuities in the person's sense of self and in their sense of agency" become apparent, including "alterations in memory, in perceptions, in consciousness, in their motor functioning"—while the affected person "is not aware that they have the disorder, […] it is noticed by other people." The condition is "stable, static and enduring", and generally entails "marked problems in the individual's social functioning or their occupational functioning or functioning on a day-to-day basis" or "severe[] clinical[] distress".[663]

VII.A.1.b. Dr. Abbo's evidence

174. The Chamber considered Dr Abbo's evidence to be "pertinent and valuable", especially her assessment of "the level of Dominic Ongwen's moral development".[664]

[660] Judgment, para. 2473.
[661] Judgment, para. 2475. *See also* paras. 2484 (opinion of Dr. Abbo, who "stated, in the specific context of a discussion of dissociative flashbacks as a symptom of PTSD, that a planned premeditated action would not be consistent with a dissociative state"), 2492 (opinion of Prof. Weierstall-Pust, who noted that, "[p]eople that suffer from PTSD, they are not functioning properly" and "will make mistakes", "will suffer from hyperarousal", and will "not [be] able to follow orders").
[662] Judgment, para. 2476.
[663] Judgment, para. 2477. *See also* para. 2484 (opinion of Dr. Abbo, who "testified that a dissociative state, especially in its severe forms, would be apparent even for a layperson").
[664] Judgment, para. 2485 (also noting that, while Dr. Abbo assumed for her report the prior diagnoses made by the Defence experts as to Ongwen's mental health at the times material to the charges, and the Court expert as to Ongwen's mental health at the time of the trial, her explanation of "the relationship between these diagnoses and

175. As the Chamber recalled, Dr. Abbo considered that, prior to Ongwen's abduction, the course of his life had "gone on satisfactorily well", and that some of his personal characteristics could have helped him to cope with his subsequent new circumstances.[665] She considered that Ongwen had attained "the highest level of moral development".[666] Even accepting for the sake of argument the Defence experts' diagnoses, Dr. Abbo stated that "'there is hardly any evidence of which particular symptoms of these disorders lead to [Ongwen] committing […] which alleged crimes'" and concluded that "'[Ongwen] was likely motivated by his existential situation rather than his symptoms of mental illnesses'."[667]

VII.A.1.c. Professor Weierstall-Pust's evidence

176. Prof. Weierstall-Pust's evidence was "of great assistance to the Chamber in the determination of the issue," including in evaluating the "other evidence in the case, in particular witness evidence," because it was "entirely convincing and his testimony in the courtroom impressive in its clarity and comprehensibility."[668]

177. Prof. Weierstall-Pust emphasised that, while "the diagnosis of a trauma-spectrum disorder required that the individual was exposed to at least one potentially traumatic event", it did not follow that particular events "necessarily lead to a trauma-related mental disorder" since "trauma is of subjective nature".[669] Nor indeed is the existence of a trauma-related disorder sufficient "to draw any conclusions about his capacity to appreciate the wrongfulness of his actions", especially since "every mental disorder fluctuates over time".[670] Consequently, while Prof. Weierstall-Pust agreed that Ongwen was exposed to potentially traumatic events, and it was "plausible" that he "'showed some signs of mental disorder'" during the material times, in his view the evidence did not justify "'[…] the diagnosis of a manifest mental disorder […]

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the conduct […] which represented the commission of the crimes charged" assisted the Chamber in understanding the mental disorders in question).

[665] Judgment, para. 2480 ("Ongwen's 'impress[ion] as above average intelligence' and 'bush socialisation'").

[666] Judgment, paras. 2480-2481 (explaining that this is "'characterized by the pursuance of impartial interests for each member in society as well as the establishing of self-chosen moral principles'").

[667] Judgment, para. 2482. *See also* paras. 2483 (recalling Dr. Abbo's conclusion that "there was no evidence from the materials provided that the illnesses identified by the other experts were directly linked to the crimes Dominic Ongwen allegedly committed"), 2485.

[668] Judgment, para. 2496.

[669] Judgment, para. 2489 (further recalling the opinion that, since an individual may process a potentially traumatic event in a number of ways, "the relationship between the experiences […] and potential mental health symptoms must be specified, as there doesn't necessarily have to be a relation between the exposure with violence and trauma and the development of impairments"). Indeed, Prof. Weierstall-Pust further agreed that even the majority of persons who suffer traumatic experiences in war zones do not develop trauma-related disorders: UGA-OTP-0280-0674 (Prof. Weierstall-Pust's first report), p. 0679; T-166, p. 57:8-15 (concurrence of Dr. Abbo).

[670] Judgment, para. 2490.

between 2002 and 2005'".[671] Like Prof. Mezey,[672] Prof. Weierstall-Pust considered it "highly unlikely" that Ongwen's level of functioning was severely impaired, "at least not for a longer period of time".[673]

VII.A.1.d. Corroborating evidence at trial

178. The Chamber found that the absence of a mental disease or defect relevant to article 31(1)(a) was corroborated by the evidence at trial.[674] It stressed that "an assessment of mental health cannot be made in the abstract, but only on the basis of the facts and evidence relating to the period under examination" from which the Chamber must draw its "own conclusions".[675] Such an analysis was "absolutely necessary".[676]

179. This did not mean the Chamber examined the trial evidence "for *diagnoses* of mental disease or defect", since "save for the experts within the scope of their expertise, the witnesses in this case are not qualified to make such diagnoses."[677] Rather, it sought to assess "whether any descriptions in particular of the conduct of […] Ongwen correspond to symptoms of mental disorders"—and, in this regard, "the possibility that witnesses may regard symptoms of mental disorders as spirit possession is immaterial, insofar as they would still describe certain symptoms, irrespective of the cause attributed to them."[678] Such symptoms would include "'hallucinations, delusions, loss of weight, loss of appetite, an inability to function, which would include an inability to function as a soldier, as a fighter'",[679] or other "'[…] 'strange' or 'unexplainable' signs'".[680] While these would not necessarily be visible at all times, the Chamber reasonably rejected the possibility that "a complete absence of evidence of facts which

[671] Judgment, para. 2491.
[672] *See above* fn. 660 (and accompanying text).
[673] Judgment, para. 2491 (observing that Ongwen "must have adapted to the war scenario in order to make the achievements he himself describes and which are not only limited to promotion in the armed force but also include his support of other people and his psychosocial abilities"). *See also* para. 2493 (noting that mental disorders don't mean it's impossible to "function at all", but that "the high level of functioning is not possible" to the extent suggested by the evidence).
[674] *See e.g.* Judgment, paras. 2498 ("such evidence did not transpire during the trial"), 2499 ("no such testimony was given by witnesses who were in position to observe […] Ongwen's behaviour at the time").
[675] Judgment, para. 2497.
[676] Judgment, para. 2505. *See also* para. 2499 (opinion of Prof. Weierstall-Pust that examining the trial evidence is "'absolutely important […]'").
[677] Judgment, para. 2501 (emphasis added).
[678] Judgment, para. 2501. *See also* para. 2500 (recalling that Defence experts Prof. Ovuga and Dr. Akena also "agreed that albeit lay persons could not make a diagnosis, they would have noted at least some symptoms of the mental disorders in question").
[679] Judgment, para. 2498 (opinion of Prof. Mezey).
[680] Judgment, para. 2499 (opinion of Prof. Weierstall-Pust).

could be seen as symptoms of mental disorders" could be properly explained as a fluctuation of symptoms.[681]

180. The Chamber likewise rejected the possibility that former LRA members would be unreliable witnesses "because of their own victimisation in the same coercive and hostile environment of the LRA".[682] The Chamber found an un-nuanced approach of this kind to be "overwhelmingly proved wrong" by the credible and reliable testimony of former LRA members, who were called as witnesses by all parties. These witnesses testified in detail about their experiences, and there was "no indication" that "as a class" they were "unable to observe, perceive, or accurately recount" Ongwen's behaviour.[683]

181. In conducting its analysis, the Chamber took into account:

- Witnesses who "spent a considerable period of time in close proximity" to Ongwen[684] and who described him as socially skilled, caring, and an effective leader, namely P-0142,[685] P-0231,[686] P-0205,[687] P-0264,[688] Daniel Opiyo,[689] Joseph Okilan,[690] Kenneth Oyet (D-0026),[691] D-0027,[692] D-0118,[693] and D-0032.[694] Overall, this testimony was "strikingly

[681] Judgment, para. 2502. *See also* para. 2503 (rejecting the possibility of masking symptoms, and the Defence characterisation of any "signs of resiliency" as "temporary and sporadic").
[682] Judgment, para. 2504.
[683] Judgment, para. 2504.
[684] Judgment, para. 2517 (witnesses were also "well placed to make these observations"). *See also* para. 2506.
[685] Judgment, para. 2506 (Ongwen was not "a bad person" but rather "a people's person" who joked and "cared about people"; while his behaviour changed as he was promoted, to become "tough on the rules", this was "because of the responsibilities" that he acquired, and "he was still good to his soldiers"). *See also* para. 269 (credibility assessment).
[686] Judgment, para. 2507 (Ongwen knew "how to speak to his soldiers" and did not "give out arbitrary orders", but rather "would invite all the officers and […] explain to them the particular nature of the operation"). *See also* paras. 275-276 (credibility assessment).
[687] Judgment, para. 2508 (Ongwen was "nice", "straightforward", and "cared about people"). *See also* paras. 272-273 (credibility assessment).
[688] Judgment, para. 2509 (Ongwen was a "good person", "always encouraged his soldiers", and "whenever he [gave] instructions, peopled work[ed] accordingly"). *See also* paras. 329-332 (credibility assessment).
[689] Judgment, paras. 2510-2511 (Ongwen was "not segregative", "would chat very freely with his people, unlike the other commanders", would "eat[] with his ordinary soldiers", was "very relaxed and easy to work with", and was "highly loved by his people" as well as being himself "a very loving person"; in leading his men, Ongwen "would only do what he knew he could accomplish"). *See also* para. 381 (credibility assessment).
[690] Judgment, para. 2512 (Ongwen was "happy", "talkative", "never […] angry", "a very easy man to deal with and […] very playful, always wanting to play around" or "joking"). *See also* para. 281 (credibility assessment).
[691] Judgment, para. 2513 (Ongwen "loved to joke", was "carefree", and even once promoted "would take his time to come and sit down", "interface" and "play games"; he "was a very simple person, who was down to earth" and showed "his love for the people"). *See also* para. 379 (credibility assessment).
[692] Judgment, para. 2514 (Ongwen was "liked by so many people", both "the young" and "the old", and "his lifestyle didn't change"; he "loved people"). *See also* para. 282 (credibility assessment).
[693] Judgment, para. 2515 (Ongwen "used to talk to everyone very freely" and was a "loving person"). *See also* para. 436 (credibility assessment).
[694] Judgment, para. 2516 (Ongwen "really, really knew how to take good care of his soldiers"). *See also* paras. 283-285 (credibility assessment).

coherent" and "weigh[ed] heavily in the Chamber's assessment."[695] No witness described anything "which could represent a symptom of the mental disorders under discussion", nor did Prof. Mezey or Prof. Weierstall-Pust find any suggestion of mental disorder in this evidence.[696]

- Witnesses P-0099, P-0101, P-0214, P-0226, P-0227, P-0235, P-0236, who were "held as so-called 'wives' or otherwise captive in […] Ongwen's immediate proximity at various times over the course of around 20 years", and Florence Ayot, did not observe any behaviour in Ongwen "suggestive of a mental disease or defect.[697]
- "[T]he large number of witnesses who described […] Ongwen's actions and interactions with others" material to the charges "did not provide any testimony which could corroborate a historical diagnosis of mental disease or defect."[698] In particular, many of Ongwen's actions "involved careful planning of complex operations".[699]

VII.A.1.e. Defence evidence (Dr. Akena and Professor Ovuga)

182. By contrast, the Chamber decided that it could not rely on the evidence of Defence experts Dr. Akena and Prof. Ovuga—"and in particular not on the[ir] diagnoses of mental disorders"—based on six factors affecting the reliability of their evidence.[700] These factors, which particularly concerned the methodology employed by the experts and which were discussed extensively at trial and in this appeal,[701] were:

- The blurring of the Defence experts' role as both treating physicians and forensic experts, leading to a loss of objectivity[702] in their reports and testimony.[703]

[695] Judgment, para. 2517.
[696] Judgment, paras. 2517-2518.
[697] Judgment, para. 2519 (P-0214 described Ongwen as "taking care of us properly" and treating "'us' 'equally' and 'well'"; P-0235 said Ongwen was a "good man", and Florence Ayot said Ongwen was "nice", "sociable", and "just"). *See also* paras. 395 (finding the evidence of P-0099, P-0101, P-0214, P-0226, P-0227, and P-0236 to be "remarkable in their detail and consistency" and "clear, nuanced and compelling"), 398-402 (finding Florence Ayot's testimony to be of "very limited use" and rejecting "those aspects of Florence Ayot's evidence which are contradicted by the consistent accounts of […] Ongwen's other so-called 'wives'").
[698] Judgment, para. 2520.
[699] Judgment, para. 2521 (also recalling the opinion of Prof. Mezey that "planned", "motivated and premeditated" behaviour is "highly unlikely to represent the sort of automatic motiveless actions that are typically associated with a dissociative state or other severe mental health conditions", and that the evidence at trial appears to suggest that the attacks were "determined and carried out through the instructions of Mr. Ongwen" and "appear to have been planned and premeditated, rather than impulsive and out of the blue").
[700] Judgment, para. 2574.
[701] Judgment, para. 2527.
[702] Judgment, paras. 2528, 2531.
[703] Judgment, para. 2529. *See also* para. 2530 (referring to Prof. Weierstall-Pust's rebuttal report).

- The Defence experts' failure to apply scientifically validated methods and tools as a basis for their forensic reports, based on specific identified shortcomings.[704]
- The unexplained contradictions and inconsistencies in the Defence experts' observations and conclusions,[705] and the Defence experts' failure to acknowledge or explain them.[706]
- The Defence experts' failure to engage sufficiently with other available sources of relevant information, including contemporary witness evidence,[707] Court transcripts,[708] or clinical notes from other professionals[709]—an "unjustifiable and fundamental failure" which invalidated their conclusions in itself.[710]
- The Defence experts' failure to address the possibility of malingering adequately.[711]
- The "very general" nature of the Defence experts' analysis and findings, which were "not clearly anchored" in the times and factual contexts material to the charges.[712]

VII.A.1.f. Other evidence (Professors De Jong and Musisi)

183. The Chamber likewise declined to rely on the evidence of Court expert Prof De Jong for the purpose of article 31(1)(a),[713] since his report was prepared in order to diagnose any mental condition or disorder affecting Ongwen on 16 December 2016 and thereafter (more than a decade after the time material to the charges), and to recommend treatment. Prof. De Jong diagnosed Ongwen with post-traumatic stress disorder, major depressive disorder, and "other specified dissociative disorder".[714] However, Prof. De Jong did not attempt an historical diagnosis, and acknowledged that his report had "several shortcomings", including his inability to complement his three interviews with Ongwen with additional information from Ongwen's family or community.[715]

[704] Judgment, paras. 2532-2535.
[705] Judgment, para. 2536. *See further* paras. 2537 (Ongwen's mood), 2538 (Ongwen's reported suicidal tendencies), 2539 (Ongwen's cognitive development), 2540 (absence of initial finding of amnesia), 2542 (absence of evidence of discontinuities in Ongwen's sense of self), 2543 (diagnosis of both post-traumatic stress disorder and dissociative amnesia). *See also* para. 2541 (Ongwen's mood and cognitive development).
[706] Judgment, para. 2544. *See also* para. 2543.
[707] *See* Judgment, paras. 2547 (opinion of Prof. Weierstall-Pust), 2551.
[708] Judgment, para. 2549.
[709] Judgment, para. 2550.
[710] Judgment, para. 2545. *See also* paras. 2500, 2548-2549, 2552.
[711] Judgment, para. 2568. *See generally* paras. 2558-2567.
[712] Judgment, para. 2569. *See also* paras. 2570-2573.
[713] Judgment, paras. 2575, 2578.
[714] Judgment, para. 2576.
[715] Judgment, paras. 2576-2577.

184. Finally, the Chamber did not rely on the evidence of Prof. Musisi, submitted by the legal representatives of the victims, since it did not "provide specific information" on the material questions.[716]

VII.A.2. The Chamber properly applied the standard of proof

185. Ongwen generally asserts that the Prosecution did not "disprove the elements of Article 31(1)(a) beyond reasonable doubt", but fails to develop this argument and instead seeks to incorporate by reference arguments from his closing brief at trial.[717] This is impermissible.[718] Yet in any event the Chamber correctly directed itself that it could only convict if it was convinced of Ongwen's guilt beyond reasonable doubt, and that consequently article 31(1)(a) would apply if the evidence established the reasonable possibility (at the times material to the charges) of a mental disease or defect satisfying the requirements of article 31(1)(a).[719] Ongwen shows no error in this approach.[720]

186. Ongwen further states that the Judgment contains "no findings that the Prosecution disproved the elements of the Article 31(1)(a) affirmative defence beyond a reasonable doubt", nor any "findings that Defence Experts' evidence provided any reasonable doubt *vis-à-vis* the Prosecution Experts' conclusions that the Appellant did not suffer—at any time in his life—from mental illness."[721] This not only mis-states the evidence in question, but incorrectly implies that correct application of the standard of proof requires the Chamber to adopt a particular form of words to satisfy appellate scrutiny. Rather, what matters is that the Chamber properly directed itself to the applicable law—as it did—and that the substance of its evidentiary reasoning was compatible with that law. Plainly, the Chamber did not consider that there was a reasonable possibility on the evidence before it that, at the times material to the charges, Ongwen suffered from a mental disease or defect that destroyed his capacity to appreciate the unlawfulness or nature of his conduct, or his capacity to control his conduct to conform to the requirements of the law. This was both correct in law and reasonable.

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[716] Judgment, para. 2579. *See also* para. 602 (noting Prof. Musisi's evidence, but observing that it did "not directly underlie any part of the Chamber's analysis as to whether the facts alleged in the Charges are established").
[717] Appeal, paras. 321-322 (referring to Defence Closing Brief, paras. 533-603).
[718] *See above* paras. 7-8.
[719] *See* Judgment, paras. 2453-2455. *See also above* para. 168. *Cf.* Appeal, para. 320.
[720] *See above* paras. 157-158. *See also* Defence Closing Brief, paras. 533-603.
[721] Appeal, para. 419.

VII.A.3. The Chamber was correct and reasonable in its approach to the evidence of the Defence experts (Grounds 27, 29, 31-32, 35-41)

187. Ongwen claims that the Chamber erred in assessing the reliability of the Defence expert evidence,[722] challenging each of the factors considered in the Judgment. Each of these arguments is addressed in turn. None of them shows any error materially affecting the findings of the Chamber, or its verdict, and so they must each be dismissed.

VII.A.3.a. The Chamber did not err in assessing the Defence experts' methodology

188. Without further elaboration, Ongwen states that "[t]here are factual errors in respect to the evidence of methodology which invalidate the Judgment's conclusions".[723] While this unsupported claim may simply have been intended to introduce the matters discussed subsequently in this response, the Prosecution notes that it is again accompanied by an attempt to incorporate by reference the Defence Closing Brief.[724] This is impermissible, and warrants summary dismissal.[725] In any event, these arguments do not show any error, and merely repeat Ongwen's own subjective (and unconvincing) view of the evidence. The Defence experts' methodological approach—including their use of the DSM, approach to psychometric testing, and selection of sources—was specifically addressed in the Judgment, together with other relevant evidence undermining the reliability of their assessment.

189. Nor is it accurate to suggest that the unreliability of specific Defence *evidence* must be established "beyond a reasonable doubt". Rather, the question to which the burden and standard of proof applied was the overall *factual* question whether Ongwen was guilty of the acts charged, to which any (reasonable) possibility that he suffered from a sufficient mental disease or defect at the times material to the charges was necessarily relevant. In deciding on this point,

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[722] Appeal, paras. 326-328. Six of these claims are subsequently discussed in their own sub-sections of the Appeal (*see* paras. 329-419), but two further claims (concerning the assessment of the Defence experts' methodology and the requirement to provide a reasoned opinion) are stated in this introduction.
[723] Appeal, para. 326.
[724] Appeal, para. 326 (fn. 364: citing Defence Closing Brief, paras. 651-653, which describes the Defence view of its experts' reliability on the basis that they described their approach in "great detail", "used the DSM as a living manual" and explained that they had not used psychometric tests "because it was a waste of time and unnecessary" when Ongwen "was, in fact, providing information that he was obviously suicidal"). "DSM" stands for "*Diagnostic and Statistical Manual of Mental Disorders*", a publication of the American Psychiatric Association. First produced in 1952, the fifth edition—known as "DSM-5"—was published in 2013.
[725] *See above* paras. 7-8. In the same fashion, the Appeals Chamber should disregard and/or dismiss *in limine* the unexplained and overly generalised incorporation by reference of the Defence "critique of the findings and conclusions of P-0446 [Prof. Mezey] and P-0447 [Prof. Weierstall-Pust] in its Closing Brief" (without citation to any particular paragraphs): Appeal, paras. 325 (fn. 362). Likewise, the Appeals Chamber should disregard and/or dismiss *in limine* the attempt to incorporate by reference the Defence's complete trial submissions on the article 31(1)(a) defence (145 paragraphs in length): Appeal, para. 328 (fn. 366: citing Defence Closing Brief, paras. 529-674).

the Chamber was obliged to weigh all the evidence together, as it did, but not to apply the standard of proof to each piece of evidence individually.[726]

VII.A.3.b. The Chamber did not fail to provide a reasoned opinion

190. Ongwen suggests that "the Judgment fails to provide a reasoned opinion as to its conclusions on methodology", because in his view "the Judgment simply chooses the Prosecution expert evidence over the Defence expert evidence, without explaining how the alleged methodological errors contributed to the Defence Experts' findings and conclusions."[727] He purports to rely on the ICTY's *Perišić* judgment to the effect that "an analysis limited to a select segment of the relevant evidentiary record is not necessarily sufficient to constitute a reasoned opinion."[728] However, this is inapposite.

191. In *Perišić*, the ICTY Appeals Chamber acknowledged that the existence of any legal error based on failure to provide a reasoned opinion was highly fact sensitive[729]—it would not necessarily be reproduced even in circumstances which appear superficially similar. Yet the circumstances in this case are not even remotely similar. The error in *Perišić* was the Trial Chamber's failure to address the contrary testimony of witnesses it accepted as reliable[730]—and thus there is no material comparison to this case, where the Chamber weighed and considered the content and reliability of both the Prosecution and Defence experts at great length,[731] and in the context of the other evidence heard at trial.[732] Based on this careful assessment, the Chamber ultimately concluded that the Defence evidence was not reliable—an approach the *Perišić* Appeals Chamber itself affirmed to be the prerogative of any trial chamber.[733]

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[726] *See e.g.* *Bemba et al.* AJ, para. 868. *See further above* paras. 157-158.
[727] Appeal, para. 327.
[728] Appeal, para. 327 (quoting *Perišić* AJ, para. 95).
[729] *Perišić* AJ, paras. 92 ("what constitutes a reasoned opinion depends on the specific facts of a case"), 95 ("In the context of this case", "In these circumstances").
[730] *See* *Perišić* AJ, para. 95 ("the Trial Chamber's *failure to explicitly discuss and analyse* the evidence of Witnesses Rašeta and Orlić constituted a failure to provide a reasoned opinion. The Appeals Chamber acknowledges that a trial chamber's *failure to explicitly refer to specific witness testimony* will often not amount to an error of law, especially where there is significant contrary evidence on the record. […] [T]he Appeals Chamber is not satisfied that, *merely by noting its existence*, the Trial Chamber adequately addressed the testimony", emphasis added). *See also* paras. 91-94.
[731] *See* Judgment, paras. 2458-2496 (38 paragraphs considering evidence of Prosecution experts), 2522-2574 (52 paragraphs considering evidence of Defence experts). For the purpose of comparison, the *Perišić* Trial Chamber briefly referred to the testimony of witnesses Rašeta and Orlić in just 2 paragraphs out of the 83 paragraphs analysing the legal issue in question (effective control over personnel assigned to the 40th Personnel Centre of the VJ, for the purpose of superior responsibility): *see* *Perišić* TJ, paras. 1669-1689, 1701-1734, 1739-1769 (*especially* paras. 1678, 1720, concerning witnesses Rašeta and Orlić).
[732] *See* Judgment, paras. 2497-2521, 2575-2579.
[733] *Perišić* AJ, para. 92 ("The Appeals Chamber acknowledges that a trial chamber is entitled to rely on the evidence it finds most convincing").

192. Furthermore, Ongwen fails to particularise or substantiate his claim of lack of reasoned opinion.[734] The Judgment is clear that the six factors "affecting the reliability of the evidence of Professor Ovuga and Dr Akena" meant that the Chamber could "[]not rely on that evidence, and in particular not on the diagnoses of mental disorders".[735] The Chamber was clear in its view that the Defence experts had: lost objectivity; not applied scientifically validated methods; expressed inconsistent opinions; failed to take account of all relevant information available; failed to address other reasonable possibilities inconsistent with their conclusion, and; failed to address with specificity the key forensic issue.[736]

193. Significantly, Ongwen does not identify any pertinent evidence or argument which he considers should have been explicitly taken into account but was not—much less show that any such failure constituted a legal error. To the contrary, "a Trial Chamber need not refer to the testimony of every witness or every piece of evidence on the trial record" and "not every inconsistency which the Trial Chamber failed to discuss renders its opinion defective".[737]

VII.A.3.c. The Chamber did not err in doubting the objectivity of the Defence experts, and taking this into account as negatively affecting their reliability

194. Ongwen states that the Chamber failed to cite any evidence or provide a reasoned opinion in concluding that the Defence experts blurred the line between treating physicians and forensic experts, leading to a loss of objectivity.[738] In particular, he stresses the supposedly contrary evidence of Dr. Akena to establish that "the Defence Experts were *not* treating physicians",[739] asserts that the Chamber misapprehended the significance of the Defence experts' acknowledgement of their "therapeutic alliance" with Ongwen,[740] and claims that there was no other evidence indicating the Defence experts' loss of objectivity.[741] These claims do not accurately represent the Chamber's reasoning or the evidence, nor do they show that the Chamber was unreasonable in its assessment, and so should be dismissed.

195. The Chamber did indeed cite the Prosecution's submission in reasoning that the Defence experts may have lost objectivity by blurring the roles of treating physician and forensic

[734] *Contra* Appeal, para. 327.
[735] Judgment, para. 2574.
[736] *See above* para. 182.
[737] *See e.g. Perišić* AJ, para. 92; *Limaj* AJ, para. 86; *Kvočka* AJ, para. 23.
[738] Appeal, paras. 329-330, 335.
[739] Appeal, paras. 331-334 (emphasis supplied).
[740] Appeal, paras. 336-339.
[741] Appeal, paras. 340-341.

expert.[742] Yet this was not a substitute for its finding that "Professor Ovuga and Dr Akena concerned themselves not only with a forensic examination to assist the Chamber […] but also with identifying recommendations for the treatment of the current mental conditions of […] Ongwen", based on four separate but mutually corroborating considerations. These were: (i) the "face of their reports",[743] which included "recommendations for treatment"[744] and "rehabilitation"[745] (as well as the Defence experts' *separate* report "'[…] for medical and not legal purposes'");[746] (ii) Dr. Akena's statement that the Defence experts had established a "therapeutic alliance" with Ongwen;[747] (iii) Dr. Akena's agreement that he regarded his duty, as a treating physician, as attempting to secure for his client "the treatment which will be of greatest benefit to their health",[748] and; (iv) the expert opinion of Prof. Weierstall-Pust.[749]

196. The Chamber explained that "there is an inherent incompatibility between the duties of a treating physician and the duties of a forensic expert", since "[t]he duty of a treating doctor is primarily towards the patient, whereas an expert engaged by a court for a forensic examination is primarily in the service of the Court."[750] As such, the "blurring of these roles" is one factor which "negatively affects" the reliability of the Defence experts' reports.[751] It did not quantify the weight assigned to this factor, nor suggest that it was dispositive, but merely specified that it was taken into account.

VII.A.3.c.i. The Prosecution alleged a loss of objectivity as a matter of fact, not law

197. Ongwen is incorrect to suggest that legal "authority" was required for the Prosecution's *factual* submission that blurring the duties of a treating physician and a forensic expert led (in this case) to a loss of objectivity by Dr. Akena and Prof. Ovuga.[752] Nor does Ongwen identify any fault of logic in this submission. Rather, he only complains that the "Chamber points to no

[742] Judgment, para. 2528 (citing Prosecution Closing Brief, para. 374).
[743] Judgment, para. 2529.
[744] Judgment, para. 2524 (citing UGA-D26-0015-0004 (Defence Experts' First Report), p. 0018).
[745] Judgment, para. 2525 (quoting UGA-D26-0015-0948 (Defence Experts' Second Report), p. 0980).
[746] Judgment, para. 2526 (quoting UGA-D26-0015-0154 (Defence Experts' Initial Medical Report), p. 0154).
[747] Judgment, para. 2529 (citing T-248, 87:17-88:9).
[748] Judgment, para. 2529 (citing T-249, 29:24-30:2).
[749] Judgment, para. 2530 (citing UGA-OTP-0287-0072 (Prof. Weierstall-Pust's rebuttal report), p. 0097: suspecting "fundamental confusion, as between the role of treating physicians and forensic experts", which in his view led to the "vast amount of shortcomings" in the Defence experts' assessment).
[750] Judgment, para. 2531. Consequently, according to the Chamber, a forensic expert "must in fact take care to remain as objective and detached as possible", and need not "sustain a relationship of trust and confidence with the person to be examined".
[751] Judgment, para. 2531.
[752] *Contra* Appeal, para. 330. *See* Prosecution Closing Brief, para. 374.

evidence to support this conclusion."[753] Given the common sense nature of the Chamber's view, and the absence of any cogent argument to the contrary, Ongwen shows no error in this respect.

VII.A.3.c.ii. The Chamber reasonably found that the Defence experts concerned themselves with Ongwen's treatment

198. Ongwen further challenges the reasonableness of the Chamber's factual finding that Dr. Akena and Prof. Ovuga concerned themselves with his treatment, as well as their forensic analysis for the Court. Yet it fails to show that the Chamber was unreasonable in its conclusion, or in any event that this materially affected the Judgment, insofar as the Defence experts' objectivity was just one factor taken into consideration by the Chamber and was not necessarily dispositive.[754] Nor does Ongwen show that the reasoning of the Judgment was inadequate. Consequently, his arguments must be dismissed.

199. First, Ongwen challenges only *some* of the evidence upon which the Chamber relied, but not all of it. In particular, Ongwen does not contradict the Chamber's conclusion that the Defence experts' own reports make recommendations for his treatment (which are not material to judicial proceedings), nor challenge the expert opinion of Prof. Weierstall-Pust that the Defence experts seemed to have lost their objectivity.[755] This unchallenged evidence corroborates and supports the Chamber's interpretation of the evidence as a whole. It also introduces doubt that any error would in fact materially affect the Chamber's conclusion even on the narrow question of the Defence experts' objectivity.

200. Second, while Ongwen contends that Dr. Akena's testimony "makes it very clear that the Defence Experts were *not* treating physicians", this depends on the semantic argument that "[a] treating physician provides treatments and medication to a client which means *actually being involved in the treatment*"—differentiated from merely "*recommend[ing]* treatment based on the professional evaluation", which Ongwen describes as a general professional responsibility of all psychiatrists.[756] For the Court's purposes, this is a distinction without a difference. Indeed, while Dr. Akena stated that his role only entailed making recommendations for Ongwen's treatment, he nonetheless also agreed that it was correct to characterise his role as a "treating physician" and as "his [Ongwen's] doctor".[757] In his own words, he conducted the clinical

[753] Appeal, para. 330 (emphasis added).
[754] *Contra* Appeal, para. 335 (suggesting this conclusion was a "key factor"). *But see above* para. 196.
[755] *See* Appeal, paras. 329-341.
[756] Appeal, para. 331 (emphasis added).
[757] T-249, 29:16-18, 29:24-30:2, 30:22-24. While the Defence suggests that "there is no evidence that [Dr. Akena] is in agreement with th[e] suggestion" that he was a treating physician, they overlook that he consistently answered

interview with Ongwen not only "for purposes of […] providing information to the Court but also, as [a] medical practitioner[], […] ethically obliged to be able to identify illness and make recommendations that would help to alleviate the suffering of individuals in whatever circumstances they are in."[758] While the Defence now suggests that Dr. Akena was under the impression that the Court would decide on Ongwen's treatment,[759] his own testimony reveals that Dr. Akena also considered it appropriate to intervene more directly with medical colleagues on Ongwen's behalf.[760] This was consistent with his initial preparation of a report "[REDACTED]".[761]

201. This evidence underlines the artificiality of the distinction upon which Ongwen seeks to rely. The Chamber's concern did not turn on the mechanics of who actually administered treatment, but rather the potential conflict if a doctor attempts to serve two potentially contradictory imperatives—both to serve the best interests of a patient and to provide an objective forensic assessment for a court. Dr. Akena's clinical recommendations speak as clearly to those conflicting duties as would any treatment he personally carried out.

202. Third, and relatedly, the Defence incorrectly suggests that the Chamber misinterpreted the Defence experts' acknowledgement of the "therapeutic alliance" with Ongwen that they had sought to establish by means of their initial report.[762] While Ongwen now suggests this alliance was merely a means to an end,[763] Dr. Akena himself distinguished between the alliance and the forensic assessment.[764] In any event, he was frank that his primary concern after his initial encounter with Ongwen was therapeutic: "we were able to tell that something needed urgent medical attention, and that's the reason we addressed [the initial report] that way."[765] The

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the Prosecution affirmatively: *contra* Appeal, para. 338. *See also e.g.* T-248, 37:10-14 (Dr. Akena volunteering that the clinical interview was conducted on the basis that information was recorded "*for his* [Ongwen's] *own good* or the good of the Court", emphasis added).

[758] T-248, 38:21-24.

[759] Appeal, para. 332 (quoting T-249, 31:6-12).

[760] *See e.g.* T-248, p. 38:3-5 (recalling that Dr. Akena's recommendations for treatment were not only reported to the Chamber but were "passed […] over to the relevant authorities with the hope that he [Ongwen] would get treated" and expressing his belief that Ongwen "received some care based on that").

[761] *See* UGA-D26-0015-0154 (Defence Experts' Initial Medical Report), p. 0154.

[762] *Contra* Appeal, para. 336.

[763] Appeal, para. 337 (suggesting that Dr. Akena testified that the purpose of the "therapeutic alliance" was "so that they would be able to gather more information at other times" from Ongwen).

[764] T-248, 87:19-21 ("that period, we used it mainly to establish therapeutic alliance with the client *and* to be able to gather much more information thereafter", emphasis added).

[765] T-248, 87:24-25. *See also above* fns. 746, 761.

Defence shows no error in the Chamber's inference that the Defence experts considered themselves to owe a duty of care to Ongwen, causing the loss of objectivity.[766]

203. Finally, Ongwen points to the fact that the Defence experts were "transparent to the Court in respect to how they got involved in the *Ongwen* case, and frankly disclosed their personal circumstances", which it considers to have "magnified" their "professional credibility and integrity".[767] Yet this is beside the point. The Chamber did not doubt the Defence experts' objectivity because of any lack of candour or professional integrity on their part—but, rather, due to their apparently divided loyalties concerning Ongwen.

VII.A.3.d. The Chamber did not err in concluding that the Defence experts did not use scientifically valid methods and tools

204. Ongwen alleges that the Chamber erred in concluding that the Defence experts did not use scientifically valid methods and tools, and asserts that that this was "not based on the evidence" but instead simply "repeats" the critique by Prof. Weierstall-Pust.[768] He seeks to explain Prof. Weierstall-Pust's criticism of the Defence experts' approach as "differences among experts, not grounds to invalidate methodology."[769] Ongwen further suggests that Dr. Akena and Prof. Ovuga were reasonable in relying on both the DSM-5 and DSM-IV,[770] and in deciding not to use psychometric tests given the absence of a specific test for malingering.[771] Yet these claims do not accurately represent the Chamber's reasoning or the evidence, nor do they show that the Chamber was unreasonable in its assessment.

205. The Chamber acknowledged that it was Prof. Weierstall-Pust—whose evidence it found to be "convincing" and "impressive"[772]—who "identified in his rebuttal report a number of issues where, in his opinion, Professor Ovuga and Dr Akena failed to apply scientifically validated methods and tools […] as a basis for a forensic report."[773] But, since Prof. Weierstall-Pust was qualified as an expert, it was just as entitled to give weight to his opinion as to the opinions of the Defence experts. Furthermore, the basis for his critique of the Defence experts'

[766] *Contra* Appeal, para. 339.
[767] Appeal, paras. 340-341.
[768] Appeal, para. 343. *See also* para. 353 ("the Chamber erred in failing to indicate how it reached its preference of [Prof. Weierstall-Pust's] position versus the Defence Experts' positions").
[769] Appeal, para. 344.
[770] Appeal, paras. 345-350.
[771] Appeal, paras. 351-353.
[772] *See above* para. 176.
[773] Judgment, para. 2532.

methodology was more wide-ranging than now acknowledged (or apparently even challenged) by Ongwen, including:

- The adequacy of relying on open-ended questions as a method to rule out malingering;[774]
- The decision not to use structured rating scales, even though they are recommended in scientific literature;[775]
- The exclusive reliance on the clinical interview with Ongwen, and the failure either to use the various assessment recommendations in scientific literature or multiple sources of information;[776]
- The lack of a clear distinction between data and inferences or opinions;[777]
- The use of diagnostic labels from the DSM-IV rather than the DSM-5, notwithstanding the Defence experts' apparent view that this might be easier to understand;[778]
- The view, as apparently expressed by Dr. Akena, that "the diagnosis of mental illness doesn't rely squarely on the core symptoms",[779] and;
- Defects in each of the diagnoses potentially advanced by the Defence experts,[780] including dissociative identity disorder,[781] dissociative amnesia,[782] major depressive disorder,[783] post-traumatic stress disorder,[784] and obsessive compulsive disorder.[785]

[774] Judgment, para. 2532.
[775] Judgment, para. 2532.
[776] Judgment, para. 2532.
[777] Judgment, para. 2532.
[778] Judgment, para. 2533.
[779] Judgment, para. 2534.
[780] Judgment, para. 2534. Like the other Prosecution experts (*see e.g. below* paras. 254, 294: concerning Dr. ABBO), Prof. Weierstall-Pust also argued that the Defence experts failed to show the necessary link between the disorders they diagnosed and the alleged criminal conduct: UGA-OTP-0287-0072 (Prof. Weierstall-Pust's rebuttal report), p. 0075. *See also* pp. 0076 (observing that the Defence experts' "REDACTED"), 0097-0098 (noting that the Defence experts "REDACTED", do not "REDACTED", and "REDACTED" including but not limited to "REDACTED", "REDACTED", and "REDACTED", and concluding that the Defence experts' report is "REDACTED").
[781] UGA-OTP-0287-0072 (Prof. Weierstall-Pust's rebuttal report), pp. 0084-0085 (noting that symptoms were "REDACTED", differential diagnoses were "REDACTED", diagnostic specificities were "REDACTED", and that at times Prof. Ovuga "REDACTED").
[782] UGA-OTP-0287-0072 (Prof. Weierstall-Pust's rebuttal report), pp. 0088-0089 (noting that "REDACTED" was not justified, and that "REDACTED").
[783] UGA-OTP-0287-0072 (Prof. Weierstall-Pust's rebuttal report), p. 0092 (noting that the Defence experts "REDACTED", "REDACTED", and did not provide "REDACTED").
[784] UGA-OTP-0287-0072 (Prof. Weierstall-Pust's rebuttal report), p. 0093 (noting that "REDACTED", and the Defence experts did "REDACTED", and established "REDACTED").
[785] UGA-OTP-0287-0072 (Prof. Weierstall-Pust's rebuttal report), pp. 0095-0096 (diagnosis of the disorder and/or its symptoms was "REDACTED", which is "REDACTED" in light of Prof. Ovuga's own previous writings and testimony).

206. On this basis, the Chamber reasonably identified "major doubts" as to the validity of the Defence experts' methods, including the Defence experts' "heavy reliance on the clinical interview, disregarding the evidence from the trial" and the "scepticism expressed by Professor Ovuga and Dr Akena towards other methods, which Professor Weierstall-Pust sufficiently demonstrated to be standard."[786] Ongwen shows no error in this approach. Not only does it fail even to address *all* the concerns identified by Prof. Weierstall-Pust and the Chamber—undermining the possibility that any could materially affect the Chamber's conclusion—but its attempts to justify the methodology of the Defence experts are self-serving and unconvincing, and do not accurately reflect the evidence in question.

VII.A.3.d.i. The Chamber reasonably concluded that the defects identified by Prof. Weierstall-Pust were not reasonable professional differences

207. Ongwen merely repeats his unsuccessful trial submissions to claim that the differences in approach between Prof. Weierstall-Pust and the Defence experts—particularly with regard to the value of the clinical interview, and the use of psychometric testing—were reasonable "differences among experts".[787] Yet quite apart from the impermissibility of justifying appellate arguments by unelaborated reference to trial arguments,[788] the Defence Closing Brief did not squarely address this point. It raised concerns about the degree to which the Prosecution experts acknowledged the potential shortcomings to their analysis because they could not conduct a clinical interview.[789] It said nothing about the degree to which the critiques expressed by Prof. Weierstall-Pust did or did not reflect reasonable differences in professional approach.

208. Nor does Ongwen address the evidence elicited from Prof. Weierstall-Pust that shows he is qualified to express an opinion on what constitutes reasonable professionalism.[790] He evaluated the Defence experts' report by comparing their approach to "general principles", "standardized criteria", "common accepted guidelines that have been made by professionals and […] discussed on an international basis", and "the scientific literature and the professional literature on forensic assessments."[791] It was on this basis that he concluded the Defence

[786] Judgment, para. 2535.
[787] Appeal, paras. 343-344 (referring generally to Defence Closing Brief, paras. 651-660).
[788] *See above* paras. 7-8.
[789] Defence Closing Brief, paras. 654-657. On this point, *see further above* para. 170.
[790] T-253, 8:5-18 (noting that Prof. Weierstall-Pust has previously been called upon to evaluate the work of other mental health experts for the purpose of Court proceedings, as well as conducted peer review for various professional journals). For Prof. Weierstall-Pust's own qualifications *see e.g.* UGA-OTP-0280-0674 (Prof. Weierstall-Pust's first report), p. 0677.
[791] T-253, 14:2-18, 17:20-22. *See also* 31:7-8 ("the methodological assessment and scientific basis of the report"), 74:16-76:13

experts' report did not "match[]the quality criteria that we would expect"[792] and did not live up to "the professional duties that should have been taken"[793]—even taking account of the differences in practice in different parts of the world and different cultures.[794] He also noted some apparent inconsistencies even in the testimony of Professor Ovuga and Dr. Akena about what should have been done.[795] In this light, Ongwen shows nothing unreasonable in the Chamber's reliance on Prof. Weierstall-Pust's evidence, among other considerations, to evaluate the Defence experts' approach.

VII.A.3.d.ii. The Chamber reasonably considered the Defence experts' use of DSM-IV raised concern

209. Ongwen contends that the Chamber misrepresented the Defence experts' approach in referring to an outdated edition of the DSM, because they presented the summary of diagnoses using DSM-IV to "ease understanding", and also used the concept of "multi-axial diagnoses" from DSM-IV, but that "the diagnostic criteria are still defined by the DSM-5."[796] Yet the Judgment itself addresses this first point, concluding that "the explanation provided in the [Defence experts'] Second Report for the use of DSM-IV rather than DSM-5 is entirely unconvincing as it is illogical to use an outdated system merely on the ground that it may arguably be easier to understand"—not least since, "[a]s experts, Professor Ovuga and Dr Akena had the opportunity, and the role, to provide all necessary explanation."[797] Ongwen shows no error in this reasoning, to which he does not even refer.

210. Furthermore, as Prof. Weierstall-Pust observed, "[REDACTED]" used by the Defence experts is also "[REDACTED]", since "[REDACTED]" and, in any event, "[REDACTED]"[798] Echoing the approach of the Chamber, the fact that a practitioner may prefer some aspects of an outdated approach does not justify them in rejecting more recent advances. While Ongwen opines—again, without reference to any evidence—that "a format for organising and communicating information" is not "the same as diagnostic criteria for a disorder",[799] this overlooks that the role of a forensic mental health expert is in large part defined by the organisation and communication of technical information in a way that it can be scientifically

[792] T-253, 14:24. *See also* 28:21-23 (clarifying the inadvertent double negative in his testimony).
[793] T-253, 30:11-17.
[794] T-253, 61:7-22.
[795] *See e.g.* T-253, 66:18-67:24.
[796] Appeal, paras. 345-350. *But compare* para. 433 (noting that the DSM-5 is "regarded by professionals in the field as a key volume which sets the standards and criteria for practitioners").
[797] Judgment, para. 2535.
[798] UGA-OTP-0287-0072 (Prof. Weierstall-Pust's rebuttal report), p. 0078.
[799] Appeal, para. 350.

and forensically validated. The concerns identified by Prof. Weierstall-Pust, which Ongwen seems to regard as mere nit-picking, go to the heart of the reliability of an expert opinion in this field—especially when the conclusions in that opinion are not consistent with the trial evidence on the record.

VII.A.3.d.iii. The Chamber reasonably concluded that the Defence experts did not address the question of malingering adequately

211. Ongwen argues that the Chamber erred by giving weight to Prof. Weierstall-Pust's concern that the Defence experts did not take all the options open to them in addressing the possibility of malingering, based on the view of the Defence experts that "there was no test for malingering" and the absence (in their view) of any "clinical features and indications for malingering".[800] Yet this assertion merely amplifies the original basis for Prof. Weierstall-Pust's concern—who had stated that "[REDACTED]" to address the possibility of [REDACTED], "[REDACTED]."[801]

212. It is notable that the Defence experts' rationale for not using a diagnostic test such as the "SCID"—which, Prof. Weierstall-Pust noted, is "particularly meant to assess dissociation in individuals affected from dissociative disorder" and "includes a paragraph on malingering, for example"[802]—seems merely to be their view that such tests should not be used unless a screening test has first been used,[803] and that screening tests may not be necessary if a clinical interview has been conducted.[804] Even on its own terms, therefore, the Defence experts' view appears to be illogical, and premised on the *a priori* assumption that a clinical interview is the only useful tool in assessing mental health. This raises the concern that, in light of the Defence experts' view that there was no malingering, they did not think it necessary to apply other methods to validate or invalidate this view.[805] In such circumstances, and given the contrary opinion of Prof. Weierstall-Pust, the Chamber was entirely reasonable in treating the Defence experts' approach on this important question with caution.

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[800] Appeal, paras. 351-353.
[801] UGA-OTP-0287-0072 (Prof. Weierstall-Pust's rebuttal report), p. 0076. *See further* pp. 0081, 0087-0088.
[802] T-252, 10:20-25.
[803] UGA-D26-0015-1574 (Defence experts' rejoinder report), p. 1580 ("[REDACTED]").
[804] UGA-D26-0015-1574 (Defence experts' rejoinder report), pp. 1579 (omitting to state [REDACTED], but only referring to "[REDACTED]"), 1580 (describing "[REDACTED]", apparently without [REDACTED], and continuing to observe that "[REDACTED]", and that "[REDACTED]").
[805] *See also* UGA-D26-0015-1574 (Defence experts' rejoinder report), p. 1575 (suggesting that the "[REDACTED]" of [REDACTED] "[REDACTED]").

VII.A.3.e. The Chamber did not err in finding inconsistencies in the evidence of the Defence experts

213. Ongwen claims that the Chamber erred in considering the Defence experts' assessment of his mental health to be incoherent or inconsistent,[806] specifically with regard to: his mood,[807] alleged suicidal tendencies,[808] functioning,[809] memory,[810] presentation in clinical interviews,[811] and the absence of alleged 'indicia of discontinuity' in his personality.[812]

214. The gravamen of the Chamber's concern about the reliability of the Defence experts' evidence—as it stressed—was not that contradictory information came to light, but the manner and degree to which the Defence experts *acknowledged or explained* those contradictions (if at all).[813] Ongwen contests this, and claims that the Chamber "totally rejected" the explanations that were given, ignoring alternative reasonable inferences.[814] But as the following subsections show, this does not accurately represent the Chamber's reasoning or the evidence, nor show that the Chamber was unreasonable in its assessment of that evidence, for any of the specific issues identified.

215. As a preliminary matter, Ongwen also complains that Prof. Weierstall-Pust should not have used the term "sloppy" to describe the approach of the Defence experts.[815] Yet this is not related to any claim of error, and should be dismissed without further consideration—indeed, the term "sloppy" itself does not appear in the Judgment at any point.[816] In cross-examination, Prof. Weierstall-Pust fully explained what he meant in his rebuttal report with regard to his concern about the Defence experts' approach to the clinical ratings taken by the ICCDC staff,[817] and justified why—in his view—it was appropriate to express greater concern about the

[806] Appeal, para. 354.
[807] Appeal, paras. 355-357.
[808] Appeal, paras. 358-361. The Prosecution notes that the remaining four Defence claims (*see below* fns. 809-812) are all addressed in the Appeal under a subheading concerning Ongwen's alleged suicidal tendencies, but their relevance in that respect is not made clear.
[809] Appeal, paras. 361-363.
[810] Appeal, paras. 364-365.
[811] Appeal, paras. 366-367.
[812] Appeal, para. 368.
[813] *See* Judgment, para. 2544 ("The Chamber appreciates that mental health assessments may ordinarily have to process contradictory information, and that the presence of contradictory information as such does not invalidate any conclusions. However, in the present case, the identified contradictions are major and readily apparent. Yet, they are not sufficiently, or at all, acknowledged and explained by Professor Ovuga and Dr Akena"). *See also* para. 2543 (not apparently challenged by the Defence).
[814] Appeal, paras. 369-370.
[815] Appeal, para. 372.
[816] *Contra* Appeal, para. 371 ("the Chamber never points out what is sloppy").
[817] *Cf.* Appeal, para. 372. *See* T-253, 81:6-88:13, *especially* 85:1-86:16.

shortcomings of the Defence experts' report than that of the Court expert Prof. De Jong.[818] An appellant cannot succeed on appeal by simply revisiting every facet of evidence with which he may disagree.

VII.A.3.e.i. Apparent inconsistencies in the reporting of Ongwen's mood

216. Among the other internal contradictions noted by the Chamber,[819] the Defence experts' report described Ongwen as "'report[ing] persistent sadness to an extent that he says he forgot to be happy or smile for many years'" yet in various clinical interactions his mood was assessed as "happy" or "subdued […] alternating with happiness, excitement and sense of satisfaction". Likewise, the Chamber noted the Defence experts' view that Ongwen suffered "'severe distress and psychosocial impairment to the extent that his depressed mood and split personality interfered with his ability to follow court proceedings and appreciate the significance of the trial'", yet they also described him on occasion as being "well informed" and "positive" about their meetings with him.[820] While Prof. Ovuga expressed the view—but only in rejoinder to the critique of Prof. Weierstall-Pust—that Ongwen was merely "masking" his symptoms when he appeared to be happy, the Chamber doubted this explanation because the possibility was not "specifically explained in the original report".[821]

217. Ongwen claims that the Chamber erred in this conclusion, because the Defence experts had noted even in their first report that his cheerful presentation "is deceptive and covers up the intense emotional turmoil he experiences almost every day."[822] Ongwen seems to equate this with the concept of "masking" which he describes as "a form of covering something up, and [which] deceives the observer".[823] Another concept introduced very late in the trial was "reaction formation"[824]—which Ongwen describes as the situation "when a person visibly shows the opposite emotion that s/he may be feeling inside".[825] Yet the Judgment reasonably rejected these theories as "impossible in practice and purely theoretical".[826] This was consistent

[818] *Cf.* Appeal, para. 372. *See* T-253, 31:10-32:20 (opining that, while neither the report of the Defence experts nor the report of the Court expert was "sufficient" to give "clear evidence" or "really assess[] the mental health status […] in the charged period", "in comparison between the two reports and in comparison to what [sic] fundamental shortcomings and contradictions […] can be found in the report of […] Professor Ovuga and Dr Akena, I think it's rather outstanding").
[819] *See also* Judgment, para. 2536 (noting that Prof. Weierstall-Pust also identified apparently incoherent or inconsistent aspects of the Defence experts' evidence).
[820] Judgment, para. 2537.
[821] Judgment, para. 2537.
[822] Appeal, para. 356 (quoting UGA-D26-0015-0004 (Defence experts' first report), p. 0013).
[823] Appeal, para. 356.
[824] *See* UGA-D26-0015-1574 (Defence experts' rejoinder report), p. 1578; T-254, 13:15-14:8; T-255, 4:16-24.
[825] Appeal, para. 357.
[826] Judgment, para. 2556. *See also below* para. 232.

with the expert evidence of Prof. Mezey,[827] Dr. Abbo,[828] Prof. Weierstall-Pust,[829] and even Defence expert Dr. Akena—who conceded that it was rarely possible to "mask symptoms of psychological distress […] for long".[830] Ongwen shows no error in the Chamber's conclusion.

218. Accordingly, Ongwen also fails to show that the Chamber was unreasonable in its caution with regard to the Defence experts' *ex post facto* explanation of this issue. The fact that the experts did not immediately identify and resolve the apparent inconsistency in their first report was relevant in considering their reliability. Even if there were a potential clinical explanation for the anomaly, which it was not necessary to resolve, the Chamber was still entitled to give weight to the concern introduced by the Defence experts' attitude in this important respect. This concern echoed and formed part of a wider pattern of concerns about the reliability of the Defence experts' assessment. Moreover, for this latter reason, even if the Chamber had erred in identifying an apparent inconsistency in the Defence experts' assessment concerning Ongwen's mood, this was not sufficient alone to disturb its conclusion that there were inconsistencies in their assessment more generally, much less to disturb its conclusion (based on multiple factors) that the Defence experts' assessment was unreliable.

VII.A.3.e.ii. Apparent contradictions in the claim that Ongwen had suicidal tendencies

219. The Chamber was "entirely unpersuaded" by the Defence experts' "contradictory" claim that, on the one hand, Ongwen was subject to suicidal tendencies and had made eight "attempts with the intention to die", but that, "at the same time, many of […] Ongwen's actions were motivated by survival instinct." Significantly, the Chamber did not exclude the possibility of this combination of motivations "in principle", but rather explained that "the contradiction lies

[827] T-163, 44:13-25 ("it is very difficult for people to either mask their symptoms because […] in severe mental illness you do not have control over your thought processes and behaviours and feelings. You often don't have insight into the fact that you have a problem with your feelings and behaviours and so you therefore don't feel the need to control them"), 46:8-17 (noting an absence of literature on masking post-traumatic stress disorder symptoms, and noting that there is "not much evidence on individuals being able to mask symptoms of severe mental illness of any kind, particularly psychotic illnesses […]—probably because the individual themselves does not have insight into the fact that they are mentally ill and also because they simply do not have that agency and ability to control their symptoms").
[828] T-167, 67:7-68:7 (Dr. Abbo opining that symptoms of depression might be "masked" in a colloquial sense, and this may be "culturally associated"—but not, in her view, with people from northern or eastern Uganda—but can usually still be identified), 68:12-25 (opining that "much of what Mr. Ongwen expresses are true feelings"). *See further* Judgment, para. 2557.
[829] UGA-OTP-0287-0072 (Prof. Weierstall-Pust's rebuttal report), p. 0091 (noting a phenomenon known "[REDACTED]", but explaining this is not "[REDACTED]", but rather a specific clinical term to describe a situation in which symptoms of depression present as "[REDACTED]" (*i.e.*, [REDACTED]) symptoms). *See also* T-252, 20:22-21:14.
[830] T-248, 110:18-22 (continuing "over time it becomes apparent that something is amiss"). *See also* Judgment, para. 2555.

in the fact that in [the] expert evidence of Professor Ovuga and Dr Akena they are put forward as the reason for essentially the same type of acts." Specifically, the Defence experts asserted that Ongwen went into battle with the intention of being killed, while also opining that obsessive-compulsive disorder would also lead Ongwen to act in (what he regarded as) his own defence. In the Chamber's view, the Defence experts never explored with Ongwen which of these motivations applied on any concrete occasion.[831]

220. Ongwen criticises this reasoning, but fails to engage with its substance.[832] He merely repeats that the Defence experts' evidence "demonstrates that there is no contradiction between suicidal tendencies or ideation and the urge, motivated by obsessive compulsive disorder, to go into battle."[833] But this does not address the fundamental point, which is the failure to address the apparent combination of motivations *with specificity*. As the Chamber reasonably considered, it was not enough that the Defence experts considered the combination to be medically possible (in the abstract); the factor undermining their reliability was the failure to inquire into Ongwen's actual motivations in specific circumstances.

221. Likewise, while Ongwen expresses his incredulity that Prof. Weierstall-Pust considered it was "[REDACTED]"—"[REDACTED]"—for an individual to survive eight "[REDACTED]" suicide attempts, this is also beside the point.[834] Ongwen neither shows how this evidence had any impact on the Judgment, nor indeed shows any reason why Prof. Weierstall-Pust's expert opinion was unreliable or contrary to common sense.

VII.A.3.e.iii. Apparent contradictions in the extent to which a mental disorder is compatible with careful planning and 'cognitive ability'

222. The Chamber noted that Prof. Ovuga's evidence was "contradictory" on the question whether the presence of a mental disorder would or would not "militate against careful planning".[835] Specifically, for example, Prof. Ovuga agreed that "careful planning" is a factor which makes it unlikely that a crime is committed "by a person whose capacity to understand what he's doing has been destroyed by mental illness".[836] Yet a few minutes later he testified to the opposite effect that "[t]he presence of a mental disorder does not necessarily militate

[831] Judgment, para. 2538.
[832] *See* Appeal, para. 358.
[833] Appeal, para. 359.
[834] *Contra* Appeal, paras. 360-361 (quoting UGA-OTP-0280-0674 (Prof. Weierstall-Pust's first report), p. 0691.
[835] Judgment, para. 2539.
[836] T-251, 73:1-5 ("Mm-hmm, you are right"). *But see also* 73:19-21 ("The presence of a mental disorder does not necessarily negate the ability of someone to *execute activities or functions that are given to him or her*", emphasis added).

against careful planning".[837] Likewise, the Chamber found that Prof. Ovuga's evidence was contradictory with regard to Ongwen's cognitive abilities. On the one hand, he characterised Ongwen's "psychological and cognitive development" as "arrested […] at about between 8 and 10 years"[838]—but, on the other hand, he agreed that Ongwen exhibited "cognitive ability".[839] The Chamber recognised that Prof. Ovuga had speculated that Ongwen might exhibit such abilities in some situations but not in others,[840] but considered that this "wholly unsubstantiated claim" did not "solve the contradiction."[841]

223. Ongwen misrepresents the Judgment when he claims that "the Chamber rejects the Defence Experts' evidence that mental illnesses are not incompatible with functionality".[842] The Chamber made no determination at all on this substantive question, nor did the relevant passage of the Judgment even address the (very general) concept of "functionality" at all. Rather, in the particular context of Prof. Ovuga's testimony on Ongwen's ability to "plan" and his "cognitive ability", the Chamber reasonably considered that Prof. Ovuga's own inconsistent statements were relevant in determining the reliability of his evidence—no matter which statement was right and which was wrong. Ongwen shows no error in this respect. His desire merely to re-litigate the evidence—as opposed to analysing any errors in the Judgment—is emphasised again by his blanket adoption of his trial submissions.[843]

VII.A.3.e.iv. Apparent contradiction between the diagnosis of dissociative identity disorder and the initial clinical observation that Ongwen had no amnesia

224. The Chamber identified another contradiction between the Defence experts' initial observation that "Ongwen had good long term memory and '[…] *no amnesia* of the events […] in the LRA'" and the diagnosis of dissociative identity disorder—which includes as a symptom "amnesia in the form of 'gaps in the recall of everyday events, important personal information

[837] T-251, 76:1-2.
[838] T-255, 7:17-23.
[839] T-255, 14:12-17.
[840] T-255, 14:18-15:15.
[841] Judgment, para. 2539 (citing Defence Closing Brief, para. 643, which in turn cites T-255, 14-15).
[842] *Contra* Appeal, para. 362.
[843] *See* Appeal, paras. 362-363 (citing Defence Closing Brief, paras. 637-644). This is impermissible: *see further above* paras. 7-8. The Defence also refers to the opinion of Prof. Wessells concerning "resilience" in the context of "mental illness and functionality"—but Prof. Wessells offered expert evidence "on the psychological, social, developmental and behavioural consequences of enlistment, conscription and use of children under the age of 15 to participate actively in hostilities", consistent with his position as a "professor of clinical population and family health": Judgment, para. 601. *See also below* para. 268. Prof. Wessells was not qualified for the purpose of this trial as an expert in mental illness, as such.

and/or traumatic events that are inconsistent with ordinary forgetting'."[844] This also directly contradicts the Defence experts' further diagnosis of dissociative amnesia.

225. Ongwen seeks to explain this contradiction by pointing to the second report of the Defence experts—prepared some 18 months later—where they described "[REDACTED]" and "[REDACTED]" corresponding to certain specified times.[845] But this fails to show that "the Chamber's contradiction is not based on the evidence."[846] To the contrary, Ongwen merely underlines the inconsistency between the initial clinical observations of the Defence experts in 2016 (when they found [REDACTED]) and their subsequent observations in 2018 (when they found [REDACTED]). The Chamber was thus perfectly entitled to note that the ultimate diagnosis was inconsistent with the Defence experts' initial observation, and to take this into account in assessing their reliability. Ongwen shows no error in this regard.

VII.A.3.e.v. Apparent inconsistency between the clinical picture of a person suffering from a severe mental disorder and Ongwen's presentation to the Defence experts

226. Without comment, the Chamber noted Prof. Weierstall-Pust's view that the "clinical picture of a person suffering from a severe mental disorder" was contradicted by the Defence experts' statement that "Ongwen appeared for the clinical interview 'dressed smartly', 'in a happy mood', and was able to follow the interview for three hours".[847]

227. Ongwen considers it to be "incomprehensible" and beyond "the parameters of evidentiary value" for the Chamber to "give credibility to an observation based on a) outward appearances; and b) the notion that one who is severely mentally ill 'looks' a certain way".[848] Yet this overlooks that the Judgment merely noted this opinion from one of the experts qualified to participate in these proceedings, and neither expressly endorsed it nor assigned any weight to it. In any event, Ongwen's criticism is exaggerated and misplaced—by definition, mental health professionals frequently take outward appearances into account, where relevant and among other evidence, since there are few means of directly ascertaining the way in which another person thinks. All experts in this case considered the manner in which Ongwen presented

[844] Judgment, para. 2540 (emphasis added, citing UGA-D26-0015-0154 (Defence Experts' Initial Medical Report), p. 0155 ("[REDACTED]"); UGA-OTP-0287-0032, p. 0033; UGA-OTP-0280-0786 (Prof. Mezey's Report), p. 0802; UGA-OTP-0287-0072 (Prof. Weierstall-Pust's rebuttal report), p. 0083).
[845] Appeal, para. 365 (citing UGA-D26-0015-0948 (Defence Experts' Second Report), p. 0971).
[846] *Contra* Appeal, para. 365.
[847] Judgment, para. 2541 (citing UGA-OTP-0287-0072 (Prof. Weierstall-Pust's rebuttal report), p. 0081).
[848] Appeal, para. 367.

himself, and drew varying conclusions in this respect. No error can arise from the Chamber's passing reference to evidence of this kind.

VII.A.3.e.vi. Apparent inconsistency between the diagnosis of dissociative identity disorder and the absence of indicia of discontinuity

228. The Chamber noted that Prof. Ovuga had testified that lay persons around Ongwen might not have observed any sign of dissociative identity disorder because of Ongwen's ability to "cope" and therefore disguise one of his alleged two identities.[849] Yet this is inconsistent with the diagnostic characteristics of this disorder, which involves "'[…] a *marked* discontinuity in sense of self and sense of agency, accompanied by related alterations in affect, behaviour, consciousness, memory, perception, cognition, and/or sensory-motor functioning".[850] As Prof. Weierstall-Pust observed, since "[REDACTED]", it would be "[REDACTED]" that Ongwen could "[REDACTED]" from the persons around him if he were subject to severe dissociative experiences.[851] The Chamber did not consider that any of the evidence obtained during the trial was consistent with indicia of discontinuity of this kind.[852]

229. Ongwen baldly asserts that the Chamber erred in identifying this inconsistency, because "the Defence Experts present significant evidence of two Dominics – A and B".[853] Yet it is insufficient simply to claim without further elaboration that the Chamber should have preferred one piece of evidence to another; Ongwen does not even attempt to show that the Chamber's approach was unreasonable, or that it materially affected the decision. Nor can he do so. As discussed elsewhere in this response, the claim that Ongwen could have suffered from a severe mental disorder such as dissociative identity disorder without anyone around him observing some of the consequent effects on his behaviour was not reasonable.[854]

VII.A.3.f. The Chamber did not err in finding that the Defence experts failed to take sufficient account of other available sources

230. Ongwen claims that the Judgment contains "factual misrepresentations" concerning the extent to which the Defence experts "interviewed collateral sources" and "met with professionals treating [Ongwen] and reviewed their notes".[855] He also claims that the Chamber

[849] Judgment, para. 2542 (citing T-251, 30:3-31:8).
[850] Judgment, para. 2542 (emphasis added).
[851] UGA-OTP-0287-0072 (Prof. Weierstall-Pust's rebuttal report), pp. 0084-0085.
[852] Judgment, para. 2542. *See also above* paras. 178-181.
[853] Appeal, para. 368.
[854] *See above* para. 217; *below* paras. 241-241.
[855] Appeal, para. 373. *See further* paras. 374-380.

erred in concluding that the Defence experts accepted that lay persons who interacted with Ongwen at the times material to the charges would have noted symptoms of mental disorder.[856] However, as the following subsections show, Ongwen does not accurately represent the Chamber's reasoning or the evidence for any of the specific issues identified, nor show that the Chamber was unreasonable in its assessment.

231. The Chamber found that the Defence experts "failed to take into account other sources of information about […] Ongwen which were readily available to them", and considered this to be "an unjustifiable and fundamental failure that in itself invalidates the[ir] conclusions".[857] It stressed that a clinical interview, "while being important, does not make any further additional information superfluous",[858] and noted that Prof. Ovuga "accepted that it is important to corroborate the account given by the accused person, and that one of the ways to do so is by accounts of people who were close to them at the time of the alleged crime."[859] The Chamber identified several specific failings in this respect.

- First, the Chamber dismissed as "entirely unconvincing" Dr. Akena's claim that the Defence experts had sought corroboration of Ongwen's narrative to the best of their ability—in particular, the Defence experts did not seek to verify Ongwen's claims that he had attempted suicide on eight occasions, experienced two different personalities, or concerning certain words allegedly said to Prof. Mezey in the courtroom.[860]
- Second, the Chamber considered that it was "not justifiable" that the Defence experts failed to engage in a detailed discussion of the clinical notes of the ICCDC psychiatrist, and found that Dr. Akena's attempt to explain this away was "unpersuasive".[861]
- Third, despite interviewing four of Ongwen's "close associates" before producing their first report—and thus illustrating that they accepted the principle "that persons who interacted with […] Ongwen could provide relevant collateral information"—the Defence experts "did not consider, or seek to consider, […] the evidence obtained during the trial", even

[856] Appeal, para. 381. *See further* paras. 382-392.
[857] Judgment, para. 2545. *See also* para. 2548 (also describing "the failure of Professor Ovuga and Dr Akena to consider the corroborating material" as "striking").
[858] Judgment, para. 2547 (further noting the view of Prof. Weierstall-Pust concerning the importance of "collateral information", disputing the notion that reviewing such information was not feasible, and opining that this information in fact reveals a "vast amount of inconsistencies" which the Defence experts should have addressed). *See also* para. 2554 (noting that these "methodological shortcomings" are "an issue affecting the reliability of [the Defence experts'] evidence in and of itself").
[859] Judgment, para. 2548 (citing T-251, 3:18-4:5).
[860] Judgment, para. 2549.
[861] Judgment, para. 2550.

though the Chamber considered this to be "crucial" in determining Ongwen's mental health at the times material to the charges.[862]

232. Quite apart from the negative implications of these failures in themselves for the reliability of the Defence experts' evidence, the Chamber further recalled that the un-addressed evidence was itself reliable and probative, and "overwhelmingly establish[ed] a picture incompatible" with their substantive conclusions.[863] This too was put to the Defence experts, who sought to claim that Ongwen might have "masked" or hidden symptoms of mental disorder from all those with whom he interacted at all the times material to the charges.[864] Yet in the Chamber's view—and based on the evidence not only of the Prosecution experts, but also the Defence experts themselves—this was "impossible in practice and purely theoretical".[865]

VII.A.3.f.i. The Defence experts did not take sufficient account of the available collateral sources relevant to their assessment

233. Rather than addressing the adequacy of the Judgment, this sub-ground of appeal merely repeats unsuccessful Defence submissions from trial.[866] For example, Ongwen recalls that his experts interviewed four collateral sources for the purpose of their first report,[867] and suggests that these sources provided "significant" corroborative information.[868] The impression that Ongwen is merely recycling previous trial arguments is further confirmed by his decision to recite again the evidence of one witness concerning the environment in the LRA[869]— testimony which was not only cited in the Defence Closing Brief (and seemingly in the Defence experts' report), but was also specifically noted in the Judgment.[870] It shows no error.

234. Ongwen seeks to justify this approach—and to ignore the reasonable concerns of the Chamber—by declaring that only the *content* of the "corroborative" evidence cited by its experts is important.[871] This sweeping argument fails in two key respects. Nor does anything in

[862] Judgment, para. 2551. *See also* para. 2553 (concerning the four "collateral interviews" which the Defence experts did undertake, but which the Chamber considered to be "questionable" in their corroborative character). The Chamber also considered Prof. Ovuga's attempt to justify the Defence experts' failure to address the trial evidence to be "entirely unpersuasive": para. 2552.
[863] Judgment, para. 2554. *See e.g. above* para. 181.
[864] Judgment, para. 2555.
[865] Judgment, para. 2556. *See further* para. 2557. *See also above* para. 217.
[866] *See e.g.* Appeal, para. 378 (citing Defence Closing Brief, paras. 618-621).
[867] Appeal, para. 377.
[868] Appeal, para. 378 (alleging that Ongwen's "personality as someone who liked to help his colleagues" and "observations" of his "suicidal behaviour", and Ongwen's "attempts to escape the LRA").
[869] Appeal, para. 379 (citing Defence Closing Brief, paras. 618-621).
[870] Judgment, para. 2553 (citing UGA-D26-0015-0004 (Defence experts' first report), p. 0012).
[871] Appeal, para. 380 ("the issue was not about the quantity of clinical notes reviewed, or the number of persons interviewed […]—it was about the findings and conclusions of the corroborative evidence").

the Judgment support Ongwen's repeated (and mistaken) assertion that the Chamber did not consider his abduction to be relevant to the issue of his mental health.[872]

235. First, this submission simply repeats the same misconception identified in the Judgment, and shows no error in the Chamber's reasoning. As the Chamber recalled, the fact that the Defence experts conducted four collateral interviews "is not determinative" because the Chamber's concern arose from the Defence experts' "failure to take into account *other sources* of information and evidence about […] Ongwen which were readily available to them."[873] In particular, as the Chamber found, the Defence experts did not take into account all the available sources of information concerning: Ongwen's narrative of eight attempts at suicide; his experience of two different personalities, or; certain words allegedly said to Prof. Mezey in the courtroom.[874] Accordingly, the conduct of the four interviews, regardless of their content, was beside the point: they were simply not sufficient to address the issues raised by the Defence experts' purported diagnosis of Ongwen's mental health condition—and indeed, by only taking into account a very limited part of the available evidence, might even have been inappropriately selective. The Defence shows nothing inaccurate or unreasonable in the Chamber's approach. Indeed, Prof. Ovuga had expressly allowed for the possibility that his conclusions "might have been substantially different" if he had access to other material.[875]

236. Second, and as the Chamber observed, even the evidence now re-emphasised by Ongwen did not actually corroborate the Defence experts' conclusions, but was rather contradictory in key respects. In particular, the Chamber noted that these interviews seemed to describe Ongwen as "diligent", "fearless", "kind", "likable", "a good administrator", and "not vicious".[876] This was more consistent with the evidence considered by the Chamber to militate *against* the likelihood that Ongwen suffered from a relevant mental disease or defect at the times material to the charges.[877] Accordingly, Ongwen not only fails to show any error in the Chamber's view that the Defence experts did not take sufficient account of the other sources available to them, but in fact underscores the reasonableness of this conclusion.

VII.A.3.f.ii. The Defence experts did not engage seriously with the clinical notes of mental health professionals treating Ongwen

[872] *Contra* Appeal, para. 380. *See below* paras. 265, 295.
[873] Judgment, para. 2553.
[874] Judgment, para. 2549.
[875] T-251, 10:10-12.
[876] Judgment, para. 2553.
[877] *See e.g. above* para. 181. *See also* Judgment, para. 2554.

237. Ongwen disputes the Chamber's characterisation that the Defence experts did not "engage seriously" with the clinical notes of ICCDC mental health professionals, and claims that they "reviewed the clinical notes which were given to them, and continued to try to obtain materials, but to no avail." He asserts that the Chamber should not have faulted the Defence experts "for their lack of 'detailed discussion' on the content of the clinical notes, when it was evident that access to the notes was not within their control."[878] Yet Ongwen shows nothing unreasonable in the Chamber's view that the Defence experts had not taken adequate steps to engage with the information contained in the ICCDC clinical notes.

238. It should be underscored that the focus of the Judgment's criticism of the Defence experts, in this respect, was their failure to engage in detail with other relevant professional opinion in written notes—and not the extent to which they did or did not meet in person with the mental health professionals in question. Nor can it be doubted that the Defence experts had access to the clinical notes to which the Chamber referred—their expert report states that in early November 2016 they met "[REDACTED]", and had "[REDACTED]."[879]

239. In the course of his testimony, Dr. Akena was questioned about discrepancies between the observations of Ongwen recorded in those clinical notes and the opinion expressed by the Defence experts in their report. For example, the clinical notes expressed the view that Ongwen's "perception is clear, there are no cognitive disorders"[880] and summarised Ongwen as "[s]table, no mental health condition; some symptoms of [post-traumatic stress disorder]."[881] Dr. Akena, in his testimony, acknowledged that such notes meant that it was "possible that the client had a mental illness here *or not*", given the varied approaches adopted in the drafting of such notes.[882] The Chamber noted this with concern, including the apparent "deviation" from what seemed to be the initial position of the Defence experts.[883]

240. In the face of such a contradiction, it was incumbent upon the Defence experts to seek to resolve the matter, at the very least by highlighting the matter in their report and explaining why in their view the apparent contradiction was not material—but they did no such thing. Nor did they take any serious steps to attempt to resolve this ambiguity with the mental health

[878] Appeal, para. 376.
[879] UGA-D26-0015-0004 (Defence experts' first report), p. 0005 (emphasis added). *See also* Appeal, para. 374; T-254, 36:6-37:6).
[880] T-249, 54:15-20.
[881] T-249, 56:22-57:4.
[882] T-249, 57:3-60:11, *especially* 58:9-10.
[883] Judgment, para. 2550. *See also* para. 2552.

professionals at the ICCDC—notwithstanding Prof. Ovuga's claim that their efforts were rebuffed,[884] Dr. Akena stated more precisely that they had told Defence counsel that "it would be good to know what exactly [Ongwen] is going through and what kind of treatment he is getting," but made no personal efforts of their own.[885] Significantly, the Defence did not seek the assistance of the Chamber in addressing any obstacle that their experts could not surmount themselves.

VII.A.3.f.iii. The Defence experts accepted that lay persons who interacted with Ongwen would have noted symptoms of mental disorder

241. The Defence seeks to justify the Defence experts' failure to address the various additional sources available to them—including the copious trial evidence from persons who interacted with Ongwen at the material times—by claiming that "there is reasonable doubt that lay people can observe symptoms of mental illness."[886] On this basis, they argue that the Chamber erred in declining to rely on the Defence experts' evidence.[887] However, the Defence fails to show that the Chamber was unreasonable in concluding that lay people interacting with Ongwen at the times material to the charges would necessarily have noticed indications that Ongwen was suffering from a mental disorder relevant to article 31(1)(a) of the Statute. Accordingly, it did not err in considering that the Defence experts could properly be expected to take account of such evidence (or the lack thereof).

242. First, Ongwen fails to acknowledge that the Chamber did not exclusively rely on the Defence experts to reach this conclusion, but also referred to Profs. Mezey[888] and Weierstall-Pust.[889] The Chamber noted that the Defence experts had also conceded that, even if "lay persons could not make a diagnosis, they would have noted at least some symptoms of the mental disorders in question",[890] which corroborated the expert opinion of Profs. Mezey and

[884] *See* Appeal, para. 375 (citing T-251, 17:1-22; T-254, 36:6-37:6).
[885] *See* T-249, 52:21-53:16.
[886] Appeal, para. 391. *See also* para. 381.
[887] Appeal, para. 392.
[888] Judgment, para. 2498 (quoting T-163, 86:23-25: Ongwen's comrades could be expected "to pick up" on the manifestations of serious mental illness—including hallucinations, delusions, loss of weight and appetite, and inability to function—"and to have noticed it and commented on it").
[889] Judgment, para. 2499 (quoting UGA-OTP-0287-0072 (Prof. Weierstall-Pust's rebuttal report), p. 0079: referring to the "recognizable manifestations in daily life" of mental disorder and stating that "[m]any of the relevant symptoms are objectively observable and in fact frequently noticed by family members and friends").
[890] Judgment, para. 2500 (citing T-249, 91:9-92:22 (Dr. Akena); T-251, 52:2-16 (Prof. Ovuga)). *See also* para. 2548 (noting that Prof. Ovuga "accepted that it is important to corroborate the account given by the accused person, and that one of the ways to do so is by accounts of people who were close to them at the time", citing T-251, 3:18-4:5).

Weierstall-Pust—whose opinion the Chamber considered to be reliable in and of itself.[891] It was on this basis that the Chamber concluded that it was not possible that Ongwen could have hidden from the persons around him the "large variety of complex symptoms" associated with the mental disorders suggested by the Defence experts.[892]

243. Second, Ongwen repeats a key misconception from trial, by confusing the ability of observers to *understand the cause* of unusual behaviour with their ability simply to recognise the behaviour itself. Thus, he suggests—wrongly—that the Chamber assumed that "a person would see symptoms and think 'mental disorder'",[893] whereas in its view the bystander would instead "interpret this as spirit possession and consider [Ongwen] to be acting normally."[894] Yet the Judgment took precisely the opposite approach. It stated that, "[c]ontrary to what is implied by the Defence, the Chamber is *not* looking in this evidence [from persons who interacted with Ongwen] for *diagnoses* of mental disease or defect" but merely for "whether any descriptions […] of the conduct of […] Ongwen correspond to *symptoms* of mental disorders."[895] In this regard, it concluded, "the possibility that witnesses may regard symptoms of mental disorders as spirit possession is immaterial, insofar as they would still describe certain symptoms, irrespective of the cause attributed to them."[896]

244. This logic is unassailable. Ongwen shows no error in the Chamber's reasoning merely by repeating his insistence that people who interacted with him at the times material to the charges might have supposed any abnormal behaviour to be caused by spirit possession or otherwise failed to recognise it as the symptom of a mental disorder.[897] This would not have prevented them from reporting any such behaviour when they were asked during their testimony. Nor is Ongwen assisted by pointing out that, if a mental health professional is attempting to *make a diagnosis*, symptoms which appear as possession need to be carefully scrutinised.[898] Again, this misses the point.

245. In any event, the Defence experts did not always try to minimise the relevance of evidence from those who interacted with Ongwen because of the issue of 'spirit possession', as now

[891] *See e.g. above* paras. 171, 176.
[892] Judgment, para. 2556. *See also* paras. 2555, 2557.
[893] Appeal, para. 386.
[894] Appeal, para. 383 (concluding that "the observer would not conceptualize or perceive what s/he sees as a symptom of mental illness").
[895] Judgment, para. 2501.
[896] Judgment, para. 2501. *See also* Appeal, para. 384.
[897] *Contra* Appeal, paras. 383, 388.
[898] *Contra* Appeal, paras. 385.

suggested.[899] While Prof. Ovuga may have been of this view in one part of his testimony,[900] earlier that day he had agreed that "accounts from people who were close" to a person suspected of mental disorder *can* be "[o]ne of the ways in which such a person's account of their symptoms can be corroborated."[901] He also agreed that "corroborative evidence becomes acutely important" if the patient's account of their symptoms is inconsistent.[902] Likewise, while Ongwen highlights Dr. Akena's comment that clinical judgment is necessary to make a diagnosis[903]—even though this is immaterial for lay people—he too concedes that bystanders would notice that there is "something amiss" with those suffering from mental disorder.[904]

VII.A.3.g. The Chamber did not err in considering that the Defence experts' approach to the question of malingering weighed against their reliability

246. Ongwen fails to show any error in the Chamber's view that the Defence experts failed to address the question of malingering sufficiently, and taking this into account in assessing the reliability of their evidence.[905] In suggesting that the evidence did not establish that he actually was malingering, Ongwen mistakes the context of the Chamber's analysis.[906] It was not necessary for the Chamber to make a positive finding that Ongwen *was* malingering, nor did the Chamber do so—nor indeed was such a finding made by necessary implication, since malingering is not the only alternative conclusion if Ongwen did not have a relevant mental disease or defect for the purpose of article 31(1)(a). Rather, it was the Defence experts' failure to engage seriously with malingering as a "possible explanation" which constituted "a major factor militating against reliance on their reports."[907] Simply put, it was the Defence experts' *dismissive approach* to a standard aspect of forensic assessment which weighed against the reliability of their evidence.

247. The Chamber recalled that malingering is "a known risk in mental health assessments" and in particular that "repeated contact with mental health experts can place a person in a

[899] *Contra* Appeal, paras. 382-383.
[900] Appeal, para. 382.
[901] T-251, 4:2-5.
[902] T-251, 6:18-7:8.
[903] Appeal, paras. 387-390. Again, to any extent Ongwen seeks to incorporate by reference arguments from its Closing Brief at trial, this is impermissible and should be summarily dismissed: *see above* paras. 7-8.
[904] T-248, 110:18-22; T-249, 92:13-22.
[905] *Contra* Appeal, para. 409. The 'reasonable doubt' standard did not apply to this assessment: *see above* paras. 157-158. Furthermore, to any extent the Defence seeks to incorporate by reference arguments from its Closing Brief at trial (*see* Appeal, para. 393), this is impermissible and should be summarily dismissed: *see above* paras. 7-8.
[906] *Cf.* Appeal, paras. 393-409.
[907] Judgment, para. 2568.

situation where they 'learn over a period of time what responses are likely to result in secondary gain for them and what responses are perhaps less desirable'."[908] In Prof. Weierstall-Pust's view, a "reputable" forensic assessment would always need to address this possibility as part of the general duty to explore the various options that might falsify the forensic expert's initial hypothesis.[909] The Defence experts purported to have addressed the question of malingering, but to have excluded the possibility because they considered it "unlikely"[910]—in particular because they did not see how Ongwen might gain from malingering, and because he expressed the wish to get better.[911] Yet the Chamber considered that this represented "a serious failure to grasp the problem appropriately", especially in light of the "obvious" benefit to Ongwen in excluding any potential criminal responsibility.[912] Nor did the Chamber consider that the methods actually used by the Defence experts to look for possible malingering—relying principally on their own experience and the conduct of a clinical interview—were adequate in the circumstances.[913]

248. Ongwen contends, first, that the Chamber was wrong to say that malingering is "generally agreed" to be a risk in mental health assessment because it did not cite any opinion by Dr. Abbo or Prof. De Jong in this regard.[914] This formalistic argument must be dismissed—there was nothing unreasonable or indeed incorrect in the Chamber's statement. Even Ongwen does not appear to suggest that the Chamber was actually wrong, but merely takes issue with its manner of expression. This is impermissible.

249. Next, Ongwen asserts that the necessary implication of the Judgment is that he "faked his illnesses for almost 26 years", which he rejects as "not believable",[915] in light of the absence of "evidence that [Ongwen] was exhibiting signs of mental distress or illness" while he was with the LRA.[916] The illogicality of this position makes it untenable. Since Ongwen had no reason to know he would be arrested and tried while he was in the LRA, he did not have any reason to malinger at that time. As Prof. Mezey stated in her evidence, the danger of malingering

[908] Judgment, para. 2559.
[909] Judgment, para. 2560.
[910] Judgment, para. 2561 (in particular, the Defence experts "explained that they did not ask leading questions, and were keen not to suggest any clues to […] Ongwen", and "also noted […] Ongwen's 'lack of insight and interest in the outcome of his trial and eventual death' [sic]"). *See further* paras. 2562-2565.
[911] Judgment, paras. 2562-2563.
[912] Judgment, paras. 2562-2563.
[913] Judgment, paras. 2564-2566.
[914] Appeal, para. 394. *See also* para. 395.
[915] Appeal, para. 396.
[916] Appeal, para. 397.

principally arises in the forensic context after a person has been arrested[917]—especially where diagnosing the existence of any mental disease or defect affecting their past conduct may depend to a great extent on self-reporting.[918] Ongwen stretches credulity when he suggests that the absence of evidence of symptoms of mental illness—from observers at the times material to the charges—militates *against* malingering a decade later. In fact, the opposite is true. The absence of contemporaneous evidence of symptoms of mental illness militates against *the actual existence of a relevant mental disorder at that time*.

250. As such, far from the Prosecution seeking to "have it both ways",[919] this would seem to be Ongwen's approach. His position appears to be that the Defence experts cannot be faulted in their approach to malingering because, if there were contemporaneous symptoms of mental disorder, this would uphold their hypothesis—and if there were no contemporaneous symptoms, this would establish that Ongwen was not malingering and again uphold their hypothesis. This cannot be correct.

251. Finally, Ongwen criticises the Chamber's view that the Defence experts' evidence was unreliable, in part because of their approach to malingering, because: they were the only ones who "spent many hours" interviewing Ongwen;[920] the alleged spread of expert opinion implies "reasonable doubt" whether Ongwen was malingering or not;[921] the evidentiary record does not support Ongwen's interest in excluding his criminal responsibility under article 31(1)(a);[922] and the Defence experts had their own interest in addressing malingering properly.[923] None of these objections shows any error in the Chamber's approach.

- While it is true that Ongwen did not permit the Prosecution experts to conduct a clinical interview, this was not the only evidence relevant to assessing his mental health at the times material to the charges.[924] Given the variety and nature of the evidence on the record, and for the reasons explained in the Judgment and otherwise addressed here, the Chamber was entitled to conclude that the Defence experts' assessment was unreliable. Ongwen's monopoly on granting clinical interviews cannot give him an effective veto on the forensic experts to be relied upon by the Chamber.

[917] *See* Judgment, para. 2559 (citing T-163, 60:10-24).
[918] *See also e.g.* Judgment, para. 2567 (noting the weight given by the Defence experts to "Ongwen's self-reporting of feelings and incidents which were then taken at face value and interpreted as symptoms of mental illnesses").
[919] *Contra* Appeal, para. 398.
[920] Appeal, para. 401.
[921] Appeal, para. 402. *See also* para. 408.
[922] Appeal, paras. 403-405.
[923] Appeal, paras. 406-407.
[924] *See above* paras. 170-184.

- Whether or not Ongwen actually was thought to be malingering was beside the point—instead, material to the Chamber's decision not to rely on the Defence experts were the clear and unexplained deficiencies in the Defence experts' approach, including on the question of malingering. The so-called spread of expert opinion on malingering was thus irrelevant—the Chamber was entitled to rely on the evidence it considered reliable, as well as its own deep forensic experience, to evaluate the reliability of the Defence experts' evidence.
- Since the Judgment did not need to determine whether Ongwen actually was malingering—but, rather, merely to conclude in light of all the evidence that it was not reasonably possible that Ongwen suffered from a relevant mental disease or defect at the material times—it is likewise irrelevant as to whether there was specific evidence of Ongwen's motive for malingering. Again, the Chamber was entitled to rely on the evidence it considered reliable, and its own experience, in considering whether the Defence experts had sufficiently addressed the matter.
- The Defence experts' interest in maintaining their professional reputation cannot, in itself, mean that their evidence must be treated as reliable. Otherwise, almost all expert evidence would have to be considered reliable. Furthermore, part of the Chamber's concern about the Defence experts' reliability stemmed from the nature of their professional obligation to Ongwen, as they saw it.[925] This may indeed reflect well upon their professional reputation, as they see it, yet still detract from the reliability of their assessment for the narrow forensic purposes of this Court.

VII.A.3.h. The Chamber did not err in concluding that the Defence experts' analysis was not anchored in the specific time and context in which Ongwen acted

252. The final factor taken into account by the Chamber in determining the unreliability of the Defence experts' evidence was the "very general" nature of their findings, which were "not clearly anchored on the relevant period and the […] specific factual contexts" relevant to the charges against Ongwen.[926] The Defence experts not only failed to address in their report the difficulty of ascertaining more than a decade later Ongwen's mental health at the times material

[925] *See e.g.* Judgment, para. 2563 (considering that the Defence experts' view of the question of malingering "confirms the concern of the Chamber, laid out above, that Professor Ovuga and Dr Akena, focusing on […] Ongwen getting better, did not have the necessary distance to consider the totality of the evidence, which they should have done as forensic experts"). *See also* paras. 2529-2531. *See above* paras. 194-203.
[926] Judgment, para. 2569.

to the charges (between 2002 and 2005),[927] but also failed to engage in substance with Ongwen about his recollections or impressions of the particular conduct relevant to the crimes charged against him.[928] This was a "striking" failure when it was "manifestly obvious and beyond discussion" that the task of a forensic mental health expert is to "explore specifically the mental status of the accused at the time of the acts in question".[929]

253. Ongwen asserts that these conclusions were "factually inaccurate", since the Defence experts' report shows that they were "well aware of the charged period" (because they referred to "dates within this period"), and that they "assessed [Ongwen] as a whole person to make their findings and conclusions."[930] This included the effect of his abduction, which they suggest was also relevant for the purpose of any assessment under article 31(1)(a). Ongwen suggests the Chamber erred in finding to the contrary.[931]

254. These criticisms are all misplaced, however. Merely referring to dates which fall within the period of time material to the charges does not mean that the Defence experts' assessment of Ongwen's mental health was conducted with the necessary specificity. Indeed, as the Chamber separately noted, Dr. Abbo specifically stated her view that the Defence experts had failed to link their diagnoses with the charged crimes, even if she accepted their diagnoses for the sake of argument.[932] Nor is Ongwen correct to assert that the Chamber considered his abduction to be irrelevant[933]—but even accepting the potential relevance of this trauma did not justify generalised opinions of resulting mental disorders which were not closely related to the times and acts relevant to the charges.

255. Ongwen also dismisses the Chamber's concern merely on the basis that the Defence experts' reports "are based on specific detailed information".[934] Yet this does not mean that the experts engaged with the *pertinent* information for the purpose of a forensic assessment. They were not required to elicit evidence which was inculpatory, but only to engage seriously with the way (if any) in which their view of Ongwen's mental health was concretely related to the charges in this case.[935] Nor did the Chamber require the Defence experts to enter into questions

[927] *See* Judgment, para. 2570.
[928] *See* Judgment, paras. 2571-2572.
[929] Judgment, para. 2573.
[930] Appeal, paras. 410-411.
[931] Appeal, paras. 412-413.
[932] *See* Judgment, paras. 2482-2483, 2485. *See also below* para. 294.
[933] *See above* para. 234; *below* paras. 265, 295.
[934] Appeal, para. 414.
[935] *Contra* Appeal, para.416.

of criminal responsibility—which were indeed exclusively its own preserve, as the Judgment makes clear.[936] Ongwen thus fails to show that the Chamber was unreasonable to conclude that the Defence experts' assessment did not meet these requirements, and taking this into account in assessing the reliability of their evidence.

VII.A.4. The Chamber correctly and reasonably assessed the Court expert's evidence (Grounds 19, 42)

256. The Defence asserts that the Chamber erred by failing to refer to the findings or conclusions of the Court expert, Prof. De Jong,[937] who had been appointed to diagnose any mental condition or disorder that Ongwen may have suffered on 16 December 2016 and thereafter, and to provide recommendations for treatment.[938]

257. As noted above, the Chamber concluded that it could "not rely on [Prof. De Jong's] report directly for its conclusions with respect to [its article 31(1)(a)] assessment" because the report "was prepared for a different purpose, having as its object of examination […] Ongwen's mental health at the time of the examination during the trial, and not at the time of his conduct relevant under the charges".[939] Ongwen argues that the Chamber should have recognised the relevance of this evidence,[940] and that consequently it failed to provide an adequately reasoned opinion.[941] In his view, "if the Chamber had considered" the report of Prof. De Jong, it would have "materially affected the Judgment" by leading to the conclusion that the Prosecution had not disproved "each and every element" of the affirmative defence under article 31(1)(a) beyond reasonable doubt.[942]

258. As noted, Ongwen is not assisted by reference to the *Perišić* case, which is dissimilar to these circumstances.[943] As far as Prof. De Jong is concerned, the Judgment is clear that his evidence was not overlooked but rather that the Chamber reached a reasoned conclusion that it was not relevant to the questions arising under article 31(1)(a). Consequently, there can be no doubt as to the adequacy of the reasoning in the Judgment—instead, Ongwen merely disagrees

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[936] *Contra* Appeal, para. 415. *See e.g.* Judgment, para. 2497 ("the Chamber, assisted by the experts, makes its own conclusions").
[937] Appeal, paras. 272, 275-276.
[938] *See* Judgment, paras. 2575-2578. *See also above* para. 183.
[939] Judgment, para. 2578.
[940] Appeal, para. 273.
[941] Appeal, para. 275.
[942] Appeal, para. 276. The Defence also refers in this respect to the defence of duress under article 31(1)(d), but the supposed relevance of Prof. De Jong's report to the issue of duress is not explained. In particular, the Chamber observed that the grounds for excluding criminal responsibility under article 31(1)(a) and (d) "cannot coexist even in the abstract, given that one is premised on a destruction of the person's capacity to appreciate the unlawfulness or nature of his or her conduct, and the other on a conscious choice to engage in conduct which constitutes a crime based on an evaluation of the harm that is caused": Judgment, para. 2671.
[943] *Contra* Appeal, para. 275 (fn. 285, citing *Perišić* AJ, para. 95). *See above* paras. 190-191.

with the Chamber's conclusion. To show error, Ongwen must either articulate a principle of law prohibiting the Chamber from acting as it did, which he has not, or show that no reasonable chamber could have regarded Prof. De Jong's evidence in this way. Again, he fails to do so.

259. No less than five expert witnesses were called to assist the Chamber in assessing Ongwen's mental health at the times material to the charges. Their sole purpose was to conduct a forensic assessment for the purpose of article 31(1)(a). Ongwen makes no argument to show why, in addition, the Chamber should have considered the assessment of Prof. De Jong. He was not mandated to conduct the same assessment, and had a distinct and unique mandate to recommend any treatment required by Ongwen to participate in his trial. Indeed, in another context, the Chamber expressly noted the importance in preserving a distinction between the forensic mandate for the purpose of article 31(1)(a) and any therapeutic mandate, in order to help ensure the necessary objectivity of analysis.[944]

260. Nor does Ongwen show that the Prof. De Jong's evidence would have served to establish any greater reliability of the Defence experts, or to establish that it was unreasonable for the Chamber to rely upon the Prosecution experts, corroborated by the other evidence received at trial. While Ongwen favours the evidence of Prof. De Jong because it "concurred with the three fundamental diagnoses of the Defence Experts",[945] he identifies no aspect of this opinion which was not adequately addressed by the other five experts.[946]

261. Similarly, even if the Chamber had considered Prof. De Jong's evidence to be relevant to its assessment under article 31(1)(a), there is still no basis to conclude that it would have materially affected the verdict. To the contrary, not only was his own assessment potentially also subject to similar critiques as to its reliability,[947] but the wealth of trial evidence corroborating the contrary view of the three Prosecution experts remains untouched. There is no basis to apprehend that the reasoning of the Chamber would have differed in any material way, even if it had not relied on Prof. De Jong's evidence for the purpose of article 31(1)(a).

[944] *See above* paras. 195-196.
[945] Appeal, para. 271.
[946] *Cf.* Appeal, para. 274 (referring to Prof. De Jong's "[u]se of a clinical history", "recognition of the Appellant's cultural context", and "[a]cknowledgement of the difficulties of westerners in understanding concepts in non-western cultures").
[947] *See above e.g.* fn. 818. *See also e.g.* T-163, 19:10-13, 31:12-35:13.

VII.A.5. The Chamber was correct and reasonable in its approach to the evidence of Ongwen's abduction (Grounds 26 (in part), 28, and 47 (in part))

262. Ongwen suggests that the Chamber decided "that the evidence of the abduction, indoctrination and childhood experience of the Appellant is not central to the issues", and that the Chamber not only "disregard[ed] this central evidence" but "used evidence of uncharged crimes and acts outside the temporal and geographic scope of the case, which were committed by Kony and the LRA, to convict or support [his] conviction".[948] He further claims that the Judgment was inadequately reasoned in this respect.[949]

263. Yet Ongwen mistakes the reasoning of the Chamber, which did not disregard this evidence at all. Rather, it merely explained the issues to which it considered such evidence relevant, and to what degree. Ongwen fails to show that this was either legally incorrect or unreasonable. Thus, the Judgment expressly recalled that it had "duly considered" the facts associated with Ongwen's "abduction at a young age by the LRA", and noted the "potential relevance" of these facts to *both* "grounds excluding criminal responsibility".[950]

264. The specific paragraph which Ongwen considers to show that evidence was disregarded is situated in the section of the judgment dealing with the defence of duress.[951] It merely states that evidence concerning Ongwen's life in the LRA as a child, following his abduction, "is not *as such* relevant for the determination whether a threat relevant under Article 31(1)(d) […] existed at the time of the conduct relevant for the charges, many years after […] Ongwen's abduction, when he was an adult and in a commanding position."[952] This does not mean that the Chamber did not consider such evidence as *context* for any threat at the material times, but merely that it did not consider evidence of past circumstances to be sufficient *in and of itself*.[953] Ongwen fails to show any error in this respect, but merely reiterates his view of Kony's "command, control, and spiritual powers" and his influence over him,[954] and the "enduring

[948] Appeal, para. 420. *See also* paras. 307-308, 311-314, 316-317, 426, 429.
[949] Appeal, para. 421. *See also* paras. 426-428.
[950] Judgment, para. 2672. *See also* para. 2671 (noting that similar "facts and evidence" are relevant to "both grounds excluding criminal responsibility discussed in the present case"). *See also below* para. 321.
[951] *See* Appeal, para. 420 (fn. 489, citing Judgment, paras. 27, 2592). At paragraph 27 of the Judgment, the Chamber merely notes that Ongwen's "exact age at the time" he was abducted, and the calendar date, "are not as such relevant to the charges".
[952] Judgment, para. 2592 (emphasis added). The Chamber also recalled that it had identified "no mental disease or defect" in Ongwen "at the time of the conduct relevant to the charges". It cross-referred to its explanation as to why articles 31(1)(a) and (d) needed to be addressed separately: *see further above* fn. 942.
[953] *See e.g.* Judgment, para. 2592. *See further below* paras. 303-380 (grounds of appeal concerning duress).
[954] Appeal, para. 423.

effects" of the conditions in which persons were initiated into and served in the LRA[955]—which were expressly considered by the Chamber.[956]

265. Nor *a fortiori* does this reasoning mean that the Chamber did not consider whether any mental illness affecting Ongwen "stemmed from his abduction by the LRA".[957] To the contrary, this was the context for much of the Defence expert evidence, which was carefully scrutinised by the Chamber, and also considered by Prosecution experts such as Dr. Abbo. Again, Ongwen fails to articulate any error in the Chamber's analysis in this respect.

266. Finally, to the extent that Ongwen asserts it was erroneous for the Chamber to take into account contextual evidence outside the temporal scope of the charges—in order to establish the LRA's ability to ensure that low-ranking fighters carried out the orders of their superiors, for the purpose of article 25(3)(a)—this claim must also fail.[958] The Judgment refers in the cited passages to the conditions prevailing *at the times material to the charges*, and so does not necessarily rely on evidence from outside the temporal scope of the charges. Yet even if it did, this is not legally erroneous, provided that such evidence is relevant to the crimes and modes of liability within the temporal scope of the charges, as it was in this case.[959] Nor does Ongwen substantiate any error in the Chamber's view that evidence might be relevant in principle for some aspects of its assessment under article 25(3)(a) but not for its assessment under article 31(1)(a) or (d). To the contrary, a Chamber's assessment of the relevance of evidence always involves a nuanced evaluation of this kind.

VII.A.6. The Chamber assessed the intersection between culture and mental health (Grounds 30, 34, 36, 43)

267. Ongwen asserts generally that the Chamber erred "in respect to cultural issues",[960] and raises three main claims: that the Chamber erred by disregarding cultural factors when assessing

[955] Appeal, paras. 309-317, 424, 426. To the extent that Ongwen claims his "childhood development and formative years" were spent in the LRA, this omits his generally positive childhood experiences prior to his abduction: *see further below* paras. 295-297.
[956] *See e.g.* Judgment, paras. 2590-2606 (whether Ongwen's position, at the material times, was "analogous to that of any low-level [LRA] member or recent abductee"), 2643-2658 (Kony's alleged spiritual powers).
[957] Appeal, para. 422. *See also* paras. 307, 317, 423.
[958] Appeal, paras. 420, 424-426 (citing Judgment, paras. 2856, 2858, 2914, 2964, 3011, 3091, 3108).
[959] *See e.g. Nahimana et al.* AJ, para. 315 (permitting the admission of evidence on events outside the temporal jurisdiction of the Tribunal "if the Chamber deems such evidence relevant and of probative value and there is no compelling reason to exclude it", including for purposes such as "clarifying a given context", "establishing by inference the elements (in particular, criminal intent) of criminal conduct", or "demonstrating a deliberate pattern of conduct").
[960] Appeal, para. 431. *See also* para. 430 (stressing the importance of the proper management of "the intersection of cultural and legal issues").

his mental health;[961] that it erred in concluding that Profs. Mezey and Weierstall-Pust had taken cultural factors into consideration;[962] and that the Chamber erred in treating certain incidents as trivial when assessing his mental health.[963] Each of these arguments is addressed in turn. None of them shows any error materially affecting the findings of the Chamber, or its verdict, and so they must be dismissed in their entirety. To the extent Ongwen seeks to incorporate by reference additional issues, but otherwise fails to explain them in his Appeal, these must be summarily dismissed.[964]

VII.A.6.a. The Chamber did not err in assessing whether Ongwen suffered from a mental disease or defect in light of the cultural context

268. Ongwen argues that the Chamber failed to take account of the cultural context relevant to assessing his mental health because: i) it failed to provide adequate reasoning concerning its decision not to rely on Prof. Musisi,[965] and; ii) it misrepresented the evidence of Prof. De Jong concerning the temporal scope of his diagnosis.[966] Yet even these (unfounded) complaints relate to relatively minor matters, and barely address the Chamber's approach to the cultural context, which was in fact addressed appropriately. Ongwen also refers to the evidence of Prof. Wessells (PCV-0002)—who was an expert witness for the Legal Representatives of Victims, and which Ongwen considers to "support[] the important role of cultural context in mental health"—yet articulates no error in the Judgment related specifically to this testimony.[967]

269. First, concerning Prof. Musisi, the Chamber noted the content of his expert evidence (principally concerning "the interplay of Acholi culture with traumas and PTSD"), but considered that "it does not directly underlie any part of the Chamber's analysis as to whether the facts alleged in the charges are established."[968] In particular, for the purpose of article 31(1)(a), the Chamber considered that Prof. Musisi did "not provide specific information in

[961] *See* Appeal, paras. 433-450.
[962] *See* Appeal, paras. 451-458.
[963] *See* Appeal, paras. 459-470.
[964] *See* Appeal, para. 432 (incorporating by reference Defence Closing Brief, paras. 661-666). *See further above* paras. 7-8.
[965] *See e.g.* Appeal, paras. 438-439.
[966] *See e.g.* Appeal, paras. 442-445.
[967] *See* Appeal, paras. 446-450. *See further* Judgment, para. 601 (noting this evidence but considering that it did "not directly underlie any part of the Chamber's analysis as to whether the facts alleged in the charges are established").
[968] Judgment, para. 602.

relation to the question whether […] Ongwen suffered from a mental disease or defect during the period of the charges."[969] While this reasoning was brief, it was adequate and reasonable.

270. Ongwen highlights Prof. Musisi's opinion that "mass traumas" could in principle cause post-traumatic stress disorder (PTSD), and that the conduct of the LRA could constitute such a mass trauma for the victimised population including abductees.[970] On this basis, Ongwen implies that Prof. Musisi's evidence must have been relevant to the Chamber's article 31(1)(a) assessment[971]—and contends specifically that the Chamber was wrong to conclude, or did not adequately explain why, Ongwen "who lived within this context of mass trauma as an abductee of the LRA, was not affected by, or was immune from, this mass trauma."[972] But the Chamber made no such finding. Nothing in the Judgment is inconsistent with the acceptance that Ongwen was subject to traumatic events, or suggests that he was *a priori* different in his reactions to those traumas than anyone else. At the same time, as the expert evidence showed, this did not necessarily imply that these events caused PTSD in him.[973] Nothing in Prof. Musisi's evidence suggests otherwise—the focus of his testimony was on the *potentiality* for mass traumas to cause PTSD, not the inevitability of PTSD.[974] Nor was Prof. Musisi's analysis specifically focused on Ongwen, or his mental health at the times material to the charges. For all these reasons, Ongwen fails to show that the Chamber erred in its approach to Prof. Musisi's evidence, far less that the Judgment was materially affected by any such error.

271. Second, Ongwen criticises the Chamber's approach to the evidence of Prof. De Jong, but appears to misinterpret the relevant passage in the Judgment. As previously recalled, the Chamber declined to rely directly on the evidence of Prof. De Jong for the purpose of article 31(1)(a) because his mental health assessment had been conducted for a different purpose—ascertaining Ongwen's condition "at the present time", rather than at the times material to the charges.[975] In that context, the Judgment notes that Prof. De Jong "properly did not attempt to

[969] Judgment, para. 2579.
[970] *See* Appeal, para. 437 (citing UGA-PCV-0003-0046 (Prof. Musisi's Report)). *But see further* T-177, 69:8-71:10.
[971] Appeal, paras. 434-439.
[972] Appeal, para. 439. *See also* paras. 434-436 (seeking to oppose the Chamber's view of Prof. Musisi's evidence against the content of his testimony).
[973] *Contra* Appeal, para. 440. *See also above* paras. 172, 177 (recalling the evidence to this effect, as noted in the Judgment, of Profs. Mezey and Weierstall-Pust).
[974] *See e.g.* T-177, 69:8-24 ("wars and traumas, mass traumas, do cause mental health problems. Also to remember maybe that we say PTSD, it's very generic when we say it like that because many things *can* cause PTSD. Even a car accident *can* cause PTSD", emphasis added)
[975] Judgment, para. 2576. *See also above* paras. 183, 256-261.

make a historical diagnosis"[976]—meaning that Prof. De Jong did not reach specific conclusions about Ongwen's mental health *at the times material to the charges*. Yet this was without prejudice to his reference to *events* in Ongwen's past for the purpose of his limited diagnosis.[977] Prof. De Jong's reference to historic events, such as Ongwen's abduction, does not imply that he sought to diagnose Ongwen's mental health following his abduction.[978]

272. Taking into account this common sense explanation, there is no basis for Ongwen's claim of "inconsisten[cy]" in the Chamber's approach to contextual evidence.[979] It did not treat Ongwen as different from others in his potential to suffer adverse effects as a result of trauma, but it reasonably considered that mental disorders were not necessarily a result of such trauma.[980] Likewise, it relied on evidence from periods beyond the scope of the charges where it considered this evidence to be relevant, but did not do so where it reasonably considered that such evidence was irrelevant.[981] Nothing in this approach establishes any error in the Chamber's approach to cultural factors. Nor did the evidence of Prof. Wessells show that it did err.[982]

VII.A.6.b. The Chamber did not err in concluding that Prosecution experts Professors Mezey and Weierstall-Pust took account of cultural factors

273. As previously recalled, the Judgment specifically addressed Ongwen's criticism that Profs. Mezey and Weierstall-Pust did not take sufficient account of cultural factors in their opinions.[983] In particular, the Chamber observed that:

- the Defence experts "evoked cultural factors on several occasions" but "did not provide any real explanation of what these factors were, how they impacted their analysis, and how their consideration was to take place according to the standards and practices of mental health expertise";[984]
- there was in fact "general agreement along all experts" that "the cultural context must be taken into account in assessments of mental health, but that at the same time the standard criteria to determine mental disorders were universally accepted";[985]

[976] Judgment, para. 2576.
[977] *Contra* Appeal, paras. 443-444 (asserting that the Chamber "misrepresent[ed]" Prof. De Jong's evidence on the basis, for example, that he referred to "dissociative symptoms that developed after the abduction in his youth").
[978] *Contra* Appeal, para. 444.
[979] *Contra* Appeal, paras. 440-441, 444-445.
[980] *Contra* Appeal, para. 440.
[981] *Contra* Appeal, para. 444. *See also above* para. 266.
[982] *Cf.* Appeal, paras. 446-450.
[983] *See above* para. 170 (first bullet point).
[984] Judgment, para. 2460.
[985] Judgment, para. 2461.

- Profs Mezey and Weierstall-Pust, and Dr. Abbo, explained how they came to their conclusions, and there is no indication that they "ignored cultural factors";[986]
- two of the matters identified by the Defence as suggesting that the Prosecution experts had not taken sufficient account of cultural factors (concerning a request for termites as food, and the fact that the word "blues" cannot be translated in many African languages) were, in the Chamber's view, "trivial and without any serious link to the issue";[987] and
- the remaining three matters identified by the Defence—arising from Prof. Ovuga's testimony that symptoms of mental illness may be somatised (perceived as physical symptoms or maladies), interpreted as spirit possession, or not recognised as illness "in an African context"—were addressed by the corroborative evidence of persons who interacted with Ongwen at material times. They described him as socially skilled, caring, and an effective leader, and did not describe witnessing any symptoms of mental disorder.[988]

274. On appeal, Ongwen does not address the Chamber's reasoning in detail, but merely points to aspects of the evidence which he considers to support his assertion that Profs. Mezey and Weierstall-Pust did not take sufficient account of cultural factors in their assessments.[989] This is insufficient, of itself, to show that the Chamber acted unreasonably, and therefore cannot show any error. Yet in any event, Ongwen's criticisms are misguided.

275. First, Ongwen asserts that Prof. Mezey "dismissed the role of cultural factors in any mental health assessment of [him]".[990] Yet this is not a correct summary of the statement that Ongwen himself quotes—in which Prof. Mezey notes that "I do not consider that I needed to be aware of every single belief system and ritual […] in order to understand *that there was* […] *a strong spiritual and cultural element affecting the LRA at the time, and needing to factor this in* when considering both the question of whether a mental disorder was present, but also how that mental disorder may have expressed itself, *given that cultural context*."[991] It is thus incontrovertible that Prof. Mezey recognised the significance of cultural factors, but considered herself able to determine whether or not those factors may have affected her ability to identify any mental disease or defect that was present.

[986] Judgment, para. 2462.
[987] Judgment, para. 2463.
[988] Judgment, paras. 2463, 2506-2521. *See also above* paras. 178-181.
[989] Appeal, paras. 452-454 (concerning Prof. Mezey), 455-458 (concerning Prof. Weierstall-Pust).
[990] Appeal, para. 452.
[991] T-163, 18:24-19:4 (emphasis added).

276. Ongwen further challenges the qualifications of Prof. Mezey to recognise cultural factors, based on his view of her "c.v. and testimony" (notably, that she "has not worked with child soldiers or in conflict zones in Africa"),[992] and his submission that she had not "attempted to fill this cultural gap in order to carry out tasks"—based on her unfamiliarity with a single article authored by Prof. Ovuga and Dr. Abbo.[993] These matters were emphasised by the Defence in its cross-examination at trial,[994] and the Chamber is entitled to the presumption that it was aware of them in its deliberations leading to the Judgment. Nor in any event does the Defence address Prof. Mezey's further evidence that, while she may not be knowledgeable specifically about Ongwen's culture, she has considerable experience of working with patients from cultures other than her own,[995] is sensitive to such issues both in theory[996] and practice,[997] and specifically noted areas of Ongwen's behaviour (for example) which seemed to be informed by his cultural background.[998] She also explained clearly and specifically why, notwithstanding cultural and other factors, she considered that persons around Ongwen would have noticed indications of mental illness.[999] Again, this evidence only supports the reasonable nature of the Chamber's conclusion that Prof. Mezey took adequate account of cultural factors in her assessment.

277. Second, while not calling into question Prof. Weierstall-Pust's credentials or experience (including with specific regard to former LRA fighters),[1000] Ongwen takes issue with remarks in his rebuttal report showing, in Ongwen's view, that "he simply did not understand and/or

[992] Appeal, paras. 453-454.
[993] Appeal, para. 454.
[994] *See e.g.* T-163, 14:2-15:10 (asking Prof. Mezey about the number of child soldiers and persons from war zones she had worked with, and the degree to which she had consulted experts about Acholi culture), 16:7-18:5 (asking Prof. Mezey about her knowledge of Acholi spiritual beliefs), 20:11-21:6 (asking Prof. Mezey about her knowledge of Acholi language).
[995] T-162, 10:2-11:4. *See also* T-163, 42:21-43:3 (recalling that Prof. Mezey had been "instructed as part of the Kenyan emergency group litigation", which involved "interviewing a large number of Kenyans, Africans who had experienced very significant trauma and abuse" and that this "obviously needed to take into account […] their cultural context").
[996] *See e.g.* T-163, 41:24-42:11 (discussing the development of transcultural psychiatry).
[997] *See e.g.* T-162, 23:12-15 ("One has to […] look at the context, both the cultural context and the situational context in which people are reporting symptoms […] It's important not to necessarily define something as representing psychopathology if it is simply an expression of that individual's cultural or religious background, even if we don't understand it"); T-163, 28:22-25 ("certainly, again, one would need to take the cultural context into it and what people around thought and felt and believed was the cause of that behaviour, but I would not consider myself to have expertise to comment on that"), 35:19-24.
[998] *See e.g.* T-163, 26:16-19.
[999] T-163, 86:9-87:17.
[1000] *See e.g.* T-253, 8:24-10:22 (recalling that Prof. Weierstall-Pust has, for the last ten years, principally been engaged in projects seeking to "disentangle disorders from normal states of behaviour" among combatants drawn from groups in Burundi, Rwanda, Uganda, South Africa, and Colombia, and that these projects have been carried out in collaboration with local universities in order to address potential cultural issues, requiring Prof. Weierstall-Pust to talk personally with "20" or "30" former LRA fighters, among others).

apply any knowledge or respect for cultural factors in his evidence".[1001] Yet this is mere hyperbole—the relevant passages of Prof. Weierstall-Pust's evidence do not show him to have said anything of a nature calling into question the reasonableness of the Chamber's assessment of his evidence, including his account of cultural factors. Nor is it the purpose of appellate proceedings to continue partisan debates from trial concerning the dictates of professional courtesy between witnesses.

278. As Ongwen rightly concedes,[1002] Prof. Weierstall-Pust prefaced his remarks by noting that it was his general "*impression*" during the hearings that "contradictions" in the Defence experts' evidence "were blamed to a misunderstanding western psychiatrist[s] have, who do not 'sense' the special conditions in the 'African' context.[1003] While perhaps phrased robustly, it is not clear that this impression was misplaced given the tenor of the Defence evidence as a whole. Not was the impression necessarily pejorative—for example, as Ongwen himself suggests, Dr. Akena's explanation of the lack of "mental health literacy" among many in African populations may justify such a view, prompting Dr. Akena himself to conclude that it was necessary as a result to "probe" or "dig" a little deeper.[1004]

279. Ongwen takes further issue with Prof. Weierstall-Pust's attempt to paraphrase the position of the Defence experts as saying that "non-African mental health professional[s] could not be capable of diagnosing individuals from an African country", and denies that the record provided any foundation to ascribe such a view to them.[1005] Yet, to the contrary, irrespective of the correctness of his characterisation, Prof. Weierstall-Pust clearly cited the basis for this remark in light of the evidence of Dr. Akena.[1006]

280. Neither of these criticisms of Prof. Weierstall-Pust's evidence suffices to show that the Chamber erred in concluding that he had taken sufficient account of cultural factors, especially given its own multi-factored analysis.[1007]

281. Finally, the Prosecution notes that, earlier in his brief, Ongwen includes a footnote stating generally that "arguments refuting the Chamber's conclusions on the evidence of P-0446 [Prof.

[1001] Appeal, para. 455.
[1002] Appeal, para. 457.
[1003] Appeal, para. 457 (citing UGA-OTP-0287-0072 (Prof. Weierstall-Pust's rebuttal report), p. 0079).
[1004] *See e.g.* T-248, 49:7-20. *See also* 76:16-19.
[1005] Appeal, para. 456 (citing UGA-OTP-0287-0072 (Prof. Weierstall-Pust's rebuttal report), p. 0079).
[1006] UGA-OTP-0287-0072 (Prof. Weierstall-Pust's rebuttal report), p. 0079 (quoting Dr. Akena at T-248, 76:15-25: "In the African setting it's perhaps not extremely clear what a mental illness is […] what we describe as mental illness among the laypeople in Africa is somebody who stripped naked and running around and eating from […] the bin").
[1007] *See above* para. 273.

Mezey] and P-0447 [Prof. Weierstall-Pust] are found in the Defence Closing Brief".[1008] To the extent this footnote may be intended to preserve grounds 31 and 32 of its appeal, this is impermissible and should be dismissed *in limine*.[1009] In any event, the passages cross-referenced in the Defence Closing Brief merely reflect one narrative of the evidence, and this does not show that the Chamber erred in law or fact in assessing the evidence of the Prosecution experts.

VII.A.6.c. The Chamber did not err by treating certain matters as trivial

282. Ongwen claims that the Chamber erred by treating two matters as trivial in considering whether Profs Mezey and Weierstall-Pust had adequately taken account of cultural factors in their evidence.[1010] Yet he shows no error, or indeed even how any error could materially affect the Judgment. In particular, the Defence incorrectly suggests that the manner or terms in which Ongwen presented himself at a particular moment while he was in detention—many years after the times material to the charges—was "at the heart of the Prosecution case" that he was not subject to a mental disease or defect relevant to article 31(1)(a) more than a decade earlier.[1011] But to the contrary, even if the Prosecution experts had misinterpreted minor aspects of Ongwen's behaviour or meaning, this would not have changed their assessment of Ongwen's mental health at the material times. Nor would it have altered the Chamber's assessment of the reliability of the Prosecution's and Defence's experts evidence, or its overall conclusion—having regard to the contemporaneous evidence of Ongwen's conduct at the material times presented at trial.[1012]

283. The first matter concerned an occasion in which an ICCDC medical officer reported that Ongwen had "jokingly" asked if it was possible to put "termites" on the ICCDC shopping list because he did not like Dutch food. This incident was put to Dr. Akena in cross-examination by the Prosecution, who suggested that Ongwen was not joking because white ants (*ngwen*) are a foodstuff for Acholi people.[1013] When Prof. Weierstall-Pust was in turn cross-examined by the Defence, and asked to comment on Dr. Akena's suggestion, he initially expressed confusion

[1008] Appeal, fn. 353 (referring to Defence Closing Brief, paras. 541, 590, 609-615, 623, 638, 644, 656, 670).
[1009] *See above* paras. 7-8.
[1010] Appeal, paras. 461-467, 470. *See* Judgment, para. 2463. *See also above* para. 273.
[1011] *Contra* Appeal, paras. 462, 468-469.
[1012] *Contra* Appeal, paras. 463 ("[w]hether or not [Ongwen] was 'joking around' was a key factual issue on which the Chamber's conclusion, rejecting the affirmative defences, hinged"), 466 ("the food request was not a 'trivial' matter because it could have materially affected a key conclusion that was used to undermine the mental health experts' analysis and to reject the affirmative defence").
[1013] T-249, 51:12-52:7. *See also* Appeal, paras. 459-460, 464.

as to the relevance of the point and then suggested he might agree with the ICCDC medical officer's perception—but was not given the opportunity to finish his explanation.[1014]

284. Ongwen claims that this incident "demonstrates the importance of cultural context" in interpreting his words and behaviour.[1015] To the extent that he considers the incident to show that Prof. Weierstall-Pust failed in general to take adequate account of cultural factors, this argument has already been addressed.[1016] Alternatively, to the extent he suggests that the Chamber's interpretation of this particular incident is significant, this merely reflects a difference of opinion on a wholly peripheral issue—whether a single remark by Ongwen to an ICCDC medical officer showed him to be making a joke or a serious request for a particular foodstuff. No matter which interpretation is correct, this is not probative—let alone dispositive—with regard to Ongwen's mental health years earlier, at the times material to the charges, or even to the ability of the various experts to assess his mental health reliably. It was certainly not legally necessary for the Chamber to determine beyond reasonable doubt that Ongwen was in a "happy" mood on that one occasion.[1017] Nor indeed is that single remark capable of establishing conclusively that Ongwen was on that occasion happy or not.[1018] As such, Ongwen fails to show that the Chamber was unreasonable, or indeed incorrect, in regarding this issue as "trivial".

285. The second matter concerned an observation by Dr. Akena in his testimony that the colloquial term "blues" (to mean a sad mood) cannot be directly translated in many African languages, which Ongwen also associates with an observation by Prof. Ovuga that many Africans in fact perceive or describe mental distress in terms of physical symptoms (somatisation).[1019] Ongwen seems to contend—although not clearly—that this shows that certain symptoms of mental disease or defect might be expressed in culturally situated ways.[1020] Yet this was not disputed,[1021] and Ongwen can point to no instance in which this truism was doubted by any Prosecution expert or the Chamber. Ongwen fails to show how this linguistic

[1014] T-253, 42:9-45:16. *Cf.* Appeal, para. 460.
[1015] Appeal, para. 461.
[1016] *See above* paras. 277-281.
[1017] *Contra* Appeal, para. 465. *See also above* paras. 157-158.
[1018] *See e.g.* T-249, 52:8-11 (Prosecution counsel asking Dr. Akena about a separate remark by the ICCDC medical officer that the "mood is good" in conversations with Ongwen).
[1019] T-248, 47:7-22 (Dr. Akena noting, by way of context, that "[t]here's a famous screening instrument for depression called a CESD" and that one of the questions in that instrument "asks something like have you been feeling blue"); T-254, 15:13-24 (Prof. Ovuga). *See also* Appeal, para. 467.
[1020] Appeal, paras. 468-470.
[1021] *See e.g.* T-253, 45:17-46:12 (Prof. Weierstall-Pust agreeing that "culture affects the way […] symptoms are expressed and […] which words are used to describe the symptoms" but also noting that "I never doubted this").

phenomenon actually served to conceal any relevant symptoms of mental disease or defect in Ongwen at the times material to the charges, so as to call into doubt the reliability of the Prosecution experts' assessment.[1022] Nor did he do so at trial.[1023] Accordingly, the Chamber was not only reasonable but correct to reject this argument as trivial.

VII.A.7. The Chamber correctly and reasonably assessed the evidence of Dr. Abbo (Ground 33)

286. Ongwen claims that the evidence of Prosecution expert Dr. Abbo was "selectively used" in the Judgment, such that "potentially exculpatory evidence" which "provided reasonable doubt" was "disregarded", particularly relating to his "moral development and 'child-like' personality" even as an adult.[1024] Ongwen further contends that Dr. Abbo's inculpatory testimony was not adequately grounded in the evidence,[1025] and that the assumptions she accepted for the purpose of her assessment were incompatible with those accepted by the Chamber.[1026] These arguments do not show any error in the Judgment, or that the Judgment was materially affected.[1027]

287. In criticising the Chamber's approach to the evidence of Dr. Abbo, Ongwen suggests that the Appeals Chamber held in *Bemba* that "it is an error […] to disregard relevant and potentially exculpatory evidence from a witness upon whom it has relied for inculpatory evidence."[1028] Yet the Appeals Chamber did not make such a categorical statement—rather, it found in the particular circumstances of the case, that the Trial Chamber's *reasoning* on the matter raised by the witness (and which Bemba emphasised in his defence) was inadequate.[1029] It did not state that a chamber must invariably and mechanically recite all aspects of a witness' evidence that the Defence regards as exculpatory; to the contrary, as is well established, "a Trial Chamber need not refer to the testimony of every witness or every piece of evidence on the trial record" and "not every inconsistency which the Trial Chamber failed to discuss renders its opinion

[1022] *See also e.g.* Judgment, para. 2461.
[1023] *See e.g.* Defence Closing Brief, para. 663 (merely repeating this assertion by Dr. Akena but failing to relate it to any concrete instance in which they contend that a relevant symptom of mental disease or defect was not properly assessed by the Prosecution experts).
[1024] Appeal, paras. 473-474. *See also* paras. 487-492, 495, 497.
[1025] *See* Appeal, paras. 475-483.
[1026] *See* Appeal, paras. 484-486.
[1027] *Contra* Appeal, para. 496.
[1028] Appeal, paras. 471-472 (citing *Bemba* AJ, paras. 148, 189, 194).
[1029] *Bemba* AJ, para. 175 ("if the accused makes a factual claim that was not challenged by the Prosecutor in the course of the trial, the Trial Chamber must give clear and convincing reasons as to why it nevertheless regards the allegation to be untrue. In the absence of such reasoning, the Trial Chamber was not at liberty to simply ignore Mr Bemba's claim"). *See also* para. 189.

defective".[1030] A chamber may properly rely on the evidence of a witness in part, and not in other parts, provided this is adequately explained.[1031]

VII.A.7.a. Dr. Abbo's conclusions on Ongwen's moral development were adequately based in the evidence

288. In the Judgment, the Chamber recalled Dr. Abbo's evidence that Ongwen had "attained the highest level of moral development, the post conventional level", which is "'characterized by the pursuance of impartial interests for each member in society as well as the establishing of self-chosen moral principles'."[1032] This was unequivocally Dr. Abbo's professional conclusion, as expressed in her report,[1033] based on her expertise (which the Chamber considered "pertinent and valuable").[1034]

289. Ongwen fails to show that no reasonable Chamber could have considered Dr. Abbo's expert opinion of Ongwen's moral development to be reliable,[1035] or that any error would in any event have materially affected the Judgment. In particular, beyond stating that it considered Dr. Abbo's evidence to be reliable, the Chamber never suggested that Dr. Abbo's view of Ongwen's moral development was dispositive for its conclusion as to whether he suffered from a mental disease or defect relevant to article 31(1)(a) at the times material to the charges.[1036] Its view of Ongwen's development and mental health was informed not only by the expert opinions offered at trial, but also by the contemporaneous and corroborative evidence of persons who interacted with Ongwen at the material times.[1037]

290. In her report, Dr. Abbo referred to three documents in evaluating Ongwen's moral development: the first report prepared by Prof. Ovuga and Dr. Akena,[1038] the report prepared by Prof. De Jong,[1039] and a transcript of Ongwen speaking on the radio.[1040] Ongwen observes

[1030] *See e.g.* *Perišić* AJ, para. 92; *Limaj* AJ, para. 86; *Kvočka et al.* AJ, para. 23. *See also above* para. 193.
[1031] *See e.g.* *Ntaganda* AJ, para. 774; *Ngudjolo* AJ, para. 168; *Ntaganda* TJ, para. 80.
[1032] Judgment, para. 2481. *See also above* para. 175.
[1033] *See e.g.* UGA-OTP-0280-0732 (Dr. Abbo's Report), p. 0741 (prefacing the remark about [REDACTED] with the term "[REDACTED]"). *See also* T-166, 16:6-12. *Contra* Appeal, para. 477 (pointing out that, on the previous page, Dr. Abbo used the word "may").
[1034] Judgment, para. 2485.
[1035] Appeal, para. 476 ("a reasonable trier of fact would reach a different conclusion based on the evidence on which she relies").
[1036] *Cf.* Appeal, para. 483 (ascribing Dr. Abbo's conclusion to the Chamber).
[1037] *See* Judgment, paras. 2505-2521.
[1038] *See* UGA-OTP-0280-0732 (Dr. Abbo's Report), pp. 0732 (citing UGA-D26-0015-0004 (Defence Experts' First Report)), 0740-0741.
[1039] *See* UGA-OTP-0280-0732 (Dr. Abbo's Report), pp. 0732 (citing UGA-D26-0015-0046-R01 (Chamber's Expert's First Report)), 0740-0741.
[1040] *See* UGA-OTP-0280-0732 (Dr. Abbo's Report), p. 0741 (citing a [REDACTED] referred to as "[REDACTED]", from the period 2003-2004, discussing the role of "[REDACTED]" during [REDACTED]). The

that, when quoting the Defence Experts' First Report—to the effect that, "[t]hough Ongwen says that he does not understand any of the charges brought against him […], he feels deeply remorseful and he regrets his participation in the activities of the LRA"—Dr. Abbo omitted to include relevant context from the preceding sentences of the First Report.[1041] Ongwen asserts that he had also "explicitly said he did not realise what was right and wrong *while he was in the bush*, which includes the period of the charged acts."[1042] Yet even accepting this context for Ongwen's statement that "he feels deeply remorseful and he regrets his participation in the activities of the LRA", this fails to take account of *other* material on which Dr. Abbo also relied in her report—and which shows that at the times material to the charges, Ongwen could appreciate the moral value of his conduct. This included:

- Prof. De Jong's report which quoted Ongwen explaining that he "[REDACTED]";[1043]
- The transcript of an intercepted LRA radio transmission from 2003-2004 in which a person identified as Ongwen (by P-0142), condemned those purportedly responsible for killings at Lukodi, saying "[REDACTED]."[1044]

291. While Ongwen attempts to suggest that the quotation from Prof. De Jong's report was also de-contextualised, he is incorrect.[1045] Furthermore, in her testimony, Dr. Abbo identified other incidents which she considered to indicate that Ongwen "had developed to such a level of forming his own values"[1046]—including Ongwen's understanding of the unhappiness of an LRA subordinate required to attack his own home[1047] and his arguing against the killing of certain LRA members, despite Kony's wishes.[1048] Ongwen also fails to consider the evidence

list of material provided to Dr. Abbo reveals that this is in fact document UGA-OTP-0274-6941: *see* UGA-OTP-0280-0732 (Dr. Abbo's Report), p. 0767.
[1041] Appeal, para. 478. *Compare* UGA-OTP-0280-0732 (Dr. Abbo's Report), p. 0740, *with* UGA-D26-0015-0004 (Defence Experts' First Report), pp. 0014-0015 (preceding the passage quoted by Dr. Abbo: "[REDACTED]").
[1042] Appeal, para. 479.
[1043] UGA-OTP-0280-0732 (Dr. Abbo's Report), pp. 0740-0741 (emphasis added). Dr. Abbo also noted Ongwen's remark to Prof. De Jong that he "[REDACTED]", which she considered to be a sign of Ongwen's ability to incorporate "[REDACTED]" and the "[REDACTED]" into his moral judgments. *See further* UGA-D26-0015-0046-R01 (Chamber's Expert's First Report), pp. 0051, 0059.
[1044] UGA-OTP-0280-0732 (Dr. Abbo's Report), p. 0741. *See further* p. 0767 (instructions to Dr. Abbo); UGA-OTP-0274-6941, p. 6947 (relevant transcript); UGA-OTP-0283-1386, pp. 1386-1387 (summary of witness testimony provided to mental health experts).
[1045] *Contra* Appeal, para. 480. The previous sentence to the quotation does not add any relevant context to the passage identified by Dr. Abbo. The aspect of the passage which speaks to Ongwen's moral development at the material time is his recognition that he was only "mean" to his solders as a form of discipline—in other words, explaining the (moral) reasoning behind his conduct while he was still in the bush.
[1046] T-166, 44:25-45:13 (noting that these are "indications […] that support moral development").
[1047] T-166, 46:6-19 (commenting on excerpt #1 of UGA-OTP-0283-1386, p.1386). *See further* UGA-OTP-0280-0732 (Dr. Abbo's Report), p. 0740 "[REDACTED]").
[1048] T-166, 43:21-45:13 (commenting on excerpt #8, set out in UGA-OTP-0283-1386, pp. 1392-1393).

that the Defence elicited from Dr. Abbo, that she was "comfortable as a child and adolescent psychiatrist" that Ongwen "had developed" and that she was "dealing with someone who does not have developmental issues."[1049] At no point in its examination did the Defence invite Dr. Abbo to explain the reason for her choice of quotations in her report, or raise any concern with her in this regard.

292. Taking Dr. Abbo's evidence as a whole, therefore, the Defence fails to show that Dr. Abbo could not properly have considered, in her expert professional opinion, that Ongwen had reached the post conventional level of moral development. Nor is there any foundation for the Defence's further assertion that "the Judgment erred by not taking cognizance of the timing of [Ongwen]'s remorse years after the charged period, and retroactively applying his verbalised awareness to the period of 2002-2005."[1050] This not only an exaggerates the degree to which Dr. Abbo may have made a minor technical error (if at all), but conflates her reasoning with that of the Chamber—when the Judgment itself makes clear that Ongwen was found to be "responsible for his conduct" on the basis of the testimony of multiple experts as well as the contemporaneous evidence heard at trial.[1051]

VII.A.7.b. The Chamber properly considered Dr. Abbo's methodology

293. Ongwen attempts to suggest there was contradiction between the methodology adopted by Dr. Abbo in reaching conclusions about his mental health at the times material to the charges and that of the other Prosecution experts Profs. Mezey and Weierstall-Pust.[1052] This, too, is incorrect. As the Judgment expressly noted, all three Prosecution experts addressed in their reports the fact that Ongwen had declined to allow them to carry out a clinical interview with him, and made clear the basis on which they were nonetheless able to carry out their assessment.[1053] Ongwen is factually incorrect to assert that Dr. Abbo was the only Prosecution expert to recognise the limitations of these circumstances.[1054] Rather, the Prosecution experts merely reflected different "school[s] of thought" in responding to such circumstances.[1055]

[1049] T-167, 42:6-22.
[1050] *Contra* Appeal, para. 482. *See also* paras. 481, 483.
[1051] *Contra* Appeal, para. 483
[1052] Appeal, paras. 484-486.
[1053] *See* Judgment, paras. 2469, 2546. *See also above* para. 170 (second bullet).
[1054] *See* Judgment, paras. 2464-2468. Appeal, para. 484.
[1055] T-166, 12:10-13:7.

294. Dr. Abbo chose to accept (for the sake of argument) that Ongwen "suffers from the three disorders documented" by the Defence experts and Prof. De Jong.[1056] She focused instead on the question whether the evidence showed any *link* between those disorders and Ongwen's criminal conduct.[1057] Finding "'[…] hardly any evidence […]'" in this respect, she concluded that "'[Ongwen] was likely motivated by his existential situation rather than his symptoms of mental illnesses'."[1058] Consequently, even if the Chamber were to have accepted the diagnosis of the Defence experts—which it did not—Dr. Abbo's evidence underscores that the relationship of any such disorders with Ongwen's decision to commit the charged crimes was not established.[1059]

295. The Defence emphasises a passage of Dr. Abbo's testimony in which she states that it is "a little bit more difficult for me" to view Ongwen as an adult in isolation from Ongwen as a child, "because it's a continuous thing."[1060] However, this did not mean that "this timeline or continuum started with the Appellant's abduction",[1061] as Ongwen contends, but also includes his previous childhood—which Dr. Abbo expressly considered to have gone "satisfactorily well".[1062] Ongwen also wrongly asserts that Dr. Abbo's view of the link between childhood and adulthood contradicts the Chamber's approach, which "explicitly excluded" the relevance of Ongwen's abduction.[1063] As previously noted, Ongwen misconstrues the Judgment in this regard, which does not exclude the relevance of his personal history to the experts' assessment of his mental health at the times material to the charges[1064]—even if, rightly, the Chamber did not treat any previous trauma as overriding its careful, multi-factored analysis.[1065]

VII.A.7.c. The Chamber did not disregard potentially exculpatory evidence given by Dr. Abbo

[1056] Judgment, para. 2482 (quoting UGA-OTP-0280-0732 (Dr. Abbo's Report), pp. 0732, 0745). *See also* T-166, 24:16-19.
[1057] Judgment, paras. 2482-2483 (citing UGA-OTP-0280-0732 (Dr. Abbo's Report), p. 0756).
[1058] Judgment, para. 2482 (quoting UGA-OTP-0280-0732 (Dr. Abbo's Report), p. 0739, and also referring to pp. 0744-0751; T-166, 21:2-25).
[1059] *See also above* fns. 780, 783 (corroborative analysis of Prof. Weierstall-Pust).
[1060] Appeal, para. 485 (citing T-166, 55:10-56:2).
[1061] *Contra* Appeal, para. 486.
[1062] Judgment, para. 2480 (citing UGA-OTP-0280-0732 (Dr. Abbo's Report), p. 0735). *See further e.g.* UGA-OTP-0280-0732 (Dr. Abbo's Report), pp. 0754 (Ongwen "[REDACTED]"), 0756 "[REDACTED]"); T-166, 46:17-18 (referring to the "good early childhood foundation, which Mr. Ongwen had").
[1063] *Contra* Appeal, para. 486 (continuing: "it is difficult to discern how the Chamber could claim to use [Dr. Abbo's] evidence in support of its conclusions").
[1064] *See above* paras. 264-265. *See* Judgment, para. 2592.
[1065] *See e.g. above* paras. 170-184.

296. Repeating his claim that Dr. Abbo's analysis "start[ed] from [his] abduction",[1066] Ongwen merely recites selected aspects of Dr. Abbo's evidence which he considers to illustrate the "adverse and unfavourable environment of the LRA and its effects on his development."[1067] He fails to show that the Chamber disregarded this evidence, or even that it was potentially exculpatory, as he implies. Consequently, Ongwen cannot show any error in the Chamber's analysis of Dr. Abbo's evidence, and his arguments must be dismissed. Again, to the extent that Ongwen seeks to incorporate by reference his unsuccessful trial arguments, this is neither permissible nor does it assist him in showing any error in this appeal.[1068]

297. First, while it is not in dispute that the LRA was not an environment generally conducive to the development of children,[1069] it is misleading to imply that this was the only environment relevant to Ongwen's childhood development.[1070] To the contrary, Ongwen's *prior* childhood experiences, which were broadly positive, were also significant.[1071]

298. Second, Ongwen takes Dr. Abbo's assertion that he "can't be blamed for failing to escape negative influences in his whole environment" out of context.[1072] This comment was prefaced by Dr. Abbo's opinion in the previous sentence that Ongwen "[REDACTED]."[1073] As such, Dr. Abbo's former statement could be seen as (potentially) a mitigating matter for sentencing,[1074] but not for determining whether Ongwen was guilty or not. In this sense, the comment was not exculpatory.

299. Third, Dr. Abbo did not conclude that Ongwen's "psychosocial development was arrested at the time of the abduction".[1075] Rather, as she emphasised in response to this same question at trial, Dr. Abbo accepted the possibility that Ongwen only had "[REDACTED]"[1076] *as a*

[1066] *Contra* Appeal, para. 487. *See above* fns. 1061-1062 (recalling that Dr. Abbo's analysis in fact also encompassed Ongwen's apparently positive childhood experiences prior to his abduction).
[1067] Appeal, para. 487. *See e.g.* paras. 488 (citing T-166, 61:18-25; T-167, 7:20-8:4), 489 (citing T-166, 61:18-25; UGA-OTP-0280-0732 (Dr. Abbo's Report), p. 0755), 490 (citing T-166, 58: 22-23), 491 (citing UGA-OTP-0280-0732 (Dr. Abbo's Report), p. 0734), 492 (citing T-166, 47:7-9).
[1068] *Cf.* Appeal, fns. 563, 566, 567-568. *See above* paras. 7-8. The Defence is incorrect to assert that Dr. Abbo "appears to accept the PTSD diagnos[i]s" (Appeal, fn. 568), and this was in fact expressly rejected by the Chamber: *see* Judgment, para. 2482.
[1069] Appeal, para. 488.
[1070] *Contra* Appeal, para. 490 (asserting that Ongwen "was removed from his normal environment and put in an unfavourable environment, which is considered toxic for development, over which he had no control").
[1071] *See above* fns. 1061-1062, 1066 (recalling that Dr. Abbo's analysis in fact also encompassed Ongwen's apparently positive childhood experiences prior to his abduction).
[1072] Appeal, para. 489 (quoting UGA-OTP-0280-0732 (Dr. Abbo's Report), p. 0755).
[1073] UGA-OTP-0280-0732 (Dr. Abbo's Report), p. 0755 (emphasis added). *See also* p. 0756.
[1074] *See* Appeal, para. 489 (quoting UGA-OTP-0280-0732 (Dr. Abbo's Report), p. 0755: "important mitigating factors include […]").
[1075] *Contra* Appeal, para. 491 (quoting UGA-OTP-0280-0732 (Dr. Abbo's Report), p. 0734).
[1076] UGA-OTP-0280-0732 (Dr. Abbo's Report), p. 0733.

starting point given the general circumstances of the case[1077]—and it was in that light that she stated there "[REDACTED]."[1078] But she went on to analyse Ongwen's "[REDACTED]"[1079] and on that basis concluded that Ongwen had in fact "[REDACTED]."[1080] In this context, Dr. Abbo noted that Ongwen appeared to have "[REDACTED]", which was "[REDACTED]",[1081] had developed an "[REDACTED]",[1082] and, in general, "[REDACTED]."[1083]

300. Even if Ongwen did exhibit some adolescent behaviours, as Dr. Abbo explained, this would not be a sufficient basis to characterise his development as a whole.[1084] She noted that persons with arrested development would be less likely to be successful in overcoming the difficulties of a non-supportive environment, such as the LRA.[1085] And if a person was moved from a non-supportive environment to an environment more suited to their development, it would be unlikely for a person to rapidly gain capabilities that they did not previously have or at least to do so in a way which did not subsequently indicate the "stresses of trauma".[1086] These considerations all supported her assessment of Ongwen's moral development.

301. Fourth, the passage of Dr. Abbo's testimony which Ongwen suggests to be "the most significant evidence" of his "arrested 'child-like state'" shows nothing of the kind.[1087] Rather, Dr. Abbo considered Ongwen's explanation of his concept of a child as "another example of thinking about thinking",[1088] which is "really a higher functioning, what we call metacognition" and a sign "that Mr Ongwen developed to that level."[1089] Dr. Abbo further opined that, in that incident, Ongwen exhibited "authority" and "power".[1090]

[1077] T-167, 42:6-43:10 (Dr. Abbo agreeing that "the evidence shows that Mr Ongwen was a well-rounded individual", and explaining that she had measured Ongwen against the development expected of a 10-14 year-old in order "to be sure that whatever would follow would be in line with my finding about his development", but that her "general conclusion" was that "he had developed" and did "not have developmental issues").
[1078] UGA-OTP-0280-0732 (Dr. Abbo's Report), p. 0734 (emphasis added).
[1079] UGA-OTP-0280-0732 (Dr. Abbo's Report), p. 0734.
[1080] UGA-OTP-0280-0732 (Dr. Abbo's Report), p. 0741 (emphasis added).
[1081] UGA-OTP-0280-0732 (Dr. Abbo's Report), p. 0742.
[1082] UGA-OTP-0280-0732 (Dr. Abbo's Report), p. 0744.
[1083] UGA-OTP-0280-0732 (Dr. Abbo's Report), p. 0753.
[1084] T-167, 22:7-12 (agreeing with the Presiding Judge that the testimony of a witness from trial "really supports my initial labouring to explain that he [Ongwen] could have had some adolescent behaviours here and there, but when you look at him holistically, that might not be what characterises him").
[1085] T-167, 35:25-36:7, 37:19-38:7 ("[if] you have an arrested development and you're in an environment that is not supportive, you're less likely to be able to manage on your own because the environment is not supportive. But [if] you have a development which is not arrested and you are in an environment that is not supportive, then your positives, your abilities will […] balance out […] and you are able to navigate the difficulties").
[1086] T-167, 40:1-17.
[1087] *Contra* Appeal, para. 492.
[1088] T-166, 46:19.
[1089] T-166, 46:4-5.
[1090] T-166, 46:19-23.

VII.A.8. Conclusion

302. For all the reasons above, Ongwen's arguments concerning the Chamber's assessment of article 31(1)(a) should be dismissed in their entirety. Applying the law correctly to the evidence, the Chamber reasonably concluded that it was not (reasonably) possible that Ongwen suffered from a relevant mental disease or defect at the times material to the charged crimes. Grounds 19, 29-44, 46-58, 61-63 should be dismissed.

VII.B. ONGWEN'S CRIMINAL CONDUCT WAS NOT CAUSED BY DURESS IN THE MEANING OF ARTICLE 31(1)(D) (GROUNDS 26 (IN PART), 44, 46, 47 (IN PART), 48-56, 58, 61-63)

303. The Chamber properly concluded beyond reasonable doubt that Ongwen's actions underpinning the crimes were "free of threat of imminent death or imminent or continuing serious bodily harm" and that, for this reason, duress as a ground excluding criminal responsibility under article 31(1)(d) was not applicable.[1091]

304. To reach this conclusion, the Chamber thoroughly assessed the evidence presented by the Parties and Participants, and carefully considered Ongwen's arguments, including: (1) Ongwen's status in the LRA and the applicability of the LRA disciplinary regime to him;[1092] (2) the executions of senior LRA commanders on Kony's orders;[1093] (3) the possibility of escaping from or otherwise leaving the LRA;[1094] (4) Kony's alleged spiritual powers;[1095] (5) Ongwen's personal loyalty to Kony and his career advancement;[1096] and (6) Ongwen's commission of crimes in private.[1097]

305. In light of this analysis, the Chamber found: (1) that Ongwen did not face any prospective punishment of death or serious bodily harm when he disobeyed Kony; (2) that he had a realistic possibility of leaving the LRA, which he did not pursue; (3) that his relevant conduct resulted from his own initiative, and that his performance was highly valued by Kony such that he rose in rank and position; and (4) that he committed some of the crimes in private, where any alleged threats could have no effect.[1098] In light of these and other considerations, the Chamber correctly concluded that Ongwen was not under threat of death or serious bodily harm to himself or

[1091] Judgment, paras. 231, 2670.
[1092] Judgment, paras. 2590-2608.
[1093] Judgment, paras. 2609-2618.
[1094] Judgment, paras. 2619-2642.
[1095] Judgment, paras. 2643-2658.
[1096] Judgment, paras. 2659-2665.
[1097] Judgment, paras. 2666-2667.
[1098] Judgment, para. 2668.

another person when he engaged in the conduct underlying the charged crimes, and found that duress as a ground excluding criminal responsibility was not applicable.[1099]

306. As discussed above,[1100] the Chamber reached this conclusion by applying the correct standard of proof. First, the Chamber correctly "carr[ied] out a holistic evaluation and weighing of all the evidence taken together in relation to the facts at issue".[1101] Second, the Chamber correctly articulated that the "beyond reasonable doubt [standard] is to be applied to any facts indispensable for entering a conviction",[1102] including the absence of any ground excluding the accused's criminal responsibility.[1103] Contrary to Ongwen's submission,[1104] the Chamber was not required to apply this standard to "any other set of facts introduced by the different types of evidence", nor to the evidence itself,[1105] but rather to the material facts underlying the elements of the crime and modes of liability, including the mental elements. The Chamber found that there was no reasonable possibility on the evidence before it that, at the times material to the charges, Ongwen's conduct had been caused by duress resulting from a threat of imminent death or continuing or imminent serious bodily harm against him or another person.

307. Ongwen's grounds of appeal misrepresent the law and the evidence, as well as the Chamber's own findings. They impermissibly incorporate by reference arguments from his Closing Brief and, in any event, fail to show any legal or factual error in the Chamber's reasoning and conclusions, or that any alleged error impacted the Judgment.

VII.B.1. The Chamber properly defined the law under article 31(1)(d) (Ground 44)

308. The Chamber correctly found that the first element of duress under article 31(1)(d) is that the alleged crime was "caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person."[1106] The Chamber observed that, "[f]rom the plain language of the provision, the words 'imminent' and 'continuing' refer to the nature of the threatened harm, and not the threat itself." In other words, "the threatened *harm* in question must be either to be killed immediately ('imminent death'),

[1099] Judgment, para. 2669.
[1100] *See above* paras. 157-160.
[1101] Judgment, para. 227. *See also* para. 260 ("Each statement made by a witness is assessed individually—while, at the same time, taking into account, holistically, the entire system of evidence available to the Chamber—and, accordingly the same witness may be reliable in one part of their testimony, but not in another"); *Ntaganda* AJ, para. 587.
[1102] Judgment, para. 227; *see also Ntaganda* AJ, para. 37; *Bemba et al.* AJ, para. 868.
[1103] Judgment, para. 231.
[1104] *See e.g.* Appeal, paras. 531, 567-568, 575, 601, 621, 649.
[1105] *Bemba et al.* AJ, para. 868.
[1106] Judgment, para. 2581.

or to suffer serious bodily harm immediately or in an ongoing manner ('continuing or imminent serious bodily harm')".[1107] Accordingly, "duress is unavailable if the accused is threatened with serious bodily harm that is not going to materialise sufficiently soon" and "[a] merely abstract danger or simply an elevated probability that a dangerous situation might occur—even if continuously present—does not suffice."[1108]

309. Ongwen argues that the Chamber went "on a frolic to split hairs" and erred in law by saying that 'imminent' and 'continuing' refer to the nature of the threatened harm and not the threat itself.[1109] He submits that the Chamber provided no reasoned explanation for its conclusion that the threatened harm must either be to be killed immediately or to suffer serious bodily harm immediately or in an ongoing manner. He appears to suggest that an abstract danger or a mere probability that such danger might occur is sufficient.[1110]

310. The Chamber correctly reasoned that the plain language of the provision ("threat of imminent death" or "threat […] of continuing or imminent serious bodily harm") unquestionably requires the harm to be imminent or continuing.[1111] Ongwen provides no explanation as to why this reading of article 31(1)(d) was erroneous.[1112] In particular he fails to explain why the "threat of imminent death" under article 31(1)(d) should be interpreted to include a threat not to be killed immediately but "later".[1113] Contrary to his submission,[1114] the clear terms "immediate" and "continuing" in article 31(1)(d) indicate that the *timing* of the materialisation of the threat ("sufficiently soon") is indeed one of the criteria to be considered when applying article 31(1)(d). The Pre-Trial Chamber in its Confirmation Decision rejected similar arguments, finding that Ongwen's interpretation, "would provide blanket immunity to members of criminal organisations which have brutal systems of ensuring discipline as soon as they can establish that their membership was not voluntary."[1115]

311. In any event, this alleged error of law would have no impact on the Judgment, since the Chamber found that Ongwen "was not under threat of death or serious bodily harm to himself

[1107] Judgment, para. 2582.
[1108] Judgment, para. 2582.
[1109] Appeal, para. 500.
[1110] Appeal, paras. 502, 508-509.
[1111] Judgment, para. 2582.
[1112] Appeal, paras. 499-503, 507-509.
[1113] Appeal, para. 507. The Prosecution notes that any threat of imminent death or bodily harm is by definition meant to materialize "later", in the sense of "after the threat". However, Ongwen uses the term "later" to signify the *opposite* of "imminent", in the sense that the threatened harm does not have to materialise imminently, *but* rather after an intervening and indefinite delay.
[1114] Appeal, para. 509.
[1115] Confirmation Decision, para. 153.

or another person" and it was "therefore not possible to further discuss specifically the imminence of the threatened harm".[1116] Accordingly, even if the Chamber had erred as to the particular nature of the threat required under article 31(1)(d), which it did not, this would still not have impacted its conclusion that there was no threat at all, imminent or otherwise.

312. Ongwen does not even attempt to demonstrate how the alleged legal error impacted the Chamber's factual determination. Rather, he reargues a number of unsubstantiated purported factual errors, largely based on his own misrepresentations of the Judgment.[1117]

313. First, Ongwen ignores the Chamber's extensive reasoning and findings when he argues that the Chamber did not explain why Ongwen did not genuinely fear death or serious harm if he defied Kony's orders.[1118] Based on its thorough analysis of the evidence[1119]—including, among other factors, Ongwen's personal loyalty to Kony and his career advancement under him[1120]—the Chamber found that Ongwen's actions were "entirely incompatible with a commander in fear for his life or similar".[1121] While Ongwen may disagree with this conclusion, he shows no error.

314. Second, the Chamber did consider the brutality of the LRA's disciplinary regime in its assessment under article 31(1)(d).[1122] Yet, crucially, it also recalled that the status of low-ranking LRA members and that of higher commanders such as Ongwen were fundamentally different, especially with regard to disciplinary matters. As the Chamber noted, Ongwen was as much the *source*, AND not the victim, of such threats.[1123] Further, contrary to Ongwen's submission, the Chamber did not find that the LRA's disciplinary regime was an "abstract danger", nor that there was an "elevated probability" that a dangerous situation might occur as a result of the disciplinary regime.[1124] Rather it found that Ongwen himself "did not face *any* prospective punishment by death or serious bodily harm when he disobeyed Joseph Kony".[1125]

315. Third, the Chamber extensively considered Ongwen's arguments surrounding the spiritual beliefs in the LRA and the alleged spy network, and concluded that LRA members with some experience, who stayed in the LRA longer, did not generally believe that Kony

[1116] Judgment, para. 2669.
[1117] Appeal, para. 505.
[1118] Appeal, para. 503.
[1119] *See e.g.* Judgment, paras. 2589-2668, *especially* paras. 2591, 2593, 2602, 2606.
[1120] Judgment, paras. 2659-2665.
[1121] Judgment, para. 2665.
[1122] *Contra* Appeal, paras. 504-505, 513. *See* Judgment, para. 2590.
[1123] Judgment, para. 2591. *See also* paras. 965, 970. *See further below* paras. 318-331.
[1124] *Contra* Appeal, paras. 509-510.
[1125] Judgment, para. 2668 (emphasis added).

possessed spiritual powers.[1126] In particular, the Chamber concluded that the evidence "speaks clearly against any such influence" over Ongwen.[1127] Ongwen fails to address these findings and, as such, his contention that he "was not a rational man" and believed his "every step" was known to Kony merely disagrees with the Judgment.[1128]

316. Fourth, contrary to Ongwen's claims,[1129] the Chamber specifically addressed evidence in relation to the Acholi tradition,[1130] Ongwen's indoctrination as a child soldier,[1131] and Ongwen's contacts with General Salim Saleh.[1132] Ongwen shows no error in these respects. Nor does he explain why and how the Chamber was unreasonable in determining the relevance of the alleged mental trauma suffered by Ongwen around the charged period for the purpose of its assessment under article 31(1)(d).[1133]

317. By misrepresenting the Judgment, Ongwen fails to show any error. He also fails to articulate how any of the alleged errors impacted the Judgment. Ground 44 should be rejected.

VII.B.2. The Chamber properly assessed Ongwen's status in the LRA hierarchy and the applicability of the LRA disciplinary regime to him (Grounds 26 (in part), 46, 47 (in part), 48)

318. After a careful assessment of the evidence the Chamber concluded that Ongwen's status, and the applicability of the LRA disciplinary regime to him, was fundamentally different from that of low-level LRA members.[1134] The Chamber noted that the relationship between Kony and Ongwen was not characterised by the complete dominance of the former and the subjection of the latter, but rather that Ongwen was a self-confident commander who took his own decisions on the basis of what he thought right or wrong.[1135] The Chamber properly considered these factors, together with its other findings, to conclude that Ongwen did not act under duress.[1136] Contrary to Ongwen's characterisation of the Judgment,[1137] the Chamber considered all the relevant evidence and provided adequate reasoning for its conclusions. Ongwen's undeveloped and incorrect arguments in Grounds 46 and 48 should be rejected.

[1126] Judgment, paras. 2607, 2643-2658.
[1127] Judgment, para. 2658. *See further below* paras. 354-364.
[1128] *Contra* Appeal, paras. 506-507, 512.
[1129] Appeal, paras. 511-512.
[1130] *See* Judgment, para. 2643.
[1131] *See* Judgment, para. 2592.
[1132] *See* Judgment, para. 2618.
[1133] *Contra* Appeal, para. 512.
[1134] Judgment, paras. 2591, 2597.
[1135] Judgment, para. 2602.
[1136] Judgment, paras. 2668-2670.
[1137] Appeal, paras. 514-515.

319. First, there are no internal inconsistencies in the Judgment, nor does the Judgment contradict the Confirmation Decision.[1138] Both the Chamber and the Pre-Trial Chamber found that: the LRA was an organised entity led by Kony;[1139] there was a working system of discipline;[1140] Kony maintained a tight grip over the structure, including by invoking mystical powers, but that there were also deviations within the hierarchical structure of the organisation;[1141] and Ongwen's performance as commander was highly valued by Kony.[1142] None of these findings is inconsistent with the conclusion that, as a commander, Ongwen was afforded more latitude than more junior LRA fighters.

320. Second, contrary to Ongwen's assertion,[1143] the Chamber carefully assessed the evidence and provided sufficient reasoning for its conclusion that the LRA was an effective, hierarchically structured organisation, but was not under the *absolute* control of Kony and that Ongwen was not under threat of death or physical punishment.[1144] In analysing the LRA's structure, the Chamber explained that "[w]hereas LRA commanders at levels such as brigade or battalion did not have the general power to ignore or refuse orders from Joseph Kony […] the commanders possessed a degree of autonomy […]. Thus, it is clear that the constant fear of violence affected the lower levels of the LRA hierarchy more strongly. Indeed, the narrative of the LRA as an organisation where all decisions and orders emanated exclusively from Joseph Kony while any other person was constrained to simply execute them regardless of their will, is not demonstrated by the evidence in such absolute terms; to the contrary […] any such narrative needs to be relativised as concerns persons at relatively high positions in the hierarchy, such as brigade and battalion commanders, who, instead, maintained agency within the organisation."[1145]

321. Consistent with—and based upon—these properly reasoned conclusions, the Chamber found, in the context of article 31(1)(d), that Ongwen was not in a situation of complete subordination, and that his situation was "fundamentally" different from that of low-level members or recent abductees who were frequently under threat of imminent death or physical punishment.[1146] The Chamber did not rely on "cherry-picked, untested and unauthenticated

[1138] *Contra* Appeal, paras. 516-519.
[1139] Confirmation Decision, para. 56; Judgment, para. 123.
[1140] Confirmation Decision, para. 56; Judgment, para. 131.
[1141] Confirmation Decision, para. 56; Judgment, paras. 124, 864, 873, 2590, 2593, 2643.
[1142] Confirmation Decision, para. 58; Judgment, paras. 2659-2660.
[1143] Appeal, para. 520.
[1144] Judgment, paras. 123-124, 131, 852-873, 950-970, 2590, 2593.
[1145] Judgment, para. 970.
[1146] Judgment, paras. 2591, 2606, 2668.

logbook[] summaries" to reach its findings.[1147] Rather, the Chamber soundly based its conclusion on its prior well-reasoned findings,[1148] as well as witness testimony[1149]—*corroborated* by intercepted radio communications,[1150] the reliability of which was extensively tested by the Chamber.[1151] General reference to Ongwen's abduction, or the general environment in the LRA, is insufficient to show this was unreasonable.[1152]

322. Ongwen suggests that the Chamber should have concluded, based on the executions of three senior LRA commanders, that the disciplinary regime was enforced equally across all LRA members irrespective of their ranks.[1153] However, Ongwen's undeveloped submission fails to acknowledge that the evidence demonstrates a contrary conclusion, as comprehensively explained by the Chamber. The Chamber reasonably concluded that the evidence "does not indicate that the commanders were executed for failing to execute orders to engage in operations, by remaining passive. Rather [the three executions] were caused by these commanders challenging 'politically' the power of Joseph Kony as the exclusive leader of the LRA".[1154] Ongwen's unsupported submission that "[t]he reasons for the execution of LRA superior commanders […] are irrelevant to the fact that they were executed irrespective of their rank" fails to show any error in the Chamber's reasoning.[1155]

323. Third, Ongwen misrepresents the Judgment by repeating his argument that the Chamber "ignored" his submissions on spiritualism.[1156] To the contrary, as noted above, after a careful assessment of the evidence,[1157] the Chamber properly concluded that LRA members with some experience in the organisation—including Ongwen—did not generally believe in Kony's spiritual powers.[1158] Ongwen's unsupported misrepresentation fails to show any error of fact.

324. Fourth, the Chamber reasonably found that, while Kony's orders were generally complied with, brigade and battalion commanders took their own initiatives when Kony was geographically removed—and this was the case during the period of the charges, when Kony

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[1147] *Contra* Appeal, para. 521.
[1148] *Including* Judgment, paras. 852-873, 950-970.
[1149] Judgment, paras. 2594-2603.
[1150] Judgment, paras. 2603-2606.
[1151] Judgment, Section IV.B.3.i (paras. 614-810). *See below* paras. 452-454, 461-486.
[1152] *See* Appeal, paras. 307-319. *See also above* paras. 262-266.
[1153] Appeal, paras. 524-525.
[1154] Judgment, para. 2614.
[1155] *Contra* Appeal, para. 525. *See further below* paras. 334-342.
[1156] Appeal, para. 522.
[1157] Judgment, paras. 2643-2658.
[1158] Judgment, para. 2658. *See further below* paras. 354-364.

was in Sudan.[1159] Ongwen's suggestion that this conclusion would be factually or legally incompatible with a common plan in which Kony was "fully in control of the crimes", based on the manner of pleading in the Prosecution's article 58 application, is undeveloped and, in any event, erroneous.[1160] Not only was the Chamber obliged to decide on the evidence at trial, but it is perfectly possible for the leader of an organisation to control the crimes of their subordinates without each of those subordinates necessarily acting under duress.

325. Fifth, the Chamber properly found that "as a matter of fact, high-ranking commanders of the LRA, including Dominic Ongwen, did not always execute Joseph Kony's orders".[1161] It based its conclusion on both Prosecution and Defence witnesses, for example the unequivocal testimony of P-0440,[1162] P-0040,[1163] P-0070,[1164] P-0231,[1165] P-0016,[1166] P-0226,[1167] D-0032[1168] as corroborated by intercepted radio communications.[1169]

326. Ongwen disagrees with the Chamber's conclusion but fails to show that its overall assessment of the evidence was unreasonable.[1170] Instead, Ongwen relies on P-0440's testimony to suggest that it contradicted the Chamber's findings.[1171] However, the fact that P-0440 testified that (i) Kony and Otti were happy because Ongwen would implement the orders,[1172] and that (ii) Kony and Otti complained about Odongo and Onen's bad performance but praised Ongwen as an example of a well-performing commander,[1173] does not contradict but rather *confirms* the Chamber's finding that commanders did not always execute Kony's orders.

327. Further, Ongwen takes P-0440's words out of context.[1174] P-0440 clearly testified that by the time he left the LRA, Odongo and Onen were still in command, but that he could not say what happened to them afterwards.[1175] Ongwen also fails to address P-0440's unequivocal

[1159] Judgment, paras. 124, 866-873.
[1160] Appeal, para. 523.
[1161] Judgment, para. 2593.
[1162] Judgment, para. 2594.
[1163] Judgment, para. 2595.
[1164] Judgment, para. 2596.
[1165] Judgment, paras. 2597-2598.
[1166] Judgment, para. 2598.
[1167] Judgment, para. 2600.
[1168] Judgment, para. 2605.
[1169] Judgment, paras. 2603-2606.
[1170] Appeal, para. 526.
[1171] Appeal, paras. 526-528.
[1172] Appeal, para. 526 (citing T-40, 20:4-8).
[1173] Appeal, para. 527 (citing T-40, 40:9-15).
[1174] Appeal, para. 527 (citing T-40, 41:16-18).
[1175] T-40, 41:4-19.

testimony relied upon by the Chamber[1176] that some people could violate Kony's order to stop abductions,[1177] and that "most times when somebody does not want to do something, they make up excuses so that they do not go on mission, for example, they pretend to be ill or, if they don't want to go, they make up their minds that, okay, I do not really want to go, so if I pretend that I'm sick, then I would not suffer consequences from that".[1178]

328. Sixth, the Chamber reasonably found Ongwen to be a self-confident commander who took his own decisions on the basis of what he thought right or wrong.[1179] Contrary to Ongwen's submission,[1180] the Chamber reasonably found that the interactions between Ongwen and Kony, as described by P-0231, were incompatible with a situation of threat of imminent death or imminent or continuing serious bodily harm.[1181] P-0231 did not merely testify that Ongwen addressed Kony "to seek clarification of the orders" received,[1182] but also that Ongwen intervened to spare the life of people that were supposed to be executed[1183] and that in general he would "always intervene in what he believes is a bad order."[1184] Further, the Chamber carefully reviewed the evidence surrounding the executions of Vincent Otti and Otti Lagony (as well as other senior LRA commanders),[1185] and found that it did not indicate that commanders were executed for failing to execute orders but rather for challenging the power and leadership of Kony.[1186] Ongwen's submissions fail to show that the Chamber's finding was unreasonable.[1187]

329. Seventh, the Chamber reasonably found that the evidence at trial did not provide any basis for considering a "spy network" as a "separate phenomenon".[1188] It properly considered the issue as "fold[ing] entirely within the analysis of the nature of the hierarchical relationship between Kony and the LRA commanders, including Dominic Ongwen."[1189] The Chamber also noted that the Defence provided no support for the claim that there was "omnipresent

[1176] Judgment, para. 2594.
[1177] T-39, 83:25-84:14.
[1178] T-40, 6:18-7:9. *See also* T-40, 4:17-5:12.
[1179] Judgment, para. 2602.
[1180] Appeal, paras. 529-530.
[1181] Judgment, para. 2597.
[1182] *Contra* Appeal, para. 529.
[1183] T-123, 83:6-84:9 (cited at Judgment, para. 2597).
[1184] T-123, 84:1-2.
[1185] Judgment, paras. 2609-2618.
[1186] Judgment, para. 2614.
[1187] Appeal, para. 531.
[1188] Judgment, para. 2607.
[1189] Judgment, para. 2607.

surveillance by selected individuals within the LRA who reported to Kony".[1190] The testimony to which Ongwen now refers[1191] merely confirms that, like many hierarchical structures, intelligence officers were potentially monitoring the conduct of LRA members, and that potential defectors might have been well advised to inform only trustworthy persons to minimise the risk of discovery and punishment. This does not contradict the Chamber's finding.

330. Finally, Ongwen fails to explain the relevance of his undeveloped submission "[i]n respect of the distribution of women."[1192] As such, the Prosecution cannot meaningfully respond to it and it should be summarily dismissed.

331. In conclusion, by misrepresenting the Judgment and the evidence, Ongwen fails to show any error of law or fact. He also fails to articulate how any of the alleged errors impacted the Judgment. Grounds 46 and 48 should be rejected.

VII.B.3. The Chamber properly considered Ongwen's commission of crimes in private (Ground 49)

332. As part of its assessment of whether Ongwen's actions were committed "under threat," the Chamber took into account the fact that Ongwen directly committed SGBC (including rape and torture) in the relative privacy of his household or even in the complete privacy of his sleeping place. Noting that Ongwen "engaged in this conduct, when, had he not, it would have been relatively easy to hide that fact," it was reasonable for the Chamber to consider this as a "further indicat[ion] that his actions were not caused by threat".[1193]

333. Ongwen misunderstands the Chamber's finding. His submissions that "wives" were distributed by Kony,[1194] that Ongwen had to obey "orders regarding women possession",[1195] and that "wives" were not exclusive to the person to whom they were assigned,[1196] do not undermine the Chamber's finding that Ongwen personally committed SGBC in private where any threat arguably made to him could have no effect.[1197] In other words, given that Ongwen chose to rape and torture young girls repeatedly over a long period of time in the privacy of his household and sleeping place, even where no alleged threat could have had any effect, it was reasonable for the Chamber to consider this as a further indication that Ongwen's actions were

[1190] Judgment, para. 2607 (fn. 6963: referring to Defence Closing Brief para. 691).
[1191] Appeal, para. 534 (fns. 608-609).
[1192] Appeal, para. 532. *See further below* paras. 332-333.
[1193] Judgment, para. 2667.
[1194] Appeal, para. 539.
[1195] Appeal, paras. 537, 539.
[1196] Appeal, para. 540.
[1197] Judgment, para. 2667.

not caused by threat.[1198] Even if it were true that Ongwen's choice was nonetheless consistent with Kony's order, this does not show that the Chamber erred.

VII.B.4. The Chamber reasonably assessed the execution of senior LRA commanders on Kony's order (Grounds 50, 51, 56)

334. The Chamber reasonably concluded that the evidence "does not indicate that the commanders were executed for failing to execute orders to engage in operations, by remaining passive. They were instead caused by these commanders challenging 'politically' the power of Joseph Kony as the exclusive leader of the LRA".[1199] Ongwen disagrees with this conclusion[1200] but fails to explain why it was unreasonable.

335. First, Ongwen does not explain why it was unreasonable for the Trial Chamber to find on the evidence that: Otti Lagony and Okello Can Odonga were executed because they were challenging Kony's authority as the exclusive leader of the LRA;[1201] James Opoka was executed because he had an arrangement to escape from the LRA with LRA soldiers;[1202] and Vincent Otti was executed because there was a divergence between what he stood for and what Kony stood for.[1203] The evidence established that these commanders were not executed for simply failing to execute orders to engage in operations or by remaining passive, but rather for challenging Kony's power as the exclusive leader of the LRA and seeking to take more general decisions in relation to the goals and priorities of the LRA.[1204] The Chamber reasonably concluded that it could not infer from this evidence that Kony inevitably and immediately ordered the killing of commanders who did not execute his orders.[1205]

336. Ongwen also fails to address the Chamber's finding that its conclusion was further corroborated by evidence that Kony at most demoted or threatened to demote non-performing commanders[1206]—including two entries in the ISO logbook recording Kony "blasting" Ongwen

[1198] As the Pre-Trial Chamber found, "[i]f, arguendo, Dominic Ongwen could not have avoided accepting (P-99), (P-101), (P-214), (P-226) or (P-227) as forced wives, he could have avoided raping them, or, at the very least, he could have reduced the brutality of the sexual abuse. Yet, his former so-called "wives" testified they were raped with ruthless regularity": Confirmation Decision, para. 155.
[1199] Judgment, para. 2614.
[1200] Appeal, paras. 542-544.
[1201] Judgment, para. 2611.
[1202] Judgment, para. 2612.
[1203] Judgment, para. 2613.
[1204] Judgment, para. 2614.
[1205] Judgment, para. 2614.
[1206] Judgment, para. 2615.

for being a weak commander and threatening a demotion,[1207] and ordering the separation of two commanders because they defied his orders.[1208]

337. Second, contrary to Ongwen's submission,[1209] the Chamber did not err by deciding not to rely on an UPDF intelligence report[1210] which alleged that, at the time of his 'arrest', Ongwen had "come close to execution for getting in touch with and receiving money from Lt General Salim Saleh."[1211] As the Chamber properly reasoned, it was not possible to ascertain the source from which the UPDF intelligence obtained the information.[1212] Ongwen fails to show that this was unreasonable.

338. In particular, the Chamber carefully reviewed the evidence as to Ongwen's brief 'arrest' in April 2003 upon Kony's order for allegedly communicating by phone with the government.[1213] In light of P-0231's testimony and several entries in the UPDF and ISO logbooks showing Ongwen's activities at that time, the Chamber found that, while Ongwen was briefly 'arrested' and accused of having communicated with General Salim Saleh, he "did not for any significant period interrupt the exercise of his authority as commander".[1214] Indeed, a radio intercept showed that Ongwen was active mere days after Kony ordered his arrest.[1215] Further, based on the testimony of P-0540, P-0070, P-0144 and Simon Tabo, the Chamber also explained that 'arrest' in this context did not refer to punishment by detention in confined space, but rather to a specific measure used for commanders of which the central feature was the temporary removal of their usual authority.[1216]

339. Given the evidence on the record—that (i) at the time of his 'arrest' Ongwen was not detained and his 'arrest' did not significantly interrupt the exercise of his command authority,[1217] (ii) only a few months later Ongwen was promoted,[1218] and (iii) Kony at most

[1207] Judgment, para. 2616.
[1208] Judgment, para. 2617.
[1209] Appeal, paras. 545-557.
[1210] UGA-OTP-0255-0943, p. 0945.
[1211] Judgment, para. 2618.
[1212] Judgment, para. 2618.
[1213] Judgment, paras. 135, 1019, 1050-1063, 2620.
[1214] Judgment, paras. 1063, 2620.
[1215] Judgment, para. 1061.
[1216] Judgment, paras. 1057-1060. Ongwen's undeveloped submission that findings on the meaning of 'arrest' in the LRA is irrelevant to the question of the threat he allegedly faced (Appeal, para. 556) should be rejected since the LRA's disciplinary regime is, by Ongwen's admission (*see e.g.* Appeal, para. 522), relevant to determine the existence of a threat under article 31(1)(d).
[1217] Judgment, paras. 1057-1063, 2620.
[1218] Judgment, paras. 136, 1062, 1071-1074, 2620.

demoted or threatened to demote non-performing commanders[1219]—it was reasonable for the Chamber not to have relied upon the sole and unsourced evidence of the UPDF intelligence report so as to conclude that he was under threat of death when he committed the underlying the charged crimes.

340. Ongwen's submission that the Chamber's conclusion is inconsistent with the evidence on the record, and that the Chamber was unreasonable to reject the UPDF report, should be rejected.[1220] In this context, Ongwen misrepresents P-0205's evidence.[1221] The witness's evidence about Okwonga Alero purportedly being sent to shoot Ongwen, and what he heard about contacts between General Salim Saleh and Ongwen, are separate matters. Although asked about them in sequence, the witness did not connect the two. P-0205 repeatedly and unequivocally stated that he could only testify to hearing about General Salim Saleh giving Ongwen money and uniforms. He explicitly said he did not know anything about how the communication between Ongwen and General Salim Saleh came about and whether Kony ever found out about it.[1222] P-0205 never testified that Alero was sent to shoot Dominic Ongwen *because* of contact with General Salim Saleh, as the Defence seems to imply.[1223]

341. Further, contrary to Ongwen's assertions,[1224] D-0013's testimony regarding Ongwen's "arrest" in 2003 does not suggest that Ongwen's life was threatened. On the basis of detailed, reliable and consistent evidence, the Chamber found that Ongwen's arrest followed contact with government forces and not, as D-0013 testified, because he tried to escape while in sickbay.[1225] Moreover, D-0013 explained that Ongwen was not apprehended but rather summoned by Otti.[1226] In addition, D-0013 stated that the only consequence of Ongwen's arrest was that he was stripped of weapons and deprived of his escorts for about two weeks, whilst his wives remained with him.[1227] Finally, D-0013 explicitly stated she did not know whether Ongwen was threatened by Otti.[1228]

342. Finally, the Chamber reasonably considered the fact that Kony promoted Ongwen only a few months after ordering his 'arrest' as a further indication that the consequences of defying

[1219] Judgment, paras. 2590-2617.
[1220] Appeal, paras. 546-547, 550-552.
[1221] Appeal, para. 548.
[1222] T-49, 37:25-42:13.
[1223] *Contra* Appeal, para. 548.
[1224] Appeal, para. 551. The Defence refers to D-0013's evidence without providing a reference to her testimony.
[1225] Judgment, para. 2620.
[1226] T-244, 56:18-20
[1227] T-244, 53:21-54:12, 54:23-24.
[1228] T-244, 56:21-23.

Kony were not necessarily grave.[1229] Ongwen argues that the Chamber misinterpreted the trial record because the evidence "stated clearly that it was the spirits [and not Kony] who made the promotion".[1230] Ongwen's submission fails to show that the Chamber was unreasonable in finding that Kony, and not the spirits, promoted Ongwen. Grounds 50, 51 and 56 should be rejected.

VII.B.5. The Chamber reasonably considered that Ongwen could escape or leave the LRA (Grounds 52, 53, 54)

343. The Chamber reasonably found that escaping from or otherwise leaving the LRA was a realistic option available to Ongwen.[1231] The Chamber reached this conclusion based on evidence that: (i) escaping from the LRA was relatively common;[1232] (ii) Ongwen's 'arrest' and subsequent promotion demonstrated to him that defying Kony did not necessarily mean being killed and that the consequences were not necessarily grave;[1233] (iii) persons of relatively high rank and position in the LRA successfully escaped, including those proximate to Ongwen;[1234] (iv) there was a high rate of defection among persons in low hierarchical positions under tighter control than Ongwen's, and;[1235] v) Ongwen refused to surrender in September 2006,[1236] and conversed with P-0172 who tried to convince Ongwen to surrender.[1237] Ongwen's sparse and unsupported arguments that the Chamber erred in law and fact should be rejected.

344. First, Ongwen argues that the Chamber erred in law by ignoring purported exculpatory evidence that people escaped "because of opportunity" and not "voluntarily".[1238] However, this evidence *is not* exculpatory. What the Chamber properly considered is "whether and to what extent escape from *or otherwise leaving* the LRA was possible for Dominic Ongwen".[1239] Contrary to Ongwen's assertion, it is immaterial whether LRA fighters left the LRA "because of opportunity, for example when there was cross fire between the UPDF and the LRA",[1240] or in other circumstances. In fact, after recalling that dozens of witnesses testified about their

[1229] Judgment, paras. 136, 1061-1062, 1071-1074, 2620.
[1230] Appeal, paras. 553-555.
[1231] Judgment, para. 2635.
[1232] Judgment, paras. 972, 2619
[1233] Judgment, para. 2620.
[1234] Judgment, paras. 2621-2631.
[1235] Judgment, paras. 2632-2635.
[1236] Judgment, paras. 2636-2640.
[1237] Judgment, para. 2641.
[1238] Appeal, paras. 559-562. *See also* paras. 639-647.
[1239] Judgment, para. 2619 (emphasis added).
[1240] Appeal, para. 559.

escape from the LRA,[1241] the Chamber expressly noted as examples some of the witnesses that Ongwen suggests were ignored: P-0209,[1242] P-0138,[1243] P-0018, D-0118, and D-0119.[1244] The Chamber was thus fully aware of the circumstances in which each witness escaped from the LRA, and reasonably found that escaping or otherwise leaving the LRA was a realistic option for Ongwen—irrespective of the range of circumstances in which this happened for other LRA members.[1245]

345. Further, as discussed above,[1246] the Appeals Chamber in *Bemba*[1247] did not require as a matter of law that a chamber must invariably accept potentially exculpatory evidence from a witness upon whom it has relied for inculpatory evidence.

346. Second, the Chamber reasonably considered that "Ongwen's refusal to surrender in September 2006, although outside of the period of the charges, provides certain further basis to conclude that he was, during the time of his conduct relevant for the charges, not under threat of death or physical harm".[1248] Ongwen argues that the Chamber erred by relying on evidence of events which occurred outside of the temporal scope of the charges,[1249] and by not explaining how his refusal to surrender in 2006 could have impacted the charged crimes, which occurred between July 2002 and December 2005.[1250]

347. Contrary to Ongwen's assertion, the Chamber did not "punish[] the Appellant for refusing to surrender under circumstances which were not linked to the charged crimes."[1251] Nor was the Chamber required to show any impact of Ongwen's decision not to surrender in 2006 on the commission of the charged crimes. Rather, the Chamber reasonably considered Ongwen's refusal to surrender in 2006 as one further evidentiary factor, among others, upon which to conclude that during the time of his conduct relevant for the charges, he had the reasonable

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[1241] Judgment, para. 2632. The Chamber heard the evidence of 50 witnesses who escaped from the LRA in a range of circumstances: P-0016, [REDACTED], P-0330, P-0379, P-0309, P-0018, P-0142, P-0314, P-0280, P-0252, P-0144, P-0054, P-0245, P0340, P-0045, P-0070, P-0097, P-0233, P-0172, P-0081, P-0138, P-0250, P-0145, P-0200, P-0410, P-0307, P-0406, P-0085, P-0286, D-0079, D-0032, D-0092, D-0118, D-0081, D-0068, D-0134. Other witnesses escaped outside the charged period: P-0205, P-0264, P-0231, P-0372, P-0448, P-0209, D-0105, D-0026, D-0024, D-0027, D-0017, D-0117, D-0075, D-0025, D-0056.
[1242] Appeal, paras. 559(a), 644; Judgment, para. 2628.
[1243] Appeal, paras. 559(b), 644; Judgment, para. 2632.
[1244] Appeal, para. 559(c)-(e); Judgment, para. 2632.
[1245] Judgment, para. 2641.
[1246] *See above* para. 287 ; *contra* Appeal, para. 562.
[1247] *Bemba* AJ, para. 189.
[1248] Judgment, para. 2640.
[1249] Appeal, para. 564.
[1250] Appeal, paras. 565-566.
[1251] Appeal, para. 566.

possibility to escape or leave the LRA.[1252] The Appeals Chamber has held that, "depending on the circumstances, the conduct of an accused after the commission of a crime may provide information or evidence that may be of relevance to the assessment of his or her intent at the time of the offence".[1253] Similarly, in its holistic assessment of the evidence, the Chamber was fully entitled to consider Ongwen's decision not to surrender in September 2006 as part of its assessment of whether Ongwen had the possibility to escape from the LRA at the time of his conduct underlying the charged crimes. Ongwen's unsupported claim that his right to a fair trial was violated should be rejected.[1254] Ongwen's further speculative submissions that he may not have surrendered because of fear that he would be captured and killed, or because he believed that his defection would have compromised the peace process and prolonged the war, has no support in the evidence[1255] and fails to show any error in the Chamber's reasoning.

348. Third, the Chamber carefully assessed the intercept materials.[1256] First, it discussed intercept materials in general,[1257] including reviewing the intercept process,[1258] the chain of custody,[1259] the audio recordings (including enhanced audio recordings),[1260] and the interceptor logbooks specifically.[1261] Then it discussed specific intercepted communications.[1262] Finally, before relying upon a specific entry, the Chamber considered the relevant intercept in the context of other evidence.[1263] Ongwen's unsubstantiated submission that the Chamber erred in its assessment of the interceptor logbooks[1264] fails to show any error in the Chamber's reasoning and conclusions.

349. Fourth, Ongwen submits that the Chamber gave no reasons for its finding that Ongwen's rank placed him in a better position to escape, and that it "cherry-picked" a few cases of escape, thus making "unmotivated" comparisons between commanders "who escaped due to opportunities".[1265] His unsubstantiated disagreement with the Judgment should be rejected.

[1252] Judgment, paras. 2619-2639, 2642.
[1253] *Ntaganda* AJ, para. 1127.
[1254] Appeal, para. 564.
[1255] Appeal, para. 568.
[1256] Judgment, paras. 614-810. *See below* paras. 452-454, 461-486.
[1257] Judgment, paras. 614-686.
[1258] Judgment, paras. 616-632.
[1259] Judgment, paras. 633-636, 645-647.
[1260] Judgment, paras. 648-657.
[1261] Judgment, paras. 658-666.
[1262] Judgment, paras. 687-810.
[1263] *See e.g.* Judgment, paras. 2603-2606, 2616-2617, 2629, 2631, 2660-2663.
[1264] Appeal, para. 569.
[1265] Appeal, paras. 571-573.

Ongwen's reference to Judge Henderson's opinion (in *Gbabgo*)[1266] is misplaced. The Chamber did not "cherry-pick" examples to fit a preconceived pattern, but rather recognised that the evidence in this case was largely consistent.[1267] As discussed above,[1268] "the Chamber heard dozens of personal escape stories from witnesses who came to testify during the trial who due to their low hierarchical position in the LRA were under much tighter control than Dominic Ongwen".[1269] The Chamber further discussed as examples the escape of 14 other witnesses—eight of whom held high rank[1270]—as corroborated by intercepted radio communications.[1271] Further, the Chamber reasonably found that there was a difference between the status of low-ranking LRA members and higher commanders in terms of the disciplinary regime to which they were subject.[1272]

350. Fifth, the Chamber properly assessed the evidence of D-0013[1273] and D-0018,[1274] and provided adequate reasoning as to why it found their testimony did not affect its conclusion as to Ongwen's possibility of escaping from or leaving the LRA. The Chamber explained that D-0018's testimony that it was impossible for him to escape was inapposite because D-0018 was never a member of the LRA but a guest commander—and because, in any event, there was no indication that D-0018 had difficulties in leaving Kony after meeting with him.[1275] As for D-0013, as discussed above,[1276] the Chamber reasonably rejected her testimony that Ongwen was arrested in April 2003 because he tried to escape, and in any event found that her testimony showed that the consequences of defying Kony's order were not necessarily grave.[1277] In this context, Ongwen's undeveloped submission[1278] that the Chamber impermissibly reversed the burden of proof merely disagrees with the Judgment and should be rejected.[1279]

[1266] Appeal, para. 572.
[1267] Judgment, para. 2632. The Chamber heard the evidence of 50 witnesses who escaped from the LRA in a range of circumstances: P-0016, [REDACTED], P-0330, P-0379, P-0309, P-0018, P-0142, P-0314, P-0280, P-0252, P-0144, P-0054, P-0245, P0340, P-0045, P-0070, P-0097, P-0233, P-0172, P-0081, P-0138, P-0250, P-0145, P-0200, P-0410, P-0307, P-0406, P-0085, P-0286, D-0079, D-0032, D-0092, D-0118, D-0081, D-0068, D-0134. Other witnesses escaped outside the charged period: P-0205, P-0264, P-0231, P-0372, P-0448, P-0209, D-0105, D-0026, D-0024, D-0027, D-0017, D-0117, D-0075, D-0025, D-0056.
[1268] *See above* para. 344
[1269] Judgment, para. 2632.
[1270] Judgment, paras. 2622-2628, 2632.
[1271] Judgment, paras. 2629, 2631, 2633.
[1272] Judgment, para. 2590. *See further above* paras. 318-331.
[1273] Judgment, para. 2620.
[1274] Judgment, para. 2630. The Prosecution note that Ongwen erroneously refers to D-0008.
[1275] Judgment, para. 2630. The Prosecution note that Ongwen erroneously refers to D-0008.
[1276] *See above* para. 341
[1277] Judgment, para. 2620.
[1278] Appeal, paras. 574-575.
[1279] *See above* paras. 157-160.

351. Sixth, the Chamber carefully assessed the evidence surrounding the general threat made to LRA members that their home areas would be attacked if they escaped, and found that such a threat did exist.[1280] However, in the context of article 31(1)(d), the Chamber reasonably rejected Ongwen's submission that this threat was sufficiently "imminent" and "constant"[1281] because: (i) all evidenced punitive attacks on escapees' home areas occurred in the 1990s and not during the relevant period;[1282] (ii) the sole exception, regarding D-0157 and the LRA attack in Mucwini in 2002, was distinguishable since it resulted from one person grabbing a gun from (and opening fire on) LRA soldiers;[1283] and (iii) the complete absence of any evidence that these incidents played any role in Ongwen's decision-making.[1284]

352. While depicting his challenge as a legal/procedural error,[1285] Ongwen effectively advances a purely factual argument which merely disagrees with the Chamber's assessment of the evidence.[1286] He fails to properly appreciate the Chamber's reasoning and conclusions. Thus, the Chamber did not just find that "the threat of collective punishment would only be applied in instances where the escapees had escaped with guns and or caused havoc prior to their escape or were affiliated with the UPDF."[1287] Rather, the Chamber found, in the context of its general analysis of the organisational feature of the Sinia brigade, that "[m]embers were also threatened that their home areas would be attacked by the LRA if they escaped."[1288] But when addressing the specific question of whether such a threat applied to Ongwen at the relevant time for the purpose of duress under article 31(1)(d), the Chamber reasonably took into account that the only incident on the record of collective punishment that time was clearly distinguishable, and that there was no evidence that it played a role for Ongwen.[1289] Ongwen fails to show that this conclusion was erroneous.

353. In any event, Ongwen fails to show the impact of this alleged error of fact.[1290] Even if *arguendo* the Chamber should have concluded that the general threat of collective punishment existed for Ongwen, this would not have impacted its ultimate conclusion that Ongwen was not

[1280] Judgment, paras. 132, 991-998, 2642.
[1281] Judgment, para. 2642 (referring to and addressing Defence Closing Brief, para. 690).
[1282] Judgment, paras. 993, 2642.
[1283] Judgment, paras. 994-998, 2642.
[1284] Judgment, para. 2642.
[1285] Appeal, paras. 578-579.
[1286] Appeal, paras. 576-577, 579.
[1287] Appeal, para. 577.
[1288] Judgment, para. 132.
[1289] Judgment, para. 2642.
[1290] Ongwen appears to suggest that this is a legal/procedural error: Appeal, para. 579. However, this would be an error of fact, since Ongwen argues that the Chamber, based on the evidence, reached the wrong conclusion.

acting under duress for the purpose of article 31(1)(d) at the time he committed the charged crimes.[1291] This finding was based on multi-layered and consistent evidence, including that Ongwen was not in a situation of complete subordination, that he frequently acted independently from and even contested Kony's orders, that he did not face any prospective punishment by death or serious bodily harm when he disobeyed Kony, that he had a realistic possibility of leaving the LRA, that he rose in rank and position including during the period of the charges and that he committed some of the charged crimes in private.[1292]

VII.B.6. The Chamber considered Kony's alleged spiritual powers (Ground 55)

354. The Chamber found that the issue of LRA spirituality did not contribute to a threat relevant under article 31(1)(d) of the Statute.[1293] Contrary to Ongwen's submissions,[1294] the Chamber gave due consideration to the substantial body of evidence detailing how Kony portrayed himself as a medium, as well as spiritualism built on Acholi traditions, but found that "[a]ll of this evidence leads the Chamber to the conclusion that LRA members with some experience in the organisation did *not* generally believe that Joseph Kony possessed spiritual powers."[1295] The Chamber further found that "[t]here is also no evidence indicating that the belief in Joseph Kony's spiritual powers played a role for Dominic Ongwen".[1296] Ongwen disagrees with the Chamber, reargues his trial submissions, but fails to show that these findings were unreasonable.[1297]

355. First, the Chamber found that the fact that Kony "acted also as a spiritual leader, building on Acholi traditions, is uncontroversial and well-attested in the evidence."[1298] It reached this conclusion based on a multiplicity of evidence including from P-0264, P-0144, P-0045, P-0233, D-0079 as well as the Defence Closing Brief (referring to P-0205, P-0142, P-0218, P-0245, P-0070, P-0172, D-0024, D-0007, D-0032, D-0092, D-0075, D-0025, D-0074 and D-0049).[1299] Several of Ongwen's submissions, based on the same evidence, are not inconsistent with this finding.[1300]

[1291] Judgment, paras. 2585-2670.
[1292] Judgment, para. 2668.
[1293] Judgment, para. 2658.
[1294] Appeal, paras. 580-603.
[1295] Judgment, para. 2658 (emphasis added).
[1296] Judgment, para. 2658.
[1297] Appeal, paras. 580-603.
[1298] Judgment, para. 2643.
[1299] Judgment, para. 2643, fn. 7045. *See also* fn. 7044 (referring to Defence Closing Brief, paras. 24-29, 692-693).
[1300] Appeal, paras. 583-585, 591.

356. Second, the Chamber provided clear and compelling reasons as to why it did not rely on certain witnesses.[1301] The Chamber explained that D-0150 (a spiritual healer who testified about spiritualism and his own possession by the spirits) and D-0111 (a spiritual healer who testified about her work as a traditional herbalist) did not testify as expert witnesses and had no knowledge of facts directly relevant to the charges.[1302] Ongwen's unsubstantiated submission fails to show any error in the Chamber's assessment.[1303]

357. The Chamber also explained why it found expert D-0060's evidence to be of limited value.[1304] Having recognised that his testimony was candid, comprehensive and clear, the Chamber nonetheless observed that, in the making of his report, D-0060 did not question the truthfulness or falsity of the statements he received from LRA fighters about spiritual influence on the LRA. The Chamber further explained that D-0060's evidence was of limited value given the abundance of direct evidence at trial by LRA witnesses on these matters.[1305] Ongwen's submission that the Chamber erred, since D-0060's response was "appropriate" and that the Chamber erroneously discounted his evidence,[1306] misses the Chamber's point that the abundant direct witness evidence of LRA members about spiritual powers and beliefs in the LRA was more valuable, in its final determination, than D-0060's opinion.

358. Further, Ongwen submits that, based on the evidence of D-0150, D-0111 and D-0060, a reasonable trier of fact "should have come to the conclusion that according to Acholi culture there is a likelihood that children, like the Appellant, may believe that they remain under the spirit's spell as the effects of indoctrination endure into adulthood and the charged period".[1307] This should be rejected. While Ongwen submits that "there is a likelihood" that LRA adult soldiers "may believe that they remain under the spirit's spell", the Chamber actually established—based on the direct evidence of adult LRA soldiers—that, in fact, "LRA members with some experience in the organisation did *not* generally believe that Joseph Kony possessed spiritual powers."[1308] In other words, Ongwen's speculative submission is inconsistent with the evidence and thus fails to show an error in the Chamber's determination.[1309]

[1301] *Contra* Appeal, paras. 586-589.
[1302] Judgment, paras. 518 (for D-0111), 608 (for D-0150).
[1303] Appeal, paras. 586-587.
[1304] Judgment, para. 597.
[1305] Judgment, paras. 596-597.
[1306] Appeal, paras. 588, 592-593.
[1307] Appeal, para. 589.
[1308] Judgment, para. 2658 (emphasis added).
[1309] *Contra* Appeal, para. 589.

359. Third, the Chamber properly considered the allegation that Kony possessed spiritual powers, or at least the belief that he possessed such powers.[1310] As discussed above, the Chamber found that it is uncontroversial that Kony acted as a spiritual leader, building on Acholi traditions.[1311] The Chamber relied on D-0074 both to support this conclusion[1312] and its finding that some persons believed in the spiritual powers of Kony.[1313] Ongwen's suggestion that the Chamber overlooked D-0074's evidence thus misrepresents the Chamber's approach—which was consistent with the testimony of D-0074 to which Ongwen refers.[1314]

360. Fourth, the Chamber's conclusion that LRA soldiers with some experience in the organisation did not generally believe that Kony possessed spiritual powers was based on the direct and consistent testimony of ten LRA witnesses (P-0231, P-0379, P-0070, P-0145, P-0205, P-0209, Simon Tabo, Kenneth Banya, Charles Lokwiya, Joseph Okilan). They testified that, while at the beginning some believed in Kony's spiritual powers, they all *stopped* believing this after they had gained some experience in the LRA.[1315] Ongwen's submission that the Chamber's conclusion was unreasonable—because it allegedly disregarded the evidence of D-0060, D-0074, D-0150, D-0111 about alleged "spiritual indoctrination and psychological manipulation used by Kony"[1316]—should be rejected.

361. As discussed above, the Chamber not only considered but properly assessed[1317] the testimony of D-0060, D-0150, D-0111,[1318] and relied on the testimony of D-0074.[1319] Their general evidence of spiritual indoctrination by Kony does not contradict the Chamber's finding that Kony led the LRA including by acting as a spiritual leader.[1320] The Chamber was also careful to recognise that "there is evidence that some persons did believe".[1321] Yet, based on the direct evidence of ten witnesses who testified about their actual views of Kony's alleged spiritual powers, the Chamber reasonably concluded that *experienced* LRA soldiers—similar

[1310] *Contra* Appeal, para. 593.
[1311] Judgment, para. 2643.
[1312] Judgment, para. 2643 (fn. 7045: referring to Defence Closing Brief, para. 710, which includes reference to D-0074).
[1313] Judgment, para. 2645 (fn. 7047).
[1314] Appeal, para. 591.
[1315] Judgment, paras. 2646-2657.
[1316] Appeal, paras. 591-595.
[1317] *Contra* Appeal, paras. 593-595.
[1318] *See above* paras. 356-357.
[1319] *See above* para. 359.
[1320] Judgment, para. 2643.
[1321] Judgment, para. 2645.

to Ongwen—no longer believed that Kony possessed spiritual powers. Ongwen fails to show any legal or factual error in this respect.

362. Fifth, the Chamber reasonably found that there was no evidence indicating that belief in Kony's spiritual power had any impact on Ongwen—including based on evidence that Ongwen at times defied Kony,[1322] which "speaks clearly against any such influence."[1323] Ongwen attempts to distinguish himself from the LRA witnesses relied upon by the Chamber,[1324] and argues that—unlike them—he did believe in Kony's spiritual powers because he "spent a lifetime in the LRA due to the early age at which he was abducted".[1325]

363. Ongwen's submission is speculative and unsupported by the evidence: Ongwen's abduction at a young age, his presence at initiation rituals and his blessing prayer before combat[1326] do not show that, as an experienced LRA commander, Ongwen still believed in Kony's spiritual powers, much less that the Chamber's conclusion was unreasonable. Rather, these facts are fully consistent with the Chamber's findings that the belief in Kony's spiritual powers "was stronger in the young, new and impressionable abductees and then subsided and disappeared in those who stayed in the LRA longer".[1327] Most of the witnesses relied upon by the Chamber were indeed abducted at a young age and they described this very trajectory.[1328]

364. Similarly, the Chamber did not disregard—but rather relied upon and cited—the evidence of P-0209, Charles Lokwiya and Joseph Okilan, that they themselves *did not* believe in Kony's spiritual power but allowed for the possibility that others did.[1329] Their evidence does not contradict,[1330] but is instead consistent with the Chamber's finding that Kony's alleged spiritual powers played no role for Ongwen—and ultimately, with the Chamber's finding that LRA spirituality was not a factor contributing to any threat material for article 31(1)(d).[1331]

VII.B.7. The Chamber properly assessed D-0133's evidence (Grounds 61, 62, 63)

365. The Chamber found D-0133 was credible in testifying about his own experience as a child abducted in the National Resistance Army, as well as about the experience of other persons

[1322] *See e.g.* Judgment, paras. 2597-2600, 2602, 2620.
[1323] Judgment, para. 2658.
[1324] Judgment, paras. 2646-2656.
[1325] Appeal, paras. 596-598.
[1326] Appeal, paras. 596-597.
[1327] Judgment, para. 2645.
[1328] *See e.g.* P-0231, P-0379, P-0070, Simon Tabo, Kenneth Banya.
[1329] Judgment, paras. 2652, 2655-2656.
[1330] *Contra* Appeal, paras. 601-603.
[1331] Judgment, paras. 2652, 2655-2656.

forced to become soldiers as children.[1332] However, the Chamber rightly noted that some of D-0133's general conclusions exceeded his "expertise" and, more importantly, addressed the legal questions arising from article 31(1)(a) or (d)—matters which could only be determined by the Chamber.[1333] These concerned: (i) the enduring effect of being a child soldier on mental health; (ii) the influence of conditions within the LRA on the free will of abductees; and (iii) whether former child soldiers are responsible for their actions as adults. On these aspects, the Chamber correctly did not rely on D-133's conclusions.

366. The Chamber discussed D-0133's testimony not as an "expert witness" [1334] but rather as one of the "other witnesses".[1335] This practical distinction was immaterial to the Chamber's assessment of D-0133's substantive testimony. As the Chamber noted at the outset of its analysis, "[t]he Chamber has structured the overview of testimonial evidence by category of witnesses; it is however understood that this categorisation is only for practical purposes. It does not have a bearing on the Chamber's assessment of any particular witness, and it is also noted that many witnesses could in fact be included in more than one category."[1336] Given that D-0133 was indeed allowed to provide his opinion,[1337] the key question is not about his *status* (whether an expert or a fact witness), as Ongwen appears to assert,[1338] but rather whether it was reasonable for the Chamber not to rely on certain of D-0133's conclusions based on his lack of expertise on certain issues.

367. First, the Chamber reasonably did not rely on D-0133's conclusions concerning the enduring effect of being a child soldier on mental health because D-0133 is not a mental health expert and thus lacked the necessary expertise.[1339] Ongwen's submission that the Chamber erred because D-0133 was "a child soldier expert", and never claimed to be "a mental health expert or legal expert",[1340] misunderstands the Chamber's reasoning. Precisely *because* "D-0133 did not testify as a mental expert"[1341] the Chamber did not rely on his conclusions requiring mental health expertise—including the question of the enduring effect of being a child soldier on *mental health*. In other words, D-0133 simply did not possess the "specialised

[1332] Judgment, para. 612.
[1333] Judgment, para. 612.
[1334] Judgment, section IV.B.2.viii. (paras. 593-602).
[1335] Judgment, section IV.B.2.ix. (paras. 603-612).
[1336] Judgment, para. 262.
[1337] *See* Appeal, para. 616.
[1338] Appeal, paras. 617-618.
[1339] Judgment, para. 612.
[1340] Appeal, para. 623. *See also* Appeal, para. 630 (suggesting again that the Chamber found that "Mr Awich presented himself as a mental health expert").
[1341] Appeal, para. 622.

knowledge, skill or training [that could] assist the Chamber in understanding or determining"[1342] an issue of such a technical nature. This approach was all the more reasonable in light of the numerous mental health experts who testified at trial.

368. Second, Ongwen's submission that D-0133's conclusions were *not* about the mental health of former child soldiers misrepresents D-0133's testimony (who indeed testified on the mental and psychological consequences for child soldiers)[1343] and which the Chamber referred to in footnotes 1084 to 1086.[1344] Further, and contrary to Ongwen's assertion, whether D-0133 did or did not name mental conditions (like PTSD or DID) is immaterial[1345]—his conclusions unequivocally related to the mental health and capacity of child soldiers, both as children and as adults. Ongwen fails to show that the Chamber was unreasonable in finding that D-0133 needed to be a mental health expert for his conclusions in that respect to be reliable. The Chamber did not misread the record nor disregard the evidence but rather provided detailed and reasonable reasoning for its conclusion.[1346]

369. Third, the Chamber did not rely on D-0133's conclusions about whether abductees were ultimately responsible for any of their actions undertaken as adults[1347] because "the question whether Article 31(1)(a) or (d) of the Statute are fulfilled can only be determined by the Chamber". [1348] This is not about whether D-0133 was a "legal expert",[1349] but about not "usurping the functions of the Chamber" including on the ultimate issue of the accused's *mens rea* and any applicable affirmative defences.[1350] This is not controversial. Fourth, Ongwen's suggestion that the Chamber was not free to make this assessment—and, specifically, that it could not decide *sua sponte* on D-0133's reliability, but was rather required to accept D-0133's conclusions because there were no objections or motions challenging his expertise or seeking to exclude his testimony[1351]—is meritless. Under regulation 44(1) RoC, the decision whether a

[1342] *Ntaganda* Expert Witness Decision, para. 7. *See also Al Hassan* Proposed Expert Witness Decision, para. 14.
[1343] *Compare* Appeal, para. 626 (fn. 762: referring to T-203, 31:25-32:13, relied upon at Judgment, fn. 1084), *with* T-203, 32:11-13; Appeal, paras. 628-629 (fn. 769: referring to T-203, 63:17-66:6, relied upon at Judgment, fn. 1085), *with* T-203, 65:18-21; Appeal, para. 627 (fns. 766-767: referring to T-203, 33:13-34:4, relied upon at Judgment, fn. 1086), *with* T-203, 33:13-14, 33:17-18.
[1344] Appeal, paras. 626-633.
[1345] *Contra* Appeal, para. 628.
[1346] *Contra* Appeal, paras. 619-621, 631-632
[1347] Judgment, para. 612.
[1348] Judgment, para. 612.
[1349] *Contra* Appeal, para. 623.
[1350] *Ruto & Sang* Expert Report Exclusion Decision, para. 13 ("Anticipated expert testimony which would qualify as usurping the functions of the Chamber by going into the 'ultimate issues' at trial would include, for example, opinions as to an accused's guilt or innocence, or whether the contextual, material or mental elements of the crimes charged are satisfied").
[1351] Appeal, paras. 616-618, 622-625.

person is an expert is clearly within a chamber's discretion. Likewise, a chamber has general discretion in assessing the reliability and credibility of a witness under articles 64, 69 and 74 of the Statute, and rule 63.[1352]

370. Fifth, Ongwen submits that the Chamber erred in finding that the remainder of D-0133's testimony did not go to "issues of relevance to the disposal of the charged crimes".[1353] His criticism lacks merit. Ongwen suggests that this case was about Ongwen's "dual-status" as "victim-perpetrator."[1354] He submits that the Prosecutor's theory was that "[Ongwen's] victimhood ended when he reached the statutory age of culpability of 18." Yet for him, "Ongwen was always a victim."[1355] For that reason, and considering that the crimes for which he was convicted occurred when he was a young adult, he argues that D-133's testimony, which related to whether he suddenly became culpable at 18, was relevant.[1356]

371. Ongwen's argument proceeds on the wrong premise. This case is about the criminal acts which Ongwen committed as an adult, and not about his "status" as a "victim-perpetrator". As the Prosecutor emphasised in her opening statement, which Ongwen misrepresents,[1357] "the focus of the ICC's criminal process is not on the goodness or badness of the accused person, but on the criminal acts which he or she has committed. We are not here to deny that he was a victim in his youth. We will prove what he did, what he said, and the impact of those deeds on his many victims. This Court [will decide] whether he is guilty of these crimes committed as an adult with which he stands charged."[1358] D-0133's testimony on "child soldiering, and its effects on the child soldier throughout her/his life,"[1359] without the expertise to conclude how it affected Ongwen's mental health specifically, was therefore not relevant to the Chamber's assessment of the charged crimes.

372. Finally, the Chamber reasonably rejected D-0133's testimony that "there are no cases where children escaped […] voluntarily" based on "the ample evidence received to the contrary"[1360] including: the direct testimony of P-0097, P-0252, P-0275, P-0307, P-0309, P-

[1352] *See e.g.* *Al Hassan* Proposed Expert Witness Decision, para. 15.
[1353] Appeal, paras. 634-648.
[1354] Appeal, para. 636.
[1355] Appeal, para. 635.
[1356] Appeal, para. 637.
[1357] Appeal, para. 636.
[1358] T-26, 37:3-10. The Chamber dismissed the same legally unspecified submissions suggesting that Ongwen's victimisation as a child prohibits prosecuting him for the crimes he committed as adult: Judgment, para. 2672 (dismissing Defence Closing Brief, paras. 6, 11-21, 487-488, 494-496, 715). *See below* paras. 376-379.
[1359] Appeal, para. 637.
[1360] Judgment, para. 2632. *Contra* Appeal, paras. 639-650.

0410 and P-0330 who left the LRA when they were children, P-0138's testimony that he left the LRA with children [REDACTED][1361] as well as intercept communications that "the LRA is allowing very many children to escape."[1362] In any event, as discussed above, the Chamber heard overwhelming evidence of adults who left the LRA[1363] which supports the conclusion that Ongwen, who was an adult at the relevant time, had the realistic option of escaping from or otherwise leaving the LRA.[1364] Ongwen fails to show an error in the Chamber's assessment of D-0133's evidence or the impact of such purported error.

373. Further, Ongwen repeats his submission that those who left the LRA did not do so "voluntarily", but because they had specific opportunities that allowed them to leave.[1365] But as discussed above,[1366] this artificial distinction is immaterial to the Chamber's ultimate finding. What the Chamber properly considered is whether, and to what extent, removing oneself from the LRA was possible.[1367] Further, the Chamber did recall the escape of P-0138,[1368] P-0209[1369] and P-0070,[1370] upon whom Ongwen relies in his submission.[1371] The Chamber was thus fully aware of the circumstances in which each of the 50 witnesses escaped from the LRA, and reasonably found that escaping or otherwise leaving the LRA was a realistic option for Ongwen.[1372]

374. For this reason, to the extent that the Chamber may not have accurately reflected D-0133's testimony[1373]—in that the Chamber appears to suggest that D-0133 testified that there are *no* cases where children escaped,[1374] whereas D-0133 agreed that children left the LRA, but only in situations he would not qualify as "voluntary"[1375]—this error has no impact on the Chamber's

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[1361] [REDACTED]. *See also* Judgment, para. 2632.
[1362] UGA-OTP-0016-0522 at 0526. *See also* UGA-OTP-0016-0503, p. 0505.
[1363] *See above* paras. 344, 349.
[1364] Judgment, para. 2635.
[1365] Appeal, paras. 641-650.
[1366] *See above* para. 344.
[1367] Judgment, para. 2619.
[1368] Appeal, para. 644; Judgment, para. 2632.
[1369] Appeal, para. 644; Judgment, para. 2628.
[1370] Appeal, para. 644; Judgment, para. 2624.
[1371] Appeal, para. 644.
[1372] Judgment, para. 2635.
[1373] Appeal, para. 647.
[1374] Judgment, para. 612.
[1375] T-203, 81:4-15 ("Q. I have one question: You said, unless I missed it, you said in the beginning, you said there are not known cases where children escaped on voluntary. Could you clarify that? I don't understand. A. I said I wanted to impart this point of entry of children coming for rehabilitation, so I was moving to say where they are coming from or how are they coming. So I said for these children to get into the hands of the normal people from rebellion, the known process of them getting out is by a recovery from the military, when the army gets in contact with them, with the LRA. But I just wanted to clearly differentiate that it is not known that a group of children left LRA on their own and went to report, say, to the government army or to a church leader. That was pretty difficult

conclusion. D-0133's testimony would rather be consistent with the Chamber's finding that many escaped from the LRA and that this was a realistic option also for Ongwen who at the time was a senior commander and not a mere low-level fighter.

375. In sum, Ongwen fails to show that the Chamber erred in its assessment of D-0133 or in its conclusion that escaping from or otherwise leaving the LRA was a realistic option available to Ongwen.[1376]

VII.B.8. The Chamber properly rejected Ongwen's submission regarding the Ugandan Government's alleged failure to protect him as a child (Ground 58)

376. Ongwen submits that the Chamber erred by failing to address his argument that the Government of Uganda had an international legal duty to protect him from abduction as a child.[1377] This ground of appeal should be dismissed: first, the Chamber properly addressed and correctly rejected Ongwen's submission;[1378] second, and in any event, Ongwen's submissions have no impact on the Judgment.

377. First, at the end of its analysis of the alleged grounds excluding criminal responsibility, the Chamber noted that "[i]n addition to specific arguments made under Article 31 of the Statute, the Defence also made some legally unspecified submissions emphasising that Dominic Ongwen was himself a victim of crimes, on account of his abduction at a young age by the LRA."[1379] The Chamber was correct to conclude that "Ongwen committed the relevant crimes when he was an adult and, importantly, that, in any case, the fact of having been (or being) a victim of a crime does not constitute, in and of itself, a justification of any sort for the commission of similar or other crimes—beyond the potential relevance of the underlying facts to the grounds excluding criminal responsibility regulated by the Statute."[1380]

378. The Chamber also rejected Ongwen's submission that he should not have been tried for crimes "committed while under bondage in the LRA as a result of the failure of protection by

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and nearly impossible. So my emphasis there was how do they get into the hands before rehabilitation"); T-204, 35:10-18 ("Q. My question was, Mr Awich, whether you were aware that in fact thousands of children did escape from the LRA. A. I'm not aware. As I said, the known cases of recovery of children, children ever getting out of the grip of LRA is in combat situation where LRA get in touch with the UPDF and, in the process, children are left actually by LRA. So even the one that is said to have escaped is actually, when conflict has occurred, an LRA has run away. But I'm not aware about a normal bush situation of LRA where children plan when the commanders are sleeping and they escape. No, not to my knowledge").

[1376] Judgment, para. 2635.

[1377] Appeal, paras. 604-610. *See also* Appeal, fn. 733 (erroneously lamenting that that there is no reference in the Judgment to Defence Closing Brief, paras. 494-496).

[1378] Judgment, para. 2672 (rejecting Defence Closing Brief, paras. 494-496).

[1379] Judgment, para. 2672.

[1380] Judgment, para. 2672.

the Government of Uganda and the international community"[1381] and his submission that "Article 21(3) prohibits charging a victim of a crime with the same crime."[1382] The Chamber was correct to conclude that "a rule that would immunize persons who suffer human rights violations from responsibility for all similar human rights violations that they may themselves commit thereafter manifestly does not exist in international human rights law."[1383]

379. Accordingly, the question whether the Government of Uganda was obliged under international law to protect Ongwen from abduction[1384] does not undermine the Chamber's unchallenged (and common sense) conclusion that being a victim of a crime does not, in and of itself, justify the commission of similar or other crimes.[1385] Ground 58 should be rejected.

VII.B.9. Conclusion

380. For the above reasons, Ongwen fails to show that the Chamber erred in law or fact in concluding that duress, as a ground excluding criminal responsibility under article 31(1)(d), was not established in this case. Grounds 44, 46, 48 to 56, 58, and 61 to 63 should be rejected.

VIII. THE TRIAL CHAMBER REASONABLY AND CORRECTLY ASSESSED THE EVIDENCE (GROUNDS 60, 70, 71, 24)

381. In these grounds Ongwen challenges the Chamber's assessment of the credibility of certain witnesses, the reliability of their evidence and the evidentiary basis for some factual findings.[1386] Ongwen misunderstands the evidentiary principles and mischaracterises the Chamber's reasoning. He fails to show an error.

382. First, Ongwen disregards that a chamber may consider a witness' testimony reliable with respect to certain parts even if it is deemed unreliable with respect to others, as long as the Chamber considers the impact of the unreliable aspects of the testimony on the overall assessment of the witness' credibility. The Chamber conducted, and carefully explained, this analysis. Second, Ongwen disregards the totality of the evidence and selectively reads the

[1381] Defence Closing Brief, para. 495. In his trial submission (Defence Closing Brief, para. 494) Ongwen refers to several international instruments referred to again in his Appeal: Appeal, paras. 604-610.
[1382] Judgment, para. 2672 (rejecting Defence Closing Brief, paras. 494-496).
[1383] Judgment, para. 2672. The Chamber's conclusion echoes the Pre-Trial Chamber's finding that Ongwen's argument that he "should benefit from the international legal protection as child soldier up to the moment of his leaving of the LRA in January 2015, almost 30 years after his abduction, and that such protection should include, as a matter of law, an exclusion of individual criminal responsibility for the crimes under the Statute that he may have committed […] is entirely without legal basis": Confirmation Decision, para. 150.
[1384] Appeal, paras. 604-610.
[1385] Judgment, para. 2672. The Chamber rightly considered Ongwen's abduction as a child in its determination of Ongwen's sentence: Sentencing Decision, paras. 65-88.
[1386] Appeal, paras. 709-742.

Judgment. As demonstrated below, Ongwen shows no error in the Chamber's reasonable and correct assessment of the relevant evidence and findings.

383. Further, Ongwen purports to challenge the Chamber's assessment of the credibility of 23 witnesses set out in Annex C.[1387] However, in these grounds he only briefly refers to some of those witnesses.[1388] The Appeals Chamber has already stated that submissions developed in annexes of filings should be disregarded.[1389] This Appeals Chamber should therefore disregard Ongwen's submissions which are not developed in the Appeal.[1390]

VIII.A. THE CHAMBER REASONABLY AND CORRECTLY ASSESSED WITNESS TESTIMONY

384. The Chamber correctly articulated the principles underlying its evidentiary analysis. First, it explained that it "carr[ied] out a holistic evaluation and weighing of all the evidence taken together in relation to the facts at issue".[1391] Second, the Chamber clearly set out its approach with respect to the documentary evidence,[1392] and provided a list of non-exhaustive factors that it considered relevant to assess the credibility of witnesses and reliability of their testimony.[1393] This included the richness of detail and internal coherence of the witnesses' narratives, the coherence of their testimony with respect to prior accounts and with other evidence,[1394] the basis of the witnesses' knowledge, their individual circumstances, including their relationship to the accused, their age, any assurances they may have been given against self-incrimination, their potential bias against the accused and/or motives for telling the truth.[1395] The Chamber also considered whether witnesses suffered trauma or were children at the time of the events, as well as the passage of time since the events, which may explain why the memory of some witnesses may have faded.[1396]

[1387] *See e.g.* Appeal, fn. 871.
[1388] *See* Appeal, para. 709-730 and Appeal Annex C (11 witnesses mentioned in both the body of the brief and Annex C: P-0054, P-0070, P-0085, P-0101, P-0142, P-0205, P-0231, P-0264, P-0309, P-0372, P-0410). Ongwen refers to ten other witnesses elsewhere in the Appeal.
[1389] *Kenya* Disqualification Decision, para. 5.
[1390] Those witnesses who are only mentioned in Appeal Annex C (P-0218, P-0269) will not be addressed.
[1391] Judgment, para. 227 and para. 260 ("Each statement made by a witness is assessed individually – while, at the same time, taking into account, holistically, the entire system of evidence available to the Chamber-, and, accordingly the same witness may be reliable in one part of their testimony, but not in another."); *see also* *Ntaganda* AJ, para. 587.
[1392] Judgment, paras. 637- 849 (intercepts, audio recordings and enhanced audio recordings, interceptor logbooks, shorthand notes, copies of ISO logbooks etc.); *see in particular* paras. 664 (corroborative effect of intercepts) and 846 (finding that the Chamber would not rely on direction-finding evidence).
[1393] Judgment, para. 260.
[1394] Judgment, paras. 255-256.
[1395] Judgment, paras. 257-258.
[1396] Judgment, para. 258; *see also* para. 577.

385. Further, the Chamber correctly stated that "[e]ach statement made by a witness is assessed individually – while, at the same time, taking into account, holistically, the entire system of evidence available to the Chamber. Accordingly, the same witness may be reliable in one part of their testimony, but not in another".[1397] When the Chamber considered certain confined aspects of a witness' testimony to be unreliable, it considered the impact of such rejection when assessing the remainder of their testimony.[1398] The Chamber's approach is fully consistent with the established jurisprudence of this Court and of other international criminal tribunals.[1399] As the *Ntaganda* Trial Chamber recognised "[i]t is possible for a witness to be accurate and truthful, or provide reliable evidence, on some issues, and inaccurate and/or untruthful, or provide unreliable evidence, on others."[1400] Thus, it is not an error of law *per se* to rely on evidence that is inconsistent with a prior statement or other evidence adduced at trial,[1401] and a witness (notwithstanding certain contradictions) may be deemed credible and reliable in light of his or her overall evidence.[1402] Ongwen's assertion that the Chamber did not conduct this analysis is without merit.[1403]

VIII.B. THE CHAMBER REASONABLY AND CORRECTLY ASSESSED THE EVIDENCE (GROUNDS 60, 70)

VIII.B.1. The Chamber reasonably and correctly assessed the evidence challenged by Ongwen in grounds 60 and 70

386. As demonstrated below, the Chamber reasonably and correctly assessed the evidence identified by Ongwen in grounds 60 and 70.

VIII.B.1.a. The Chamber reasonably and correctly assessed P-0205's evidence

387. Ongwen shows no error in the Chamber's assessment of P-0205's evidence, a former LRA fighter who testified about his role as an LRA commander, his knowledge of Ongwen, the

[1397] Judgment, para. 260.
[1398] *See e.g.* Judgment, fn. 320 (P-0085), paras. 365-374, 1394 (P-0410), 508 (P-0286); *see also* paras. 271, 413, 578, 583.
[1399] *See Ntaganda* AJ, para. 774 (quoting *Ntaganda* TJ, para. 80); *see also* paras. 835-6; *see also Kupreškić et al.* AJ, para; 333; *Renzaho* AJ, para. 425; *Haradinaj et al.* AJ, paras. 201, 226.
[1400] *Ntaganda* TJ, paras. 80 and 75-76 (whether a Chamber requires corroboration falls within its discretion); *see also Ngudjolo* AJ, para. 148; *Lubanga* TJ, para. 218; *see also Simba* AJ, para. 24.
[1401] *See Popović et al.* AJ, paras. 136-137 (where inconsistencies exist the Trial Chamber must evaluate the explanation given for these inconsistencies and provide reasons to its decision to rely on such evidence); *Taylor* TJ, paras. 1564, 1591 (finding a witness credible despite inconsistencies, and noting his young age and traumatic experiences during the events).
[1402] *Popović et al.* AJ, para. 137; *Muvunyi* First AJ, para. 144.
[1403] *Contra* Appeal, para. 736 (while Ongwen agrees with the non-exhaustive factors considered by the Chamber, he argues that "[d]espite listing factors relevant to an assessment of reliability, the Chamber subsequently disregarded the said criteria without any consideration of the effect this had on the witness' general credibility").

attacks on Lukodi and Odek IDP camps and the treatment of women in the LRA.[1404] The Chamber correctly concluded that P-0205's "recollection was detailed and precise", that "[h]is testimony was comprehensive and included the kind of details that the Chamber would expect from a witness with his rank and time spent in the LRA", that "his testimony was as would be expected from a witness who testified to events he actually experienced", and that he "distinguished clearly between information he gained from personal experiences as opposed to events he was informed about".[1405] Ongwen asserts that the Chamber erred in considering this witness as credible even though his testimony was allegedly contradicted or inconsistent in many instances, and that he gave false testimony about his own involvement in the Odek attack.[1406] Ongwen's undeveloped submissions are incorrect. Specifically:

- P-0205's testimony regarding the visits that Ongwen received in the sickbay was corroborated by other witnesses, such as P-0379.[1407]
- That Ongwen ordered the attack on Odek was corroborated by other witnesses, including P-0410 and P-0054.[1408] Contrary to Ongwen's submissions, the Chamber did not find that P-0205 gave false testimony regarding his participation in the attack. Rather, the Chamber considered it unnecessary to resolve the discrepancy between P-0205's testimony that he did not participate in the attack and stayed behind, and P-0372's evidence, who said that P-0205 was on the ground during the attack. The Chamber reasonably considered that based on "P-0205's in Court testimony, the manner of recounting the events, as well as the corroboration by other witnesses, [this discrepancy] is without bearing on the reliability of P-0205's evidence as to the preparations of the attack".[1409] The Chamber's approach and assessment of this witness were reasonable, also bearing in mind that the Chamber found that Ongwen did not enter Odek IDP camp with the fighters sent to attack it (although he moved with the attackers towards the camp),[1410] and that P-0205 testified that Ongwen did not participate in the attack (but rather testified about Ongwen's actions and role before and after the attack).[1411]

[1404] Judgment, para. 272.
[1405] Judgment, para. 272.
[1406] Appeal, para. 710 (citing Judgment, paras. 1044, 1396, 1674-1675 and fns. 1687, 2043, 5490 and 5806).
[1407] Judgment, para. 1044. The Chamber also noted that P-0379 was a low-ranking LRA member and that visits to Ongwen could occur without his knowledge.
[1408] Judgment, paras. 1393-1408; *contra* Appeal, paras. 710, 738 (citing Judgment, para. 1396). *See below* para. 393.
[1409] Judgment, para. 1396; *contra* Appeal, para. 710.
[1410] Judgment, paras. 162, 1414-1428.
[1411] Judgment, para. 1422.

- P-0205's explanation regarding the differences between his statement to the Prosecution and his in-court testimony on Ongwen's order to attack Odek is entirely plausible.[1412] A long time had passed since the events. It is not uncommon for witnesses to provide further detail if they are questioned on the same topic in different contexts.[1413] The Chamber's decision to rely on this aspect of his testimony in light of the totality of corroborative and consistent evidence was reasonable and correct.
- As for P-0205's testimony regarding Ongwen's order to attack anybody in Lukodi the Prosecution refers to its arguments in grounds 81 and 82 below.[1414]

388. Finally and considering the abundant corroborative evidence, even if the Chamber had erred in relying on the above aspects of P-0205's testimony, such errors would not have impacted the Chamber's findings. Nor did the fact that the Chamber chose not to rely on certain minor aspects of P-0205's testimony have an impact on the overall credibility of the witness. The Chamber explained that those issues were of minor importance and that the discrepancies could be explained by the lapse of time.[1415]

VIII.B.1.b. The Chamber reasonably and correctly assessed P-0231's evidence

389. With respect to P-0231 (also a former LRA fighter), the Chamber explicitly considered the witness' testimony that Ongwen only instructed members of the Oka battalion who were in the sickbay and that he had no radio communication equipment,[1416] and assessed it together with the testimony of D-0056, P-0101, P-0205, P-0379, P-0016 and P-0366.[1417] Contrary to Ongwen's suggestion, P-0016 testified that Ongwen *did* use radio devices brought by visitors (like P-0016) while in sickbay.[1418] D-0056 testified along similar lines, and P-0205 and P-0235 confirmed that Ongwen had access to, and used, radio communications while in the sickbay.[1419] The logbook entries corroborated the witnesses' testimonies on the fact that Ongwen's authority was not compromised during his stay in the sickbay because he had access to radio

[1412] *Contra* Appeal, para. 738 (citing Judgment, fn. 3213); *see* T-50, 45:18-20 (P-0205 "As I tried to explain a short while ago, there are things which happened a long time ago. If what happened, what was said is important or not important then I am sorry to have brought this issue out").
[1413] *Kamuhanda* AJ, paras. 136-137. *See also Kajelijeli* AJ, para. 176 ("to suggest that if something were true a witness would have included it in a statement or a confession letter is obviously speculative and, in general, it cannot substantiate a claim that a Trial Chamber erred in assessing the witness's credibility").
[1414] *See below* paras. 530-533.
[1415] *Contra* Appeal, fn. 868 (citing Judgment, fns. 1687 (on Abudema replacing Tabuely as brigade commander in 2003 instead of 2002), 2043, 5490 and 5806); *see also* Appeal, para. 738 (citing Judgment, fn. 1687).
[1416] Judgment, paras. 1038, 1045; *contra* Appeal, para. 711 (citing Judgment, paras. 1038, 1045)
[1417] Judgment, paras. 1038-1044.
[1418] Judgment, para. 1045.
[1419] Judgment, para. 1045.

communications and sent his subordinates on missions.[1420] The Chamber also noted P-0309's evidence (about what he did not see and what he did not know) and concluded it did not bring into question other testimonies considering that the witness was a low-ranking LRA member and may not have been aware of certain events.[1421]

VIII.B.1.c. The Chamber reasonably and correctly assessed P-0070 and P-0142's evidence

390. Finally, Ongwen has not demonstrated an error in the Chamber's careful assessment of P-0070's and P-0142's credibility.[1422] Contrary to Ongwen's suggestion,[1423] the Chamber did not disregard certain aspects of the witnesses' testimonies. Rather, the Chamber distinguished and clearly explained why it chose not to rely on limited and minor aspects of the witnesses' testimony.[1424]

VIII.B.2. The Chamber assessed the totality of the evidence in making factual findings

391. Ongwen does not show an error in the following findings entered by the Chamber:[1425]

VIII.B.2.a. Ongwen was responsible for the Pajule attack

392. Ongwen argues that he was not criminally responsible for the Pajule attack because, in his submission, an ISO Logbook entry (recording Kony saying 'Dominic should remain behind with Otti b[ecau]se he has good plans which can help Otti') shows that he was only following Kony's instructions, rather than planning the attack.[1426] The entry does not support Ongwen's argument. Rather than demonstrating that Ongwen was following instructions, the entry suggests that Ongwen was actively contributing to the LRA criminal actions.[1427] Further, Ongwen completely disregards the wealth of reliable evidence before the Chamber demonstrating that Ongwen met with LRA commanders and planned the attack, and evidence

[1420] Judgment, paras. 1037 and 1047.
[1421] Judgment, para. 1044.
[1422] Judgment, paras. 267 (for P-0070) and 269 (for P-0142).
[1423] Appeal, para. 711 and Appeal Annex C, pp. 2 and 4.
[1424] Judgment, paras. 2170 (on P-0070's vague statement on Kony's authority to distribute wives which was not attributed much value for lack of detail), 2249 (on P-0070's statement that young girls were 'given to a man' later around the age of 17, which was overwhelmingly disproven by other evidence), 2317 (on P-0070's statement that abduction orders for small children were transmitted downwards by Tabuley, which it does not rule out Ongwen's role in the abductions), 1411 and fn. 3274 (on P-0142's statements on two fighters from Gilva attack that participated in the attack, which was weighed against other evidence in detail), 1684, 1686 (on P-0142's testimony that Capt. Ocaka was the overall commander of the Lukodi attack and listed the second-in-command, which the Chamber assessed in the context of P-0205's testimony that Ongwen appointed Ocaka to lead the attack), 1698 (on P-0142's statements that Ongwen remained behind for the Lukodi attack, which was assessed along with P-0145's testimony), 1734, 2382, 2506 and fn. 7047 (on P-0142's general statements; although they were not conclusive evidence, the Chamber considered and did not disregard these aspects).
[1425] *Contra* Appeal, paras. 715-730.
[1426] Appeal, para. 715 (referring to Judgment, para. 1180).
[1427] ISO Logbook (Gulu), UGA-OTP-0232-0234, at 0501.

showing his actions leading a group of attackers in Pajule and ordering to attack, to loot and to abduct civilians, among others.[1428] Finally, *arguendo*, the fact that Kony might have instructed Ongwen to plan and take part in the attack does not exclude Ongwen's criminal responsibility.[1429]

393. Ongwen's challenge to the Chamber's finding regarding the composition of the Pajule attacking forces is likewise without merit.[1430] The Chamber relied on several items of evidence showing that Ongwen was with Otti at the time of the Pajule attack and that the "Sinia brigade was 'moving together' with Control Altar at the time".[1431] In addition to witnesses P-0070 and P-0379, the Chamber also relied on P-0209, P-0144 and P-0045 (all LRA insiders) as well as Sinia members P-0309, P-0330 and Ongwen's so-called 'wife' P-0101 who testified being present with Ongwen and his group at the time of the attack.[1432] Testimony of these witnesses is corroborated by logbook evidence,[1433] as well as numerous other witnesses testifying to Ongwen's actions on the ground before, during and after the attack. [1434]

VIII.B.2.b. Ongwen knew about Kony's order to attack Odek

394. Further, while Ongwen does not challenge that Kony issued an order to attack Odek in a meeting in Sudan (where Ongwen was not present), he disagrees with the Chamber's conclusion that Ongwen (who was already the Sinia brigade commander at the time, and subsequently decided, planned and ordered the attack) knew about the order.[1435] The Chamber reasonably inferred that Ongwen knew about Kony's order from a holistic assessment of the evidence, such as: (i) the LRA had a functioning hierarchy where Kony's orders were reported down to brigade commanders and further to battalion commanders;[1436] (ii) in addition to the meeting in Sudan where he issued the order, Kony was heard on the radio saying that the people of Odek had to

[1428] Judgment, paras. 144-158; 1172-1383;
[1429] *See* Statute, art. 33; Ongwen does not fall within the limited exception where a person is not criminally responsible in execution of their superior's order; nor does he alleges that those exceptions apply to his case.
[1430] Appeal, para. 716 (referring to Judgment, paras. 865, 1186, 1223, 1492, 1733, 1739, 1922, 1937, 1946).
[1431] Judgment, para. 1181.
[1432] Judgment, paras. 1181, 1185; see also para. 1179.
[1433] Judgment, paras. 1180, 1187-1188.
[1434] Judgment, paras. 1189-1383. After the attack looted goods were distributed, including among Ongwen's group; abductees were distributed among the LRA and some joined Ongwen's group; and Ongwen participated in meetings with Otti right after the attack.
[1435] Appeal, para. 717; *see* Judgment, paras. 160, 1387-1392.
[1436] Judgment, paras. 124, 873; *see also* para. 869 (where the Chamber explained that in some occasions Ongwen would issue direct orders to brigade and battalion commanders, but that this was not a contradiction with the evidence indicating that the LRA had a functioning hierarchy; rather, it was "a precise and nuanced description of the LRA as an organisation").

be punished;[1437] (iii) P-0142 ([REDACTED]) testified that Okwer (an LRA commander who participated in the planning and execution of the Odek attack *together with Ongwen*) knew about Kony's order;[1438] and (iv) Ongwen planned and ordered the attack[1439] and reported the result of the attack to Kony and other LRA commanders.[1440]

395. However, even if *arguendo* the Chamber had erred with respect to Ongwen's knowledge of Kony's order, such error would have no material impact.[1441] Ongwen was convicted as an indirect co-perpetrator (together with Kony and other Sinia brigade commanders), and this mode of liability does not require Kony to have issued an order (or for Ongwen to have known about it) to satisfy the objective and subjective elements of the crime, which are abundantly met in this case.[1442] Moreover, although on some occasions Kony specifically ordered attacks on certain IDP camps, most of these orders were general and it fell upon the commanders to translate these general orders into concrete actions and to determine the specific times and locations of the attacks.[1443] With respect to Odek, regardless of what Kony ordered, the evidence demonstrates beyond reasonable doubt that Ongwen was the mastermind behind the planning and execution of the attack.[1444] This is fully consistent with the Chamber's conclusion elsewhere in the Judgment that commanders displayed a considerable degree of initiative in implementing Kony's general orders.[1445]

VIII.B.2.c. Ongwen ordered LRA fighters to attack anyone, including civilians, in Odek

396. As noted above, a holistic and proper assessment of the evidence established that Ongwen ordered LRA fighters "to target everyone they find at Odek, including civilians", and not only to "collect food".[1446] Before reaching its conclusion, the Chamber considered the evidence of relevant witnesses and observed the different wording used by the witnesses. While some witnesses plainly testified that the content of the instruction was to target anyone including civilians (P-0410, P-0205, P-0054),[1447] others referred to the instruction in terms of the abduction of civilians and children or burning the camp (P-0264, P-0314, P-0406),[1448] and some

[1437] Judgment, paras. 1387-1388.
[1438] *Contra* Appeal, para. 717.
[1439] Judgment, paras. 161, 1393-1408.
[1440] Judgment, paras. 177; 1615-1642.
[1441] Judgment, para. 1392.
[1442] Judgment, paras. 2909-2926.
[1443] Judgment, paras. 872, 1392.
[1444] Judgment, paras. 161, 1393-1408.
[1445] Judgment, para. 872.
[1446] *Contra* Appeal, paras. 718-719.
[1447] Judgment, paras. 1395-1397, 1405, 1407.
[1448] Judgment, paras. 1398, 1405.

referred to the collection of food (P-0142, P-0330, P-0314).[1449] The Chamber considered all the evidence. It observed that the witnesses expressed in their own terms their recollection of different specific orders and rejected the Defence's argument that it was contradictory.[1450] Two *prima facie* credible testimonies need not be identical in all aspects or describe the same fact in the same way to corroborate each other. Every witness presents what he or she has seen from his or her own point of view at the time of the events, or according to how he or she understood the events recounted by others.[1451] Indeed, corroboration may exist even when some details differ between their testimonies.[1452] The Chamber also correctly recalled P-0340's elaboration on what it meant, in that particular context, "to collect food" (that is "[w]hen you go there, you have to fight, you have to shoot at them") and considered that "the witnesses expressed in their own terms their recollection is natural and expected. They described or emphasised different specific orders".[1453] It also noted the manner in which the attack unfolded (the attackers split in two groups, one headed to the UPDF barracks and another directly to the civilian camp), and concluded that "the evidence before it justifies and necessitates the finding that Dominic Ongwen, as well as other commanders, ordered LRA fighters to target everyone they find at Odek, including civilians".[1454]

VIII.B.2.d. The Chamber correctly dismissed Ongwen's argument that the victims died in cross-fire in the Odek and Lukodi attacks

397. The Chamber considered the Defence's arguments that the victims died in crossfire in the Odek and Lukodi attacks and rejected them, after carefully assessing *all* relevant evidence.[1455] In relation to the attack on Odek the Chamber correctly concluded that "not one witness testified of a specific incident where a civilian was shot by government soldiers or of a civilian actually killed in alleged cross-fire".[1456] The Chamber specifically addressed the testimony of each witness who raised the possibility of deaths of civilians in crossfire,[1457] before going on to discuss the evidence of specific individuals killed. Ongwen's references to the testimonies of P-0372, P-0309 and P-0085 are taken out of context and ignore the Chamber's *analysis* of their

[1449] Judgment, paras. 1399, 1401.
[1450] Judgment, para. 1407.
[1451] *Ntaganda* AJ, para. 672; *see also* *Nahimana et al.* AJ, para. 428; *see also* Judgment, paras. 1406-1407, 1870.
[1452] *Nahimana et al.* AJ, para. 428; *Ntabakuze* AJ, paras. 150-151 (where two testimonies were approached holistically, and found they corroborated each other despite some difference between them).
[1453] Judgment, para. 1407.
[1454] Judgment, para. 1407.
[1455] *Contra* Appeal, paras. 720-721.
[1456] Judgment, para. 1492.
[1457] Judgment, paras. 1477-1504.

evidence. Ongwen fails to engage with the reasoning of the Chamber and fails to explain why its conclusions were purportedly flawed.

398. With respect to P-0372, the Chamber correctly concluded that the witness was speaking about what *could* happen in a general manner rather than what *did* happen.[1458] As pointed out by the Chamber, P-0372 did not testify to actually seeing a civilian struck in crossfire nor did he say that a possible stray bullet was fired by government soldiers.[1459] Instead, P-0309's evidence confirms that LRA fighters shot without distinguishing between civilians and soldiers.[1460] Further, P-0085 testified he was told by Ongwen that civilians were killed in crossfire, but neither Ongwen nor P-0085 were present at the Odek IDP camp attack – and thus they could not have seen civilians being killed as a result of the crossfire.[1461]

399. In relation to Lukodi, the Chamber correctly found that there was no evidence that civilians in Lukodi were killed in crossfire. Significantly, as pointed out by the Chamber (and uncontested by Ongwen), there was at most a short exchange of fire between the LRA fighters and the government soldiers stationed in the camp, after which the government soldiers quickly fled.[1462] That civilians died in that short exchange of fire is not supported by the evidence and is nothing more than a theoretical speculation.[1463] The Chamber analysed the testimony of the four witnesses referred to by Ongwen in his Appeal and reasoned why their evidence did not support Ongwen's assertion. Once again however, Ongwen does not engage with the Chamber's *analysis* of evidence, but merely disagrees with its conclusions. The Chamber correctly noted that P-0142 and P-0172 did not go to the attack and therefore had no first-hand knowledge about the causes of death during the attack.[1464] Their evidence on the issue of crossfire is either speculation (P-0142) or hearsay (P-0172). P-0205, who was at the attack also merely speculated about the *possibility* that civilians died in crossfire but said he did not witness any deaths personally.[1465] With respect to D-0072, the Chamber found this witness unreliable.[1466] In any event, he too did not give evidence of seeing anyone killed in crossfire.[1467] In summary, the references to the four witnesses, when weighed against the overwhelming

[1458] T-148, 46:17-47; Judgment, para. 1478.
[1459] Judgment, para. 1478
[1460] T-60, 79:18-20; Judgment, para. 1482.
[1461] Judgment, para. 1484.
[1462] Judgment, para. 1733.
[1463] Judgment, para. 1733.
[1464] Judgment, paras. 1734-1735.
[1465] T-51, 17:10-15; Judgment, para. 1736
[1466] Judgment, paras. 534-536.
[1467] T-212, 38:23-39:23; Judgment, para. 1736.

evidence of intentional killings by the LRA attackers in Lukodi, is incapable of creating reasonable doubt about the cause of civilians' deaths.

400. Ongwen's passing (and unsubstantiated) claim challenging the Chamber's conclusion that Ongwen's order to attack Abok IDP camp included targeting civilians should be summarily dismissed.[1468] In any event, Ongwen is incorrect, since he ordered LRA fighters to attack the camp, including civilians.[1469]

VIII.B.2.e. The Chamber correctly found that LRA commanders had a degree of agency

401. Ongwen challenges the Chamber's conclusion that LRA commanders had a degree of agency, and its rejection of the Defence's submissions that the LRA should be equated with Kony alone, and that those who disobeyed Kony's orders were killed.[1470] Ongwen incorrectly describes the evidence cited by the Chamber. The evidence demonstrates that, although there was a functioning hierarchy within the LRA with Kony on top, LRA commanders had a degree of independence which was manifested in different ways. For example, although some commanders (such as Unita and D-0032) did not comply with Kony's orders, they were not punished.[1471] D-0032 himself testified that he was not beaten, demoted or punished, and that he was even appointed to be part of the LRA peace talks delegation.[1472] Other commanders (like Ongwen) had an even more elevated standing and were able to engage and discuss with Kony the implementation of his orders.[1473] Moreover, as P-0226 testified, Ongwen even managed to keep her (as a so-called 'wife') despite Kony sending his escorts to collect her for him.[1474] The Chamber's findings are supported by numerous witnesses' testimony as well as intercept evidence.[1475] Ongwen fails to show an error in the Chamber's reasonable and correct assessment of the totality of the evidence.

402. Ongwen's submissions in this section regarding evidence concerning spiritual beliefs and Kony's alleged powers are addressed above in responding to Ground 55.[1476]

[1468] Appeal, para. 722.
[1469] Judgment, paras. 1864-1876.
[1470] Appeal, paras. 723-726, 729; *see* Judgment, paras. 866-873; 2590-2606.
[1471] Judgment, paras. 2595-2596, 2605.
[1472] Judgment, para. 2605.
[1473] Judgment, paras. 2597-2598.
[1474] Judgment, para. 2600.
[1475] Judgment, paras. 866-873, 2590-2606. As to witnesses: (P-0440, P-0231, P-0070, Hillary Daniel Lagen/P-0040, P-0016, P-0226 and aspects of D-0032).
[1476] Appeal, paras. 727, 729; *see above* paras. 354-364.

403. In conclusion, the Chamber reasonably, and correctly, assessed the evidence before it. Ongwen fails to show an error.

VIII.C. THE CHAMBER REASONABLY AND CORRECTLY ASSESSED EVIDENCE (GROUNDS 71, 24)

404. Ongwen once again fails to demonstrate that the Chamber erred in its assessment of the evidence that he challenges. He again refers to paragraphs of the Judgment in isolation without acknowledging the Chamber's comprehensive assessment of the evidence.

VIII.C.1. The Chamber considered relevant factors to assess the witnesses' credibility

405. Ongwen argues that the Chamber erroneously "identif[ied] self-incrimination or positive feelings towards the Appellant as factors which supported the credibility and reliability of witness statements".[1477] This argument should be rejected. The fact that a witness incriminates himself/herself (or avoids such incrimination) or that he or she shows bias towards the accused *may* be relevant in assessing his or her credibility, *together with other factors*. As the Chamber explained, these considerations are "by no means [] an exhaustive list of factors, or a 'check-list' of requirements for a witness to be relied upon. Any assessment of testimonial evidence (like of any other type of evidence) is in fact dependent on the specific circumstances at hand" and will be assessed holistically together with "the entire system of evidence available to the Chamber".[1478]

406. Ongwen apparently agrees with the Chamber's approach of considering a non-exhaustive list of factors to assess the witnesses' credibility.[1479] But he disagrees with the Chamber's application of the factors in certain paragraphs of the Judgment that Ongwen refers to without further explanation.[1480] Since Ongwen fails to substantiate and develop his vague assertions, the Appeals Chamber should dismiss these arguments *in limine*.[1481] In any event, Ongwen's submissions are incorrect since he selectively refers to paragraphs of the Judgment without considering the totality of the evidence and the Chamber's careful analysis of it. For example:

- The Chamber's general considerations regarding P-0233's and P-0406's credibility and reliability were reasonable and correct and were "based on the totality of the evidence before the Chamber and not only on each witness's evidence alone" and "must be read in conjunction with the evidentiary discussion further below" in the Judgment.[1482]

[1477] Appeal, para. 736.
[1478] Judgment, para. 260.
[1479] Appeal, paras. 733-736.
[1480] Appeal, para. 736 and fn. 916.
[1481] *See above* paras. 4-6.
[1482] Judgment, para. 261; *contra* Appeal, fn. 916 (referring to Judgment, paras. 319 (P-0233) and 361 (P-0406)).

- The abduction and treatment of civilians in the attack on the Pajule IDP camp was supported by abundant "credible" and "mutually corroborative" evidence of LRA fighters, insiders and camp residents such as P-0372, P-0081, P-0249, P-0372, D-0085, P-0138, P-0015, P-0067, P-0144, D-0085, P-0249, D-0081 and P-0379 as well as UPDF commander P-0359.[1483] Hence, even if *arguendo* the Chamber had erred in assessing the evidence of P-0330 or P-0309 (which it did not), the Chamber's finding would not have been affected.
- The Chamber found P-0252's testimony [REDACTED] a person named Atir together with another abductee from Odek credible primarily because he "provided details that made it clear to the Chamber that P-0252 was describing an event that he actually experienced".[1484] Further, his testimony on Atir's death is corroborated by at least two other witnesses[1485] and was consistent with the account of numerous other witnesses who testified about abductees from Odek being severely physically abused and killed by the LRA.[1486]
- P-0406's testimony that the LRA set huts on fire in the Abok IDP camp was corroborated by P-0330, P-0293, P-0282, P-0286, P-0281 and P-0340.[1487] P-0330's testimony that the LRA targeted civilians for killing in the Abok IDP camp was also consistent with the evidence of multiple other witnesses (including LRA fighters and camp residents) such as P-0406, D-0065, P-0293, P-0284, P-0282, P-0286, P-0281, P-0280, P-0279, P-0306.[1488]

VIII.C.2. The Chamber reasonably and correctly assessed the credibility of P-0205, P-0054 and P-0309

407. Further, the Chamber reasonably and correctly assessed the evidence of the "few examples" of witnesses that Ongwen identifies.[1489] As to Ongwen's repeated challenges to P-0205's evidence, the Prosecution refers to its submissions in section XI.B.1.b.[1490] Ongwen's submissions regarding P-0054's and P-0309's evidence, and the Chamber's assessment of it, are equally without merit. Ongwen again disregards that a witness' testimony can be found

[1483] Judgment, paras. 1328-1338.
[1484] Judgment, para. 1586 (where the Chamber "*also* note[d] that P-0252 incriminates himself") (emphasis added); *contra* Appeal, fn. 916 (referring to Judgment, para. 1586 (P-0252)).
[1485] Judgment, para. 1587 (Zakeo Odora and P-0269).
[1486] Judgment, paras. 173, 1554-1589.
[1487] Judgment, paras. 1911-1915; *contra* Appeal, fn. 916 (referring to Judgment, para. 1911 (P-0406)).
[1488] Judgment, para. 1931 (where the Chamber found "this account detailed, coherent and consistent with other evidence discussed here about the LRA's behaviour during their attack on Abok"); *contra* Appeal, fn. 916 (referring to Judgment, para. 1931 (P-0330)).
[1489] *Contra* Appeal, paras. 737-741.
[1490] *See below* paras. 509-511; *contra* Appeal, paras. 737-739.

reliable on some aspects while unreliable on others, so long as the Chamber properly explains its assessment and considers the impact of the unreliable parts.

408. With respect to P-0054 (LRA fighter), the Chamber reasonably decided not to rely on the aspect of P-0054's testimony that, as an instructor in Sinia, he taught his soldiers not to mistreat civilians.[1491] The Chamber correctly observed that: (i) he was the only witness to testify to this effect (in fact he only accepted a general proposition put to him and did not provide any details as to the alleged training);[1492] (ii) he, as an LRA instructor, had an interest in presenting himself in a positive light;[1493] and significantly, that (iii) the rest of the evidence indicated that LRA did not pay attention to the protection of civilians or civilian objects in the training of soldiers. In this regard it noted P-0142's testimony that "nobody would see it as a crime if a civilian is injured or if a civilian is shot at" during the course of an attack, that the LRA perceived civilians living in Northern Uganda as the enemy because they were associated with the Government of Uganda, and evidence regarding the orders and the execution of the LRA attacks.[1494]

409. Further, even if P-0054 initially stated that he did not remember any further order by Ongwen in Odek, he subsequently did confirm as truthful his prior testimony that Ongwen also ordered to 'attack the civilians'.[1495] He stated that he was present when Ongwen issued the order.[1496] As noted above, this aspect of P-0054's testimony was corroborated by P-0410 and P-0205 (who were also present and overheard Ongwen issuing the order),[1497] and was consistent with other evidence.[1498] Moreover, as also explained above, the Chamber was attentive and explained the different wording used by witnesses to describe Ongwen's order.[1499] Because of the foregoing, the Chamber did not need to provide further reasoning with respect to P-0054's credibility in relation to this aspect of his testimony.[1500]

410. In addition, Ongwen disregards the Chamber's explanation that P-0054 might not have known of the fact that Gilva brigade was not involved in the Lukodi attack,[1501] since he did not participate in this attack, unlike in Odek and Abok where he took part.[1502] Ongwen also omits

[1491] Judgment, para. 947; *contra* Appeal, para. 740.
[1492] Judgment, para. 947.
[1493] Judgment, para. 947.
[1494] Judgment, paras. 948-949.
[1495] Judgment, para. 1397.
[1496] Judgment, para. 1397.
[1497] Judgment, paras. 1395-1396.
[1498] Judgment, paras. 1398-1406.
[1499] Judgment, para. 1407.
[1500] *Contra* Appeal, para. 740.
[1501] Judgment, para. 1691; *contra* Appeal, para. 740.
[1502] Judgment, para. 296.

the Chamber's similar explanation that P-0054 may not have known what was taken from the Abok IDP camp during the attack since he did not enter the IDP camp and instead stayed outside the camp.[1503] Nor does Ongwen accurately describe the Chamber's careful assessment of all the relevant evidence regarding his role leading the Odek attack, or the Chamber's conclusion that "Ongwen moved with the attacking group towards the camp but did *not* actually enter the camp to attack".[1504]

411. Finally and with respect to P-0309 (former LRA child soldier and one time Ongwen's escort), the Chamber's decision not to rely on certain aspects of his testimony was reasonable in light of the characteristics of the witness and his testimony (low ranking), and the totality of the evidence.[1505] The Chamber reasonably decided to rely on P-0379's and P-0205's testimonies (LRA officer and LRA commander, respectively) that Ongwen maintained communications and received visits of LRA commanders in the sickbay instead of P-0309's testimony that he did not know whether certain LRA commanders visited Ongwen at the sickbay.[1506] The Chamber observed that P-0309 was a low-ranking LRA member and that the visits could have happened without his knowledge.[1507] Likewise, the Chamber reasonably decided to rely on the testimonies of P-0205 and P-0231 about the time that Ongwen spent in the sickbay (around eight months) rather than P-0309's estimation that he was there for four to six months.[1508] The Chamber aptly noted that such variation can be explained by the difficulty of estimating the duration of time while in the bush,[1509] and that P-0205 and P-0231 provided detailed context since both testified that Ongwen was out of the sickbay when they went to Teso.[1510]

412. In conclusion, the Chamber reasonably and correctly assessed the evidence before it and made the necessary findings beyond reasonable doubt. Ongwen's selective (and undeveloped) presentation of the evidence does not demonstrate an error and should be rejected.

IX. THE CHAMBER REASONABLY AND CORRECTLY FOUND ONGWEN CRIMINALLY LIABLE UNDER ARTICLE 25(3)(A): GROUNDS 64-69

[1503] Judgment, para. 1908; *contra* Appeal, para. 740.
[1504] Judgment, paras. 1414-1428; *contra* Appeal, para. 740. *See also* Judgment, para. 296 (noting that the Chamber does not necessarily disregard P-0054's evidence as to the occurrences at the centre of the camps during the Odek and Abok attacks even if the witness stayed behind if "for example if the witness gained information in the aftermath of the attack from other LRA fighters who had gone into the centre of the camp").
[1505] *Contra* Appeal, para. 741.
[1506] Judgment, para. 1044.
[1507] Judgment, para. 1044.
[1508] Judgment, para. 1068.
[1509] Judgment, para. 1068.
[1510] Judgment, paras. 1066-1067.

413. Ongwen puts forward a wide range of multi-pronged arguments challenging discrete aspects of the Chamber's findings regarding his individual criminal responsibility as an indirect perpetrator or an indirect co-perpetrator under article 25(3)(a) of the Statute. Many of those arguments repeat, or are inextricably linked, to arguments advanced in other grounds of his Appeal, and are addressed by the Prosecution in other parts of this Response Brief. In such cases, the Prosecution will refer to the relevant paragraphs of this Brief where it responds to Ongwen's submissions.

IX.A. THE CHAMBER REASONABLY AND CORRECTLY FOUND THAT ONGWEN HAD CONTROL OVER THE CRIMES AND ESSENTIALLY CONTRIBUTED TO THEM (GROUND 64)

IX.A.1. The Chamber's conclusions were sufficiently reasoned

414. Ongwen argues that the Chamber failed to provide a reasoned opinion for its findings on his control over the crimes; that it disregarded his arguments; and that it made no findings on evidence that, according to Ongwen, raised reasonable doubt. These arguments merely refer to submissions made in the Defence Closing Brief.[1511] As noted above,[1512] this practice is inappropriate. Ongwen's arguments should therefore be dismissed *in limine*.

415. Ongwen's submissions also misrepresent the Judgment. They fail to consider the Chamber's extensive analysis and findings on his control over the crimes, his essential contribution to the crimes, and his resulting power to frustrate their commission.[1513]

416. Further, Ongwen does not specify which of his prior arguments the Chamber allegedly disregarded.[1514] Instead he refers to a lengthy portion of the Defence Closing Brief,[1515] which itself also inappropriately incorporated arguments made in previous submissions.[1516]

417. Moreover, Ongwen's submissions that the Chamber did not make relevant findings, made inconsistent findings, did not provide sufficient reasoning, and did not establish Ongwen's

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[1511] Appeal, para. 652 and fn. 791, referring to Defence Closing Brief, paras. 181-208.
[1512] *See above* paras. 7-8.
[1513] Judgment, paras. 2855-2864 (attack on Pajule IDP camp); paras. 2913-2918 (attack on Odek IDP camp); paras. 2963-2964 (attack on Lukodi IDP camp); paras. 3010-3011 (attack on Abok IDP camp); paras. 3022-3024, 3028-3031, 3040-3041, 3045-3047, 3052-3053, 3057-3059, 3064-3066 (SGBC perpetrated directly by Ongwen); paras. 3090-3095 (SGBC not directly perpetrated by Ongwen); paras. 3107-3111 (child soldier offences). See also the Chamber's relevant findings of law at Judgment, para. 2782 (direct perpetration); paras. 2783-2784 (indirect perpetration); paras. 2786-2787 (indirect co-perpetration).
[1514] Appeal, para. 652. The Chamber expressly addressed some of Ongwen's prior submissions (see e.g. Judgment, paras. 2786, 3036-3039, 3051). In any event, the Chamber was not required to expressly address all of Ongwen's arguments to provide a sufficiently reasoned judgment. *See above* fn. 510.
[1515] Defence Closing Brief, paras. 181-208.
[1516] *See e.g.* Defence Closing Brief, para. 184, where the Ongwen incorporates his submissions from the Defence Defects Series Part II, paras. 32-49.

ability to frustrate the commission of the crimes,[1517] fail to identity the precise parts of the Judgment affected by the alleged errors and are not substantiated by concrete facts or arguments. As explained above,[1518] such abstract allegations should also be rejected *in limine*. Ongwen fails to meet his burden to present "cogent arguments" setting out the alleged error and to explain how the Chamber erred.[1519]

IX.A.2. The Chamber correctly attributed responsibility to Ongwen for the crimes committed by the Sinia brigade

418. Ongwen's arguments that the Chamber erred by attributing him with responsibility for the crimes committed by the Sinia brigade[1520] do not correctly represent the Chamber's findings and should therefore be rejected. For all the crimes for which Ongwen was convicted pursuant to the modes of liability of indirect co-perpetration or indirect perpetration under article 25(3)(a), he was found to have had control over the crimes, including by commanding fighters who were involved in their commission.[1521] These findings acknowledged Ongwen's evolving position within the Sinia brigade during the charged period,[1522] including that he was appointed commander of the Sinia brigade on 4 March 2004.[1523] The Chamber also carefully assessed Ongwen's conduct and its *nexus* to the crimes.[1524]

IX.A.3. The Chamber was not required to identify all victims by their names

419. The Chamber did not err by convicting Ongwen of counts 61 to 70 (indirect SGBC and child soldier crimes) where not all the victims could be identified by their names.[1525] The parameters of the charges and the scope of the conviction for these crimes were sufficiently specific. According to the established jurisprudence of this Court (and consistent with other international criminal tribunals), the degree of specificity required to identify the victims of crimes in the charges is context-specific. It depends, among other things, on the nature and scale of the crimes, the accused's proximity to the crimes and the applicable mode of liability.[1526] In

[1517] Appeal, paras. 655-658.
[1518] *See above* paras. 4-5.
[1519] *Ntaganda* AJ, para. 48.
[1520] Appeal, paras. 653-654.
[1521] Judgment, paras. 2855-2864 (attack on Pajule IDP camp); paras. 2913-2918 (attack on Odek IDP camp); paras. 2963-2964 (attack on Lukodi IDP camp); paras. 3010-3011 (attack on Abok IDP camp); paras. 3090-3095 (SGBC perpetrated not directly by Ongwen); paras. 3107-3111 (child soldier offences).
[1522] Judgment, paras. 1013-1083.
[1523] Judgment, paras. 1075-1083.
[1524] Judgment, paras. 2855-2864 (attack on Pajule IDP camp); paras. 2913-2918 (attack on Odek IDP camp); paras. 2963-2964 (attack on Lukodi IDP camp); paras. 3010-3011 (attack on Abok IDP camp); paras. 3090-3095 (SGBC perpetrated not directly by Ongwen); paras. 3107-3111 (child soldier crimes).
[1525] *Contra* Appeal, para. 655.
[1526] *Ntaganda* TJ, paras. 38-42; *Bemba* TJ, para 43; *Yekatom* Additional Details Decision, para. 19 *Katanga* Summary Charges Decision, para 31; *Ruto & Sang* 5 July 2012 UDCC Order, para. 8; *Bemba* CD, para. 133;

the circumstances, it may not be possible to allege the number or identity of all victims, as well as other details exhaustively and with precision, given their systematic and pervasive nature.[1527] For instance, in *Ntaganda*, the Appeals Chamber confirmed that similar charges were sufficiently specific (even if the individual victims were not identified) because they identified the group of perpetrators, the group of victims and the temporal and geographical parameters.[1528]

420. In this case, consistently with the parameters of the Charges, the Chamber found that at any time between 1 July 2002 and 31 December 2005 there were over one hundred abducted women and girls in the Sinia brigade and that the evidence gives rise to a powerful inference that almost all of them had broadly similar experiences of victimisation.[1529] Indeed, the evidence overwhelmingly demonstrated that SGBC crimes were committed on a systemic and institutionalised manner in the LRA, including in the Sinia brigade, since there was an elaborate system of abuse of women and girls which was consciously maintained through a coordinated effort by the co-perpetrators (including Ongwen) over an extended period of time.[1530] Similarly, the Chamber found that a "large number of children" were conscripted and used to participate in hostilities.[1531] It found that LRA soldiers abducted children under 15 years old upon orders of the LRA leadership on a coordinated and methodical manner pursuant to an specific and methodologically pursued organisation-wide policy where Ongwen and his co-perpetrators specifically targeted children under 15. These children were distributed within all parts of the LRA, including in Sinia, integrated and trained with the aim of using them in hostilities—and they did participate in hostilities, including in the four charged attacks.[1532] Against this backdrop, the Chamber's findings were sufficiently specific. The Chamber sufficiently identified the victims by reference to: (i) the groups to which they belonged, namely abducted women and girls serving as domestic servants or so-called wives, or child soldiers, within the Sinia brigade; (ii) the temporal and geographical parameters of the crimes committed against them (from 1 July 2002 to 31 December 2005, in Northern Uganda);[1533] and (iii) their gender

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Lubanga AJ para. 123; *Mbarushimana* CD, paras. 82, 112; *Al Hassan* DCC Time Limit Decision, para. 30; *Ntaganda* AJ, para. 326.

[1527] *Ntaganda* TJ, paras. 968, 1112-1113; *Ntaganda* AJ, paras. 331, 326 (quoting *Bemba* AJ Minority Opinion, paras. 27-28), 340-343; *see also* *Bemba* TJ, para 43; *Mbarushimana* CD, para. 112; *Ntaganda* CD, para. 83; *Ntaganda* UDCC Decision, para. 72; *Yekatom* Additional Details Decision, paras. 31-32, 34.

[1528] *Ntaganda* AJ, paras. 326, 331.

[1529] Judgment, paras. 213, 2141-2142, 3070, 3074, 3080.

[1530] Judgment, paras. 212-221, 2094-2095, 2098-2113, 2139-2142, 3089-3091.

[1531] Judgment, paras. 223, 3102.

[1532] Judgment, paras. 222-225, 2312-2313, 2329-2402, 2415-2447, 3106-3108.

[1533] Judgment, paras. 3069-3115. *See e.g.* *Ntaganda* TJ, paras. 968.

(for SGBC), their age (for child soldier crimes) and other identifying features such as their origin (Northern Uganda).[1534] This approach is consistent with the Court's jurisprudence and that of other tribunals.[1535]

421. Further, the Chamber made the necessary findings with respect to Ongwen's *mens rea* regarding the indirect SGBC crimes and crimes against child soldiers for which he was convicted.[1536] The Chamber did not need to make separate findings with respect to the *mens rea* of the physical perpetrators "in [Ongwen's] absence or incidentally".[1537] As the Appeals Chamber has confirmed, the Chamber was not required to assess Ongwen's *mens rea* with respect to the specific criminal acts; rather, what must be established is that he possessed the requisite *mens rea* with respect to the crimes as such, in the sense of rape, sexual slavery, conscription and use of children, among others, committed in the implementation of the common plan.[1538] Finally, Ongwen fails to demonstrate that he incurred any unfair prejudice as a result of the Chamber's approach.

IX.A.4. Ongwen played an essential role in defining and sustaining a system of abduction

422. The Chamber correctly held that Ongwen played an essential role in defining and sustaining a system of abduction, from which it inferred Ongwen's control over the SGBC crimes he was found to have indirectly co-perpetrated.[1539] The Chamber's conclusions were based on clearly identified evidence and related factual findings.[1540] Moreover, the fact that Kony issued standing orders did not exclude that Ongwen and other Sinia leadership issued more specific orders.[1541] Ongwen misrepresents the Judgment, disagrees with the Chamber's conclusions and proposes an alternative interpretation of the evidence, but fails to show an error. His arguments should therefore be rejected.

[1534] Judgment, paras. 212-213, 222.
[1535] With respect to the crimes against children, *see* *Ntaganda* SD, para. 83, *Lubanga* TJ, paras. 911-916 and *Taylor* TJ, para. 1596, where Chambers did not identify a precise number of children recruited and used. For indirect SGBC against women and girls within an armed group, no similar charges have been presented in other tribunals; moreover, although the *Ntaganda* Trial Chamber identified the number of female UPC members under 15 years who were victims of rape and sexual slavery, those charges were framed differently: *see* *Ntaganda* SD, paras. 93, 108, noting that female members of the UPC/FPLC were regularly raped and subjected to sexual violence during their service and that this was a common practice generally known and discussed within the UPC/FPLC, but that as a result of the manner in which the charges were framed, the Chamber only considered those victims who were under 15 years of age at the relevant time.
[1536] Judgment, paras. 3096-3099 (indirect SGBC) and 2403-2414, 3112-3114 (child soldiers).
[1537] *Contra* Appeal, para. 655.
[1538] *Ntaganda* AJ, para. 1065; *see also* para. 1126.
[1539] *Contra* Appeal, paras. 659-660.
[1540] Judgment, paras. 3092-3094; *see also* paras. 212-214, 216, 2114-2142.
[1541] Judgment, para. 2122.

IX.A.5. Ongwen had the required *mens rea* for SGBC

423. Ongwen alleges that the Chamber erred in its findings on his *mens rea* for SGBC which he did not directly commit.[1542] However, he fails to substantiate his submissions that the relevant facts were not established beyond reasonable doubt or that the Chamber's conclusions are undermined by other factual findings in the Judgment.[1543] Ongwen's arguments merely disagree with the Chamber's findings and should be rejected.

424. Likewise, for SGBC he was found to have directly committed, the Chamber did not impermissibly rely on evidence falling outside the temporal or geographic scope of the charges.[1544] While, as a matter of background and context, the Chamber found that some victims had been abducted before July 2002, the Chamber only attributed to Ongwen the SGBC that he personally committed against such victims in Northern Uganda from 1 July 2002 until 31 December 2005.[1545]

425. Nor did the Chamber disregard evidence concerning Kony's role in the abduction and distribution of women and girls.[1546] To the contrary, the Chamber made detailed findings in this respect.[1547] It found that the LRA leadership, including Kony, maintained and coordinated an elaborate system of abuse of women and girls.[1548] However, when attributing individual responsibility for SGBC to Ongwen, for either direct or joint commission, the Chamber correctly assessed Ongwen's personal conduct and role, as well as his intent and knowledge.[1549] For the above reasons, Ground 64 should be rejected.

IX.B. THE CHAMBER REASONABLY AND CORRECTLY ASSESSED THE LRA'S STRUCTURE AND ONGWEN'S ROLE (GROUND 65)

IX.B.1. Ongwen received sufficient notice of the facts pertaining to his ability to frustrate the commission of the crimes

426. Ongwen's argument that he did not have notice of the means by which he could have frustrated the crimes[1550] misunderstands the notion of 'control over the crime' as a component

[1542] Appeal, paras. 661-663, challenging Judgment, paras. 3096-3099.
[1543] The Chamber's findings in paragraphs 182-184 and 100-111 (referred to in Appeal, fn. 802) are irrelevant to the Chamber's conclusions on Ongwen's mental element for SGBC (Judgment, paras. 3096-3099).
[1544] *Contra* Appeal, para. 662.
[1545] Judgment, paras. 205-206 (referring to the abduction of women and girls prior to 1 July 2002); *see also* paras. 3021, 3035, 3044, 3050, 3056, 3063 (defining the temporal scope of the SGBC charges against these victims).
[1546] *Contra* Appeal, para. 663.
[1547] *See* Judgment, paras. 2010-2012, 2014, 2019-2020, 2037-2038, 2043, 2092 (referred to in Appeal, fn. 804).
[1548] Judgment, paras. 2098-2113.
[1549] For SGBC directly committed by Ongwen, see Judgment, paras. 3021-3068. For SGBC committed by Ongwen jointly with others, see Judgment, paras. 3089-3099. As a matter of law, the fact that Ongwen committed a crime pursuant to an order from Kony does not relieve him of criminal responsibility (*see* article 33(1)).
[1550] Appeal, paras. 666-668.

of the mode of liability of (indirect) co-perpetration, and misinterprets the Judgment. As correctly held by the Chamber, the law on (indirect) co-perpetration requires that "[t]he accused […] must have control over the crime 'by virtue of his or her essential contribution to it and the resulting power to frustrate its commission'".[1551] A co-perpetrator will have control over a crime and the resulting power to frustrate its commission, if, "within the framework of a common plan [he or she has made] an essential contribution".[1552] This requires consideration of whether the accused's contribution within the framework of the common plan was such that without it, "the crime would not have been committed or would have been committed in a significantly different way".[1553] Such an essential contribution "can be made not only at the execution stage of the crime, but also, depending on the circumstances, at its planning or preparation stage, including when the common plan is conceived".[1554]

427. Accordingly, for Ongwen to have received notice about his control over the crimes and his resulting power to frustrate them, he needed to be informed of his alleged contributions to the crimes within the framework of the common plan. In that respect, he was given abundant notice.[1555] As a matter of law, there is no separate requirement to give notice of the means by which Ongwen could have frustrated the crimes,[1556] nor must the Chamber use specific terminology aside from the language of the Statute.[1557]

428. In order to decide whether Ongwen's contributions were essential and sufficient so to confer upon him the power to control the crimes and to frustrate their commission, the Chamber was required to normatively assess the accused's role in the implementation of the common plan, taking into account the division of tasks[1558] and his contributions to the implementation

[1551] Judgment, para. 2787. *See also* *Lubanga* AJ para. 473.
[1552] *Lubanga* AJ para. 469.
[1553] *Bemba et al.* AJ, paras. 810, 820, 825; *Ntaganda* AJ, para. 1041; *Lubanga* AJ, para. 473. As to the assessment of the essential nature of a contribution to the common plan, *see also* *Bemba et al.* AJ, paras. 812, 824, 1029; *Lubanga* TJ, paras. 1000-1001. This aspect is merely a result of an essential contribution, and not a stand-alone objective legal element of indirect co-perpetration. At most, it is a factual indicator to demonstrate that the accused's contribution was essential. These two notions (the essential nature of the contribution and power to frustrate) are no more than (in photographic terms) the positive and negative expression of the same idea. To argue that the failure to articulate the negative expression confounds the entirety of the Chamber's inquiry into the truth of this issue, is to confuse form with substance.
[1554] *Lubanga* AJ para. 469; *see also* *Ntaganda* AJ, para. 1066; *Bemba et al.* AJ, paras. 810, 819.
[1555] *See in particular*, Confirmation Decision: regarding Pajule (p. 74, para. 17), Odek (p. 78, para. 29), indirect SGBC (p. 100, para. 123), child soldiers (p. 103, para. 129); *see also* p. 73, para. 13; DCC, paras. 9-13, 17-18, 29-30, 133, 139; Prosecution Pre-Trial Brief, pp. 41-75, 87-93, 107-119, 157-168, 182-189, 197-222, 244-260, 277-285. *See also above* Section III (Grounds 5 and 6).
[1556] *Contra* Appeal, para. 666.
[1557] *Yekatom & Ngaïssona* Charges AD, paras. 60-61.
[1558] *Lubanga* AJ, para.473; *Bemba et al.* AJ, para.820; *Bemba et al.* TJ, para.69; *Katanga* CD, para.525.

of the plan.[1559] The Chamber correctly made such normative assessments, relying on an evaluation of its prior factual findings on Ongwen's conduct, role and contributions.[1560] Having made findings on the structure of the LRA, and specifically the Sinia brigade,[1561] on Ongwen's role and authority within the LRA and the Sinia brigade,[1562] and on his contributions within the context of the common plan,[1563] the Chamber made a factual evaluation and concluded that he had the power to control the crimes and the ability to frustrate their commission.[1564] This approach was correct and Ongwen fails to show any error.

IX.B.2. The Chamber's findings were consistent

429. Ongwen argues that the Chamber's findings were inconsistent with the Confirmation Decision and that the Judgment contains inconsistent evidentiary findings on the LRA's command structure and hierarchy.[1565] Relatedly, he argues that the Chamber's conclusion on Ongwen's power to frustrate the commission of the crimes was inconsistent with its findings that some decisions within the LRA were delegated to lower-level commanders and that they were able to take some initiative within the framework of general orders from Kony or Ongwen.[1566] These arguments are unsupported and should be rejected.

430. First, there is no significant contradiction between the Pre-Trial Chamber's evidentiary findings on Kony's role within the LRA and the Trial Chamber's findings on the matter.[1567] Both the Pre-Trial Chamber and the Trial Chamber acknowledged Kony's role at the top of the hierarchically structured organization.[1568] Crucially, Ongwen does not show that any of the Chamber's findings exceeded the scope of the charges confirmed by the Pre-Trial Chamber.[1569]

431. Second, Ongwen fails to show that any of the Chamber's findings were internally inconsistent. The Chamber consistently held that at the time relevant to the charges, the LRA had a hierarchical structure with Kony as its highest authority and Otti as his deputy. The LRA was divided into four brigades, including the Sinia brigade. The brigades were divided into

[1559] *Ntaganda* AJ, para. 1060; *Bemba et al.* AJ, para.1029.
[1560] Judgment, paras. 2859-2864, 2915-2918, 3092-3095, 3109-3111.
[1561] Judgment, paras. 852-1012.
[1562] Judgment, paras. 1013-1084.
[1563] Judgment, paras. 2851-2859, 2910-2914, 3089-3091, 3106-3111.
[1564] *Contra* Appeal, paras. 667, 678.
[1565] Appeal, para. 668.
[1566] *Contra* Appeal, paras. 669-676.
[1567] *Contra* Appeal, para. 668.
[1568] Confirmation Decision, paras. 56-57; Judgment, paras. 123-125. *Contra* Appeal, paras. 669, 671-678.
[1569] The Chamber is not bound by the PTC's factual assessments, but only by the scope of the charges confirmed by the PTC. Pursuant to article 74(2), the Trial Chamber's final decision "shall not exceed the facts and circumstances described in the charges and any amendments to the charges" (*Ntaganda* AJ, para. 324).

battalions and further into companies or 'coys'. Each of these units was led by a commander.[1570] The Chamber made detailed findings on the structure and command of the Sinia brigade[1571] and how the Sinia brigade and its commanders ensured its capability to undertake military operations.[1572] It also elaborated in detail about Ongwen's position and authority within the LRA.[1573] None of these findings were inconsistent.

432. Third, the Chamber's finding that within the LRA some functions were delegated to lower-level commanders and that it "relied also on the independent actions and initiatives of its commanders at divisions, brigade and battalion levels"[1574] was not inconsistent with its conclusion that the LRA had a functioning hierarchy.[1575] The Chamber carefully explained its conclusion that while orders were generally communicated to the brigade commanders directly from Kony or through Otti, the brigade commanders occasionally took their own initiatives when Kony was geographically removed from LRA units.[1576] According to the Chamber, these "occasional deviations" did not detract from the "otherwise effective hierarchical organization" of the LRA.[1577] It specifically held that there was no contradiction in the evidence, but that the relevant evidence describes the LRA as an organisation in a precise and nuanced way.[1578]

433. Fourth, the Chamber's finding that Kony would occasionally bypass the hierarchy and issue orders directly to battalion commanders,[1579] likewise does not contradict its findings that Ongwen was responsible for the crimes charged, included those committed by fighters under his command in the Sinia brigade.[1580] The findings on Ongwen's responsibility are based on his own role and authority within the LRA, including in the Sinia brigade, and on his own conduct contributing to the crimes either directly or through fighters under his command. Ongwen fails to show how the manner in which Kony exercised command within the LRA would affect the Chamber's findings on Ongwen's responsibility for the crimes.

434. Fifth, Ongwen's arguments that the Chamber failed to provide a reasoned decision regarding his intent and knowledge to commit the crimes and regarding the *mens rea* of the

[1570] Judgment, paras. 854-856.
[1571] Judgment, paras. 883-892.
[1572] Judgment, paras. 893-1012.
[1573] Judgment, paras. 1013-1083.
[1574] Judgment, paras. 873.
[1575] *Contra* Appeal, paras. 672, 677.
[1576] Judgment, paras. 866-873.
[1577] Judgment, para. 869.
[1578] Judgment, para. 869.
[1579] Judgment, para. 868.
[1580] *Contra* Appeal, para. 673.

physical perpetrators[1581] do not correctly represent the Judgment, as the Chamber made all the relevant findings.[1582]

435. Sixth, the Chamber correctly attributed responsibility to Ongwen for the crimes committed in the attack on the Abok IDP camp, even if it held that Ongwen did not physically participate in the attack.[1583] The Chamber found that the crimes were perpetrated by fighters subordinate to Ongwen, and that Ongwen designated Okello Kalalang, one of his subordinate commanders, to command the attack on the ground pursuant to his instructions.[1584] Based on these and other relevant findings,[1585] the Chamber correctly found that Ongwen executed the material elements of the crimes through his subordinates and found that he was responsible for these crimes pursuant to the mode of liability of indirect perpetration.[1586] Ongwen's argument that under such circumstances the only applicable mode of liability would be command responsibility[1587] lacks foundation. This is particularly in light of the Chamber's finding that Ongwen committed the crimes by ordering his subordinates to attack the IDP camp.[1588]

436. Finally, Ongwen merely disagrees with the Chamber's conclusion that he was informed about the death of civilians in Lukodi.[1589] The Chamber's conclusion is based on a careful analysis of corroborated evidence.[1590] While it is correct that some witnesses gave contradicting evidence, the Chamber amply dealt with these contradictions and explained in detail why it found contradicting evidence to be unreliable.[1591] In particular, the Chamber did not err by generally relying on insider witnesses P-0145 and P-0205, while rejecting discrete portions of their evidence on the basis that they were "seeking to minimise their involvement".[1592] As explained above and previously held by the Appeals Chamber, "a Trial Chamber may indeed rely on certain aspects of a witness's evidence and consider other aspects unreliable. […] [T]he evidence of a witness in relation to whose credibility the Trial Chamber has some reservations

[1581] Appeal, para. 678.
[1582] *See* e.g. Judgment, paras. 2865-2873, 2919-2926, 2965-2972, 3012-3019, 3021-3068, 3096-3099, 3112-3114.
[1583] Judgment, para. 1873. *Contra* Appeal, paras. 679-680.
[1584] Judgment, paras. 192, 1873, 3010, 3013.
[1585] *See e.g.* Judgment, paras. 1865, 1866.
[1586] Judgment, paras. 3010-3011.
[1587] Appeal, para. 680.
[1588] Judgment, paras. 192, 3010.
[1589] Appeal, para. 674.
[1590] Judgment, para. 1845; *see also* paras. 1838-1842.
[1591] Judgment, paras. 1843-1845.
[1592] Judgment, para. 1688; *see also* para. 268; *contra* Appeal, paras. 674-676.

may be relied upon to the extent that it is corroborated by other reliable evidence."[1593] For the above reasons, Ground 65 should be rejected.

IX.C. ONGWEN AND HIS CO-PERPETRATORS RELIED ON LRA SOLDIERS TO ABDUCT AND DISTRIBUTE WOMEN AND GIRLS (GROUND 66)

437. Ongwen's Ground 66 concerning an alleged error in the Chamber's findings that Ongwen and his co-perpetrators carried out a coordinated and methodical effort to abduct and distribute women and girls[1594] is developed under Sections E and G of his Appeal.[1595] The Prosecution accordingly responds to this ground under section XIII below.[1596]

IX.D. THE LRA HAD A FUNCTIONING HIERARCHY (GROUND 67)

438. In his Notice of Appeal, Ongwen anticipated his intention to raise Ground 67 concerning alleged errors in the Chamber's findings on the LRA's hierarchy, its command structures and Kony's role and responsibility within the LRA.[1597] The Appeal does not separately elaborate on that ground, but the substance of Ongwen's anticipated Ground 67 appears to be fully captured by his arguments under Ground 65.[1598] The Prosecution has responded to those arguments in section IX.B[1599] above and accordingly Ground 67 should be rejected.

IX.E. THE CHAMBER CONSIDERED ONGWEN'S SUBMISSION THAT HE AS A "TOOL" OF KONY (GROUND 68)

439. Ongwen's arguments under this ground of appeal[1600] overlap to some extent with his arguments in relation to the applicability of grounds for excluding criminal responsibility under article 31(1).[1601] The Prosecution's response to Ground 68 should therefore be read together with its response to section VII of this brief.[1602]

IX.E.1. The Chamber's findings on recruitment, initiation, training, and service in the LRA, and Ongwen's personal situation, were not inconsistent

440. The Chamber's findings regarding LRA policies and practices of abduction, initiation and training of child soldiers were not inconsistent with its findings on Ongwen's personal situation during the charged period.[1603] The Chamber acknowledged that Ongwen had been abducted by

[1593] *Ngudjolo* AJ, para. 168; *see also Ntagerura et al.* AJ, para. 174; *Halilović* AJ, para. 125.
[1594] NoA, Ground 66, pp. 23-24.
[1595] Appeal, paras. 918-934 and 975-1000.
[1596] *See below*, paras. 546-586.
[1597] NoA, Ground 67, p. 24.
[1598] Appeal, paras. 665-680.
[1599] *See above*, paras. 426-436.
[1600] Appeal, paras. 681-702.
[1601] *See* Appeal, Grounds 19, 26-44, 46-58, 61-63.
[1602] *See above*, section VII, paras. 166-380.
[1603] *Contra* Appeal, paras. 683-695.

the LRA when he was 9 years old and that as a young child, he had been the victim of LRA crimes.[1604] It also found that the mechanisms used in the LRA to ensure obedience in its ranks were characterised by their brutality.[1605]

441. However, it held that there was a significant difference in the LRA between the status of low-ranking members and the higher commanders. Low-ranking LRA fighters were frequently placed in situations where they had to perform certain actions under threat of imminent death or physical punishment.[1606] According to the Chamber, the situation of LRA commanders was different: whereas the LRA was an effective, hierarchically structured organisation, it was not under the absolute control of Kony. Instead, Kony relied on the co-operation of various LRA commanders to execute LRA policies[1607] and commanders were able to take some initiative, especially when Kony was geographically removed from LRA units.[1608] Accordingly, the Chamber concluded that Ongwen's situation in the LRA during the charged period was not analogous to that of any low-level LRA member or recent abductee.[1609] In fact, Ongwen himself was often the source of threats to low-level members or recent abductees.[1610]

442. When making its finding in relation to Ongwen, the Chamber correctly focussed on Ongwen's situation as a battalion and brigade commander during the period of the charges. His childhood experience was not central to the issue.[1611] Contrary to Ongwen's assertion,[1612] the Chamber did not dismiss that at the time of his abduction he was under a situation of threat and total subordination;[1613] it simply held that this was not decisive to determining whether a threat existed during the charged period. The Chamber concluded that this threat did not express itself at the time of his conduct during the period of the charges.[1614] Instead, it found that during the charged period Ongwen was a "self-confident commander who took his own decisions on the basis of what he thought right or wrong" and he was not subject to Kony's complete dominance.[1615]

[1604] Judgment, paras. 29-31, 2672.
[1605] Judgment, para. 2590.
[1606] Judgment, paras. 2591, 950-1004.
[1607] Judgment, para. 2590.
[1608] Judgment, paras. 866-873. *Contra* Appeal, para. 694.
[1609] Judgment, 2591.
[1610] Judgment, 2591.
[1611] Judgment, 2592, 2672.
[1612] Appeal, para. 695.
[1613] Judgment, 2592, 2672.
[1614] Judgment, paras. 2592.
[1615] Judgment, paras. 2602, 2668.

443. In light of the Chamber's analysis, Ongwen's argument that the Chamber erred by failing to equate Ongwen with low-level LRA members or recently abducted child soldiers merely disagrees with the Judgment and should be rejected. It shows no error by the Trial Chamber.

IX.E.2. The Chamber reasonably and correctly attributed to Ongwen the conduct of Sinia brigade fighters

444. Ongwen challenges the Chamber's findings attributing to him the crimes of the Sinia brigade fighters. According to Ongwen, the Chamber failed to apply to him the same reasoning that it used for other victims of the LRA's brutal policies, namely that they lacked independent will.[1616] This argument is related to Ongwen's previous submissions and should also be rejected. As shown above, the Chamber carefully explained the difference between LRA commanders, such as Ongwen, who maintained their free will, and low-level LRA members and recent abductees, who did not.[1617] There is no inconsistency in the Chamber's approach.[1618]

445. Ongwen's claim that the Chamber disregarded his arguments and failed to consider the long-term effects of the crimes suffered by him[1619] should equally be rejected. The Chamber did not disregard such arguments, but rather rejected them and gave detailed reasons for its findings.[1620] The Chamber analysed at great length whether at the time relevant to the charges, Ongwen suffered from any mental disease or defect, or whether he acted under duress.[1621] In so doing, the Chamber fully considered Ongwen's arguments and his evidence in support of his grounds for excluding criminal responsibility under articles 31(1)(a) and 31(1)(d). In light of these detailed findings, Ongwen's assertion that the Chamber erred in failing to acknowledge that his childhood experiences stripped him of his free will[1622] merely disagrees with the Chamber's conclusions. It shows no error by the Trial Chamber. For the above reasons, Ground 68 should be rejected.

[1616] Appeal, paras. 696-699.
[1617] Judgment, paras. 2590-2592, 2668, 2672.
[1618] *Contra* Appeal, para. 696.
[1619] Appeal, para. 697.
[1620] Judgment, paras. 2590-2608, 2668-2672.
[1621] Judgment, paras. 2450-2672. *See also* section VII, paras. 166-380.
[1622] Appeal, paras. 698-699.

IX.F. ONGWEN SHARED A COMMON PLAN TO CONSCRIPT AND USE CHILDREN UNDER THE AGE OF 15 (GROUND 69)

446. Ongwen's arguments that his participation in a common plan to conscript and use children under the age of 15 was defectively pleaded and not established beyond reasonable doubt[1623] are unsupported and should be rejected.

IX.F.1. Ongwen's participation in the common plan to conscript and use children under the age of 15 was pleaded correctly

447. Ongwen's arguments that his participation in the common plan to conscript and use children under the age of 15 was defectively pleaded[1624] has no basis. The Confirmation Decision—which is the authoritative document setting the parameters of the Charges for trial[1625]—clearly sets out that Ongwen shared a common plan to that effect together with Kony and the Sinia brigade leadership. The Pre-Trial Chamber made the required evidentiary assessments and factual findings,[1626] and then, in the dispositive part of the Confirmation Decision setting out the confirmed charges, held as follows:[1627]

> Between at least 1 July 2002 and 31 December 2005 Dominic Ongwen, Joseph Kony, and the Sinia brigade leadership ("child soldiers co-perpetrators") pursued a common plan to abduct children in the territory of northern Uganda and conscript them into the Sinia Brigade in order to ensure a constant supply of fighters ("child soldiers common plan"). […] As a result of the child soldiers common plan, children younger than 15 were abducted at various locations across northern Uganda and forcibly integrated into the Sinia brigade from at least 1 July 2002 until 31 December 2005. […] Children under 15 participated actively in hostilities. They participated in combat and activities linked to combat.

448. It is irrelevant that the Prosecution's initial Arrest Warrant Application for Ongwen[1628] and the Pre-Trial Chamber's Arrest Warrant[1629] issued in July 2005 did not include child soldier charges and the related common plan.[1630] When formulating the charges against Ongwen in the DCC under article 61(1) and rule 121(3), the Prosecution was not bound or limited by the factual allegations included in its application under article 58 for a warrant of arrest. The Appeals Chamber has held that the Prosecutor may expand the factual basis of a case beyond

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[1623] Appeal, paras. 703-708.
[1624] Appeal, paras. 704-705.
[1625] *See* 2019 ICC Chambers Practice Manual, para. 57; *Lubanga* AJ, para. 124; *Bemba et al.* AJ, para. 196; *Bemba* Second DCC Decision, para. 15; *Ntaganda* TJ, para. 37; *Bemba* TJ, para. 32; *Katanga* Summary Charges Decision, paras. 22-23.
[1626] Confirmation Decision, para. 145; *see also* paras. 141-144.
[1627] Confirmation Decision, section on Confirmed Charges, paras. 126-128. *See also* DCC, paras. 136-141; Prosecution Pre-Trial Brief, paras. 740-745.
[1628] Amended Arrest Warrant Application.
[1629] Arrest Warrant.
[1630] *Contra* Appeal, paras. 704.

that for which a warrant of arrest or a summons to appear has been issued.[1631] The Chambers Practice Manual endorses this principle.[1632]

449. Ongwen incorporates additional arguments by reference to a previous filing before the Trial Chamber.[1633] As noted above, such practice is inappropriate and accordingly these arguments should be disregarded.[1634] In any event, it is not apparent how such arguments are relevant to Ongwen's position on the pleading of the common plan for child soldier offences.

IX.F.2. The Chamber correctly found that Ongwen shared a common plan with Kony and the Sinia brigade leadership to conscript and use children under the age of 15

450. Ongwen's arguments that the Chamber erred in fact when finding that Ongwen shared a common plan with Kony and the Sinia brigade leadership to conscript and use children under the age of 15[1635] are unsupported and merely disagree with the Chamber's findings on the evidence. They do not show the Chamber's findings were unreasonable and should therefore be rejected.

451. That the LRA policy of abduction and recruitment of children under the age of 15 had been conceived and enforced by Kony before the period relevant to the charges,[1636] that orders to abduct came from Kony,[1637] and that whoever dared to contradict Kony would face dire consequences,[1638] were irrelevant to the Chamber's determination of Ongwen's responsibility for the child soldier crimes. For Ongwen to be held responsible for these crimes as an indirect co-perpetrator (together with Kony), it was sufficient for the Chamber to conclude that Ongwen, Kony and others shared that common plan during the period relevant to the charges, namely between 1 July 2002 and 31 December 2005,[1639] that Ongwen executed the material elements of the crime through other persons;[1640] that he had control over the crimes;[1641] and that he acted with the required intent and knowledge.[1642] The Chamber made all the necessary findings. Ongwen merely disagrees with those findings by proposing alternative interpretations, but does

[1631] *Ntaganda* AJ, para. 325.
[1632] 2019 ICC Chambers Practice Manual, paras. 31-34.
[1633] Appeal, para. 705 and fn. 862.
[1634] *See above* paras. 7-8.
[1635] Appeal, paras. 706-708.
[1636] Appeal, para. 706.
[1637] Appeal, paras. 706-707.
[1638] Appeal, paras. 708.
[1639] Judgment, paras. 3101-3102; 3106.
[1640] Judgment, paras. 3107-3108.
[1641] Judgment, paras. 3109-3111.
[1642] Judgment, paras. 3112-3114.

not show the Chamber's findings were unreasonable.[1643] Accordingly, for the above reasons, Ground 69 should be rejected.

X. THE CHAMBER CORRECTLY AUTHENTICATED, ASSESSED AND RELIED ON INTERCEPTS, LOGBOOKS AND SHORTHAND NOTES: GROUNDS 72-73

452. Based on multiple factors—including testimony from persons who had intercepted LRA radio communications, audio-recorded them, and created contemporaneous records in logbooks—the Chamber correctly authenticated and assessed LRA intercept-related evidence before relying on it.[1644] Although the Chamber received diverse LRA intercept-related material, it all related to just three verified sources — the ISO, UPDF and Police/CID.[1645] This material was carefully considered by the Chamber, which ultimately took into account only the "actual intercept evidence",[1646] defined as: (i) the tape recordings of the actual LRA communications;[1647] (ii) the UPDF (the army), ISO (national intelligence agency) and CID (certain local police forces) interceptors (who gave evidence concerning the circumstances of the intercepts);[1648] (iii) LRA witnesses with detailed knowledge of the LRA's methods of communication;[1649] and (iv) the logbooks, in which the interceptors had contemporaneously summarised in substantial detail the content of each audio recorded intercept.[1650]

453. Nothing in principle prevented the Chamber from relying on any of these items individually. Yet, in fact, the Chamber frequently preferred to take a cautious approach, relying on this evidence in combination—with each item mutually reinforcing the credibility and reliability of the whole. Notably, for example, before relying on logbook entries of intercepted LRA communications—which form the bulk of Ongwen's challenges in this appeal—the Chamber not only determined that they were exclusively based on the audio/cassette recording of the relevant LRA radio communication,[1651] but also ensured that they were identified and

[1643] Appeal, paras. 707-708.
[1644] Judgment, paras. 613-810, 1107-1147; *contra* Appeal, paras. 743-801.
[1645] Judgment, paras. 616-636, 645-666.
[1646] Judgment, para. 685.
[1647] Judgment, paras. 617, 620, 626, 680.
[1648] Judgment, paras. 617, 619, 625 (including P-0059—the ISO's primary interceptor—and other witnesses involved in the ISO interception operations, namely: P-0027, P-0032, P-0291, P-0301, P-0303, P-0384 and P-0386), 629 (including Patrick Lumumba Nyero—the primary interceptor for the CID (Police)— and P-0370, who worked with Lumumba and P-0126, to whom P-0370 reported), 680 (including P-0003—the UPDF's primary interceptor—and other witnesses involved in the UPDF interception operations, namely: P-0029, P-0337, P-0339, P-0400 and P-0404).
[1649] Judgment, paras. 616, 680 (including P-0016, P-0029, P-0138, P-0440 and Francis Ocen).
[1650] Judgment, paras. 621, 658-659, 685.
[1651] Judgment, paras. 620-621, 623, 626.

authenticated by various witnesses who had authored them or were otherwise familiar with them.[1652] Furthermore, the Chamber only relied on logbook entries to corroborate witness testimony, including from eyewitnesses to the relevant events on the ground.[1653]

454. Ongwen's challenge to the Chamber's authentication, assessment and eventual reliance on LRA intercept-related evidence does not show any error. Instead, he makes unsubstantiated and legally misconceived claims, misreads the Judgement and/or repeats failed trial arguments and merely disagrees with the Chamber's reasonable evaluation of the evidence. His appeal should be dismissed.

X.A. THE CHAMBER CORRECTLY APPLIED THE 'SUBMISSION REGIME' TO THE INTERCEPTS

455. The Chamber correctly applied the 'submission regime' of evidence to the intercept related-evidence. It recognised various intercepts of LRA radio communications as submitted into evidence via the Prosecution's bar table motion, and consequently deferred assessing their relevance and probative value to the deliberations stage, once it had received all the evidence.[1654] Ongwen's arguments challenging the Chamber's approach are misconceived and should be dismissed.[1655]

456. First, having adopted the 'submission regime', the Chamber was not required to assess—even on a *prima facie* basis—the relevance, probative value or alleged prejudicial effect of each item, *at the time of its submission*.[1656] Rather, as explained above it was entitled to defer such assessment to the deliberation stage as part of its holistic assessment of all the evidence.[1657] Further, the Chamber explained its general approach regarding the reliability of the intercept evidence.[1658] Ongwen disregards the Chamber's explanation and instead takes three footnotes out of context.[1659]

457. Second, while the Chamber retained discretion to address any objections when the intercept material was submitted, Ongwen does not elucidate how the Chamber abused this discretion by not granting any of his objections either at that point or during trial[1660]—and

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[1652] Judgment, para. 659.
[1653] *See below* paras. 467-468.
[1654] Intercept Bar Table Decision.
[1655] Appeal, paras. 745-752.
[1656] *Contra* Appeal, paras. 745-752.
[1657] *See above* paras. 120-130; *see generally* Judgment, paras. 613-810 (reiterating these benchmarks: paras. 613, 615, 640, 643-644); *see also* *Bemba et al.* AJ, para. 8; *Bemba* Admissibility AD, para. 37.
[1658] Judgment, paras. 637-687.
[1659] *Contra* Appeal, paras. 748-749 (fn. 946: citing Judgment, fns. 2082-2084).
[1660] *Contra* Appeal, paras. 745, 747-748, 751.

instead addressing them at the deliberation stage, after receiving all the evidence.[1661] Not only did the Chamber correctly explain, following Appeals Chamber jurisprudence,[1662] that it would "rule upfront on certain issues related to the admissibility of evidence […] particularly when *procedural bars* are raised,"[1663] but it also added that it "may *exceptionally* consider standard evidentiary criteria at the point of submission of the evidence."[1664] However, Ongwen neither raised any procedural or 'exclusionary' bars of this kind,[1665] nor identified any circumstance pertaining to the intercepts which warranted 'exceptional' consideration of the evidentiary criteria at the time of their submission. To the contrary, he merely impugned the 'submission regime' adopted by the Chamber as a whole—asserting that it allegedly precluded an item-by-item assessment of the evidence,[1666] and denied him an opportunity to challenge the relevance or probative value of the intercepted material—[1667] and challenged the volume of the intercept evidence submitted.[1668] These generalised claims were not only incorrect, but failed to identify any concrete reason for the Chamber to conduct any threshold assessment.

458. In particular, as established by the Appeals Chamber—and correctly found by the Chamber[1669]—"[i]rrespective of the approach the Trial Chamber chooses, the Chamber will have to consider the *relevance*, *probative value* and the *potential prejudice* of each item of evidence at some point in the proceedings—when the evidence is submitted, during the trial, or at the end of the trial."[1670] In this case, the Chamber elected to assess these elements with regard to the intercept-related evidence at the end of the trial, and by this means fully respected Ongwen's fair trial rights.[1671] He articulates no prejudice as a result.

459. The Chamber also correctly dismissed *in limine* Ongwen's concerns about notice and fairness, based on the volume of intercept evidence submitted. It took into account, *inter alia*, that the Prosecution had given an itemised assessment of the relevance and probative value of

[1661] Judgment, paras. 615, 640-644.
[1662] *Bemba et al.* AJ, paras. 583, 603, 611 (underlining that a Chamber may make separate rulings on relevance and/or admissibility of individual items; this may include circumstances where the *exclusionary rule* in article 69(7) is raised).
[1663] Intercept Bar Table Decision, para. 4 (emphasis added, also referring to its earlier rule 140 decision: Initial Conduct of Proceedings Directions, para. 26).
[1664] Intercept Bar Table Decision, para. 4 (emphasis added, again referring to its earlier rule 140 decision: Initial Conduct of Proceedings Directions, para. 26).
[1665] *Bemba et al.* AJ, paras. 583, 603, 611.
[1666] Intercept Bar Table Decision, paras. 12, 14.
[1667] Intercept Bar Table Decision, paras. 15-26.
[1668] Intercept Bar Table Decision, para. 24.
[1669] Intercept Bar Table Decision, paras. 12.
[1670] *Bemba* Admissibility AD, para. 37 (emphasis added).
[1671] Judgment, paras. 613-810.

each item, and that the Prosecution's Pre-Trial Brief provided more than adequate notice of those parts of the evidence which were of particular importance to the Prosecution's allegations.[1672] Moreover, the Chamber left it open for Ongwen to raise any further evidentiary objections subsequent to its Bar Table Decision "should the Prosecution seek to rely upon any submitted evidence in a manner which the Defence could not have reasonably anticipated."[1673] Ongwen did not do so.

460. Finally, Ongwen's reliance on *Bemba et al*—ostensibly concerning the need for corroboration when there are discrepancies in material—is misplaced.[1674] In that case, the Trial Chamber had likewise adopted the 'submission regime', and the Appeals Chamber was ultimately led to address whether the Trial Chamber had erred in assessing the alleged discrepancies *at the end of the trial*. It did not consider the propriety of the Trial Chamber accepting the material at the 'submission' stage, as Ongwen wrongly suggests. In any event, in this case, Ongwen neither raised any objection alleging an incomplete logbook when the intercept evidence was submitted, nor in any event would such an objection necessarily have mandated the Chamber to make a threshold ruling at that point. Indeed, as noted above, save for the exclusionary rule and materials of a testimonial nature,[1675] a Chamber adopting the 'submission regime' is not required to carry out a threshold assessment even if faced with alleged discrepancies in the submitted item. Rather, it is entitled to defer such assessments to the end of the trial, after receiving all the evidence, as was the case here. Regardless of when the assessment is carried out, the exclusion of evidence or the requirement of corroboration turns on all the relevant circumstances.[1676]

X.B. THE CHAMBER CORRECTLY AUTHENTICATED AND ASSESSED THE LOGBOOKS[1677]

461. The Chamber correctly authenticated and assessed logbooks of intercepted LRA radio communications before relying on them.[1678] Like any documentary evidence, it was not mandatory that these logbooks were authenticated[1679] in any particular manner (including via

[1672] Intercept Bar Table Decision, para. 24.
[1673] Intercept Bar Table Decision, para. 25.
[1674] *Contra* Appeal, para. 750 (citing *Bemba et al.* AJ, paras. 1003, 227).
[1675] *Bemba et al.* AJ, paras. 583, 603, 611.
[1676] *Bemba et al.* AJ, para. 1003; *see similarly Nahimana et al.* AJ, para. 226.
[1677] *Contra* Appeal, paras. 753-766.
[1678] *Contra* Appeal, paras. 753-766.
[1679] In the sense of verifying that they were what they purported to be. *See* Judgment, para. 686 (the Chamber considering that it "set(s) out a precise foundation for its conclusions on when the recorded conversations occurred and who was communicating"). *See also Bemba* First Admissibility Decision, para. 15.

oral testimony)[1680]—but, here, the Chamber did authenticate the logbooks through means including (*viva voce* or rule 68) witnesses who could testify to their contents.[1681] These witnesses included persons who had intercepted the very LRA radio communications in question, recorded them onto cassettes, and also contemporaneously and systematically recorded the information on the cassettes into logbooks.[1682] Ongwen's claims that the Chamber relied on untested and unauthenticated logbook evidence are thus unsubstantiated, legally misconceived, misread the Judgement and/or repeat failed trial arguments and merely disagree with the Chamber's reasonable evaluation of the evidence without showing any error.[1683] They should be dismissed.

X.B.1 The Chamber assessed item-by-item the logbooks it relied on in the case

462. Ongwen's claim that the Chamber simply assessed the logbook entries generally and admitted them holistically or in bulk, thereby compromising the fairness and integrity of the proceedings,[1684] misreads the Judgement. To the contrary, the Chamber correctly applied a two-tier approach to authenticating and assessing intercept-related evidence before relying on it. At the *first* level, the Chamber examined and analysed the features that cut across *all* the intercepted LRA communications before assessing, at the *second* level, the specific intercepted communications it relied upon in the case.[1685] At the end of the first-level scrutiny, the Chamber concluded that the intercept-related evidence met general benchmarks suggesting its originality and integrity, and many of those benchmarks are widely accepted in international law. Yet even so, the Chamber still added that those benchmarks were to be read in conjunction with its second-level and more individualised and item-by-item analysis of the intercept evidence.[1686] Ongwen shows no error in this meticulous approach.

463. In its *first* level of analysis, the Chamber correctly identified the following features common to all the intercept evidence:

[1680] *Gbagbo & Blé Goudé* Submission of Evidence AD, para. 52 ("To the extent that Mr Gbagbo argues that, as a matter of logic, the authenticity of a document must be determined by reference only to the document concerned and that there is therefore no reason to defer a ruling in this regard, the Appeals Chamber disagrees. *It is clear that, depending on the circumstances, the authenticity of a given document may be further elucidated by other evidence, be it evidence specifically adduced for that purpose or evidence otherwise submitted in the course of the trial* […]", emphasis added). *See also* *Lubanga* TJ, para. 109 (identifying multiple authentication tools); *Katanga* Bar Table Decision, para. 23 (evidence authenticating documents may be direct or circumstantial).
[1681] Judgment, paras. 556-585, 640.
[1682] Judgment, paras. 613-810.
[1683] Appeal, paras. 753-766.
[1684] Appeal, paras. 753-754.
[1685] Judgment, paras. 613-614.
[1686] *See e.g.* Judgment, paras. 556, 613-614, 686-810, 1107-1145.

- The *content* concerned LRA radio communications during the period relevant to the charges;[1687]
- The *sources* of the intercepts were verifiable and limited to only three government or official organs—namely, the UPDF, ISO and Police/CID;[1688]
- The *persons* who actually did the intercepts ("interceptors") were also readily identifiable—namely, they were UPDF, ISO and Police/CID officers;[1689]
- The *object* of the interception was also clear, namely, for "counterintelligence,"—and because each organ generally operated independently, this "ensure[d] that no one interceptor was a spy or was otherwise manipulating the intelligence collected."[1690]
- All the interceptors were trained or sufficiently skilled in monitoring radio communications;[1691]
- Overall, all the interceptors could understand what the LRA was saying, and were well placed to recognise voices of individual LRA members on the radio;[1692]
- Although the three intercepting organs/persons operated independently, "their respective logbooks can […] be understood to be corroborative when their entries are consistent;"[1693]
- In particular, the UPDF's and ISO's processes of intercepting and recording the intercepted LRA radio communications onto cassettes, and inputting the information into the logbooks,[1694] were methodical and consistent throughout.[1695] Specifically, the respective UPDF and ISO interceptors recorded LRA communications onto audio cassettes, prepared shorthand notes of the communications as they unfolded, then did the necessary work to understand the contents (including breaking any codes), and finally—and contemporaneously—prepared a systematic logbook summary of the LRA communication

[1687] Judgment, paras. 613-636.
[1688] Judgment, paras. 616-636, 645-666.
[1689] Judgment, paras. 619-636.
[1690] Judgment, para. 671. *See also* paras. 644, 661 (noting some witnesses suggesting that, despite orders to the contrary, the UPDF and ISO personnel would sometimes help each other to understand the meaning of certain parts of a communication—but that, nevertheless, the same witnesses "made it clear that each agency was still working independently from each other").
[1691] Judgment, paras. 555, 619, 625, 629.
[1692] Judgment, paras. 555, 619, 625.
[1693] Judgment, para. 661.
[1694] Judgment, paras. 616-631, 648-650, 658-666.
[1695] Judgment, paras. 620-624 (UPDF), 626-628 (ISO), 630-632 (Police/CID). Overall, the Police/CID interceptors listened to LRA communications, and prepared shorthand notes in a contemporaneous fair copy—but the processes were less formal and did not record communications onto cassettes. Although the logbook of the Police/CID's primary interceptor (Patrick Lumumba Nyero) was not prepared as systematically as those of the UPDF and ISO, "the overlap between these entries and those of other interceptors again confirm the ability of this witness to understand LRA radio communications": Judgment, para. 565.

in question, based exclusively on the recording.[1696] The ISO process also involved "sequentially label[ling] each audio cassette" and then using this serial number in their logbook, which allowed easy identification of which logbook summaries reflected the content of which tape.[1697]

- The UPDF and ISO intercepted-related material showed reliable and consistent chain of custody.[1698]

464. Notwithstanding these general considerations of authenticity and reliability, the Chamber carried out a *second* level of analysis—in which it authenticated and assessed all the specific logbooks of intercepted LRA communications that it actually relied upon, including via particular witnesses who had intercepted the communications and contemporaneously produced the logbook entries.[1699] In hearing this testimony, it followed a consistent procedure: the Prosecution played the audio-cassette recording to each witness (normally the enhanced version); the witness gave a summary of the recording played without recourse to a transcript; the Prosecution then showed the witness an annotated transcript, discussing certain lines or annotations; and the witness confirmed in court whether the recording matched what appeared in the annotated transcript.[1700] A similar procedure was followed on certain occasions when the Defence played recordings to witnesses.[1701] As the Chamber observed, when multiple witnesses individually commented on a given recording, "the extent to which they corroborated each other and the formal logbooks [was] remarkable."[1702]

465. This detailed authentication and assessment of specific logbooks was not limited to just 17 intercepts, as Ongwen wrongly claims.[1703] To the contrary, in addition to those that the

[1696] Judgment, paras. 620-621, 623, 626. Based on this meticulous process, the Chamber restricted logbook evidence to logbooks that were "a contemporaneous written record of LRA's intercepted communications" (Judgment, para. 658) — because "they [gave] every indication of being what the witnesses describe[d] them to be, and the various witnesses who authored them or were familiar with these books identified them in the course of their testimony." (Judgment, para. 659). The Chamber thus excluded or gave limited weight to other material which, although based on the intercepts, was not a contemporaneous record of the events, lacked detail or completeness, or was hard to read or follow. This included: intercept evidence in intelligence reports (Judgment, paras. 673-674); shorthand notes (Judgment, paras. 667-669); TONFAS codes (Judgment, paras. 677-682); and Prosecution evidence analysis (Judgment, para. 684).
[1697] Judgment, para. 627.
[1698] Judgment, paras. 645-647.
[1699] *See e.g.* Judgment, paras. 556, 613-614, 686-810, 1107-1145.
[1700] Judgment, para. 557.
[1701] Judgment, para. 557.
[1702] Judgment, para. 558.
[1703] *See e.g.* Judgment, paras. 613-614, 686-810, 1107-1145.

Chamber assessed in more detail,[1704] the Chamber addressed the relevance and reliability of various *other* intercepts, to the extent this was appropriate when addressing specific matters.[1705]

466. In particular, for those matters to which Ongwen specifically refers, the Chamber did not rely solely on the general considerations identified in its first-level of analysis[1706] but combined them with the particular assessment in its second-level of analysis.[1707] For each logbook, for example, the Chamber again identified the *exact source* (such as the ISO or UPDF), the *location* of the intercept (Gulu or Lira); the *date* of the intercepted communication; and the *content* of the intercept. In many instances, the Chamber relied on more than one logbook from more than one source, demonstrating that although independently recorded by either ISO, UPDF or the Police, they were consistent and thus corroborative.[1708] The Chamber also carefully assessed any discrepancies (for example, between UPDF and ISO logbook entries of the same date), and offered a reasoned opinion why it relied on the relevant logbook entries despite the discrepancy, or preferred one to the other.[1709] As noted above, logbook entries were further authenticated via witnesses as necessary, including by witnesses that had intercepted the very LRA radio communications and contemporaneously recorded the information in the logbooks.[1710]

X.B.2. The Chamber relied on logbook entries when corroborated[1711]

467. Notwithstanding the Chamber's exacting scrutiny—which Ongwen overlooks[1712]—it still exercised caution by only relying on the logbooks to corroborate other reliable witness testimony, including from insider witnesses who had testified to the events on the ground.[1713] It did not rely solely on any individual logbook to make a finding necessary to Ongwen's guilt.

[1704] *See e.g.* Judgment, paras. 659, 686-810.
[1705] *See e.g.* Judgment, paras. 613-614, 1107-1145.
[1706] *Contra* Appeal, paras. 753-754.
[1707] Judgment, paras. 613 ("In this section [where the first level of analysis is addressed], the Chamber lays down the general considerations with respect to the documentary evidence submitted in this case. The analysis […] must be read in conjunction with the evidentiary discussion further below in the present judgment. Indeed, certain aspects relating to the relevance and reliability of documentary evidence are further addressed, as appropriate, in the relevant evidentiary discussion"), 614, 686, 1107-1145.
[1708] *See e.g.* Judgment, paras. 1117 (fn. 2243), 1119 (fn. 2258), 1121 (fn. 2262), 1122 (fns. 2263-2264), 1123 (fn. 2265), 1124 (fn. 2267), 1125 (fn. 2270), 1126 (fn. 2272), 1142 (fn. 2302), 1143 (fn. 2303), 1145 (fns. 2305-2307).
[1709] *See e.g.* Judgment, paras. 1125 (fn. 2269), 1140 (fn. 2299).
[1710] *See e.g.* Judgment, paras. 1124 (fn. 2267), 1128 (fn. 2274), 1131 (fn. 2280), 1134 (fn. 2284).
[1711] *Contra* Appeal, paras. 753, 763-766.
[1712] Appeal, para. 753 (fn. 954: with reference to Judgment, paras. 1108-1117, 1119-1127, 1129-1130, 1132-1140, 1142-1143, 1145).
[1713] Judgment, paras. 1107 ("*Beyond witness evidence* there is ample evidence in the records of intercepted radio communications of orders having been given to LRA soldiers to direct violence against civilians", emphasis added), 1108-1147 (discussing the logbooks of LRA intercepted radio communication that corroborate the witness evidence).

This was the case not only with respect to the logbook entries in paragraphs 1108-1145,[1714] but also others relied on in the Judgement.[1715]

468. Indeed, in analysing whether Ongwen continued to exercise command even when he was allegedly sick—a matter which Ongwen singles out for criticism—the Chamber in fact only used the logbooks to corroborate witness testimony, such as that of P-0205.[1716] Ongwen does not clearly identify which logbook(s) he claims the Chamber wrongly relied on, nor does he clearly explain the nature of the alleged error.[1717] In any event, his continued command was attested to by many witnesses, and the logbooks cited elsewhere in his Appeal (including those in paragraphs 1046-1049 and 1056 of the Judgment) corroborate the witness testimony.[1718] Ongwen's further arguments that the Chamber erred in finding that his command was not affected by injury are addressed elsewhere in this response.[1719]

X.B.3. The Chamber properly assessed and relied on interceptor evidence[1720]

469. The Chamber correctly found that all the UPDF, ISO and Police/CID primary interceptors (respectively, P-0003, P-0059 and Patrick Lumumba Nyero) had training and experience in monitoring radio communications and were well placed to recognise LRA voices on the radio.[1721] They testified truthfully. None attempted to incriminate Ongwen at all costs. They differentiated between communications when Ongwen spoke and did not speak, and none claimed to know everything spoken in every communication.[1722]

470. First, in claiming that "no interceptor, whose unauthenticated reports were submitted into the record testified at trial,"[1723] Ongwen ignores that *all* the UPDF, ISO and Police/CID primary interceptors testified before the Court and explained how they intercepted LRA radio communications and simultaneously recorded them.[1724] Additionally, another witness involved in the UPDF's interception operations—P-0339[1725]—also testified, and statements of other persons involved in UPDF, ISO and Police/CID interception operations were admitted under

[1714] *See* Judgment, paras. 1107-1147. *Contra* Appeal, para. 753 (fn. 954: with reference to Judgment, paras. 1108-1117, 1119-1127, 1129-1130, 1132-1140, 1142-1143, and 1145).
[1715] *Contra* Appeal, paras. 763-766.
[1716] *Contra* Appeal, para. 763 (referring to Judgment, para. 890).
[1717] Appeal, para. 763.
[1718] Judgment, paras. 1036-1047 (including P-0231, P-0101, P-0205, P-0379 and P-0366).
[1719] *See below* para. 496.
[1720] *Contra* Appeal, para. 755.
[1721] Judgment, para. 555.
[1722] Judgment, para. 556.
[1723] Appeal, para. 755.
[1724] Judgment, paras. 619 (P-0003—the UPDF's primary interceptor), 625 (P-0059—the ISO's primary interceptor), 629 (Patrick Lumumba Nyero—the primary interceptor for the Police/CID (Police)).
[1725] Judgment, para. 619.

rule 68.[1726] Ongwen had the opportunity to challenge the admission of those statements by this means. He does not show the Chamber erred in dismissing his objections.[1727]

471. Second, Ongwen's reliance on the Chamber's finding that "none of the witnesses gave indisputable evidence on all points"[1728] is selective and ignores that the Chamber carefully considered any limitations in their testimony before finding their evidence credible and reliable.[1729] Rather than showing error in the Judgment, this acknowledgement by the Chamber illustrates its cautious, nuanced, and abundantly reasonable approach.

X.B.4. The Chamber appropriately preferred logbooks over shorthand notes, intercept evidence in intelligence reports and evidence related to TONFAS codes[1730]

472. The Chamber was both correct and reasonable in preferring logbooks of intercepted LRA communications over other related material, such as shorthand notes and intercepted evidence in intelligence reports.[1731] In particular, it correctly considered the methodical and consistent processes that culminated in the production of the logbooks.[1732] The UPDF and ISO interceptors—all of whom, as noted above, were skilled in monitoring radio communications, understood what individual LRA members were saying, and even recognised their voices[1733]—recorded LRA radio communications onto audio cassettes, prepared shorthand notes of the communications as they unfolded, did the necessary work to understand the contents (including breaking any codes), and contemporaneously prepared a systematic logbook summary based exclusively on the recording.[1734] In this context, having carefully assessed any limitations or challenges the interceptors may have faced,[1735] the Chamber reasonably restricted logbook evidence to logbook entries that were "a contemporaneous written record of LRA's intercepted communications"[1736]—because "they [gave] every indication of being what the witnesses

[1726] Judgment, paras. 619, 625, 629.
[1727] First Rule 68(2) Decision, paras. 146-220.
[1728] Appeal, para. 755 (referring to Judgment, para. 559).
[1729] Judgment, paras. 555-566.
[1730] *Contra* Appeal, paras. 756-761; 767-772.
[1731] Judgment, para. 659. *See further* paras. 667-669 (shorthand notes), 677-683 (TONFAS codes), 684 (Prosecution evidence analysis). *Contra* Appeal, paras. 756-761, 767-772.
[1732] Judgment, paras. 620-624 (UPDF), 626-628 (ISO), 630-632 (Police/CID. Overall, the Police/CID interceptor listened to LRA communications, and prepared shorthand notes in a contemporaneous fair copy – but the processes were less formal and did not record communications onto cassettes).
[1733] Judgment, paras. 619, 625, 629.
[1734] Judgment, paras. 620-621, 623, 626.
[1735] Judgment, paras. 559, 666.
[1736] Judgment, para. 658.

describe[d] them to be, and the various witnesses who authored them or were familiar with these books identified them in the course of their testimony."[1737]

473. Ongwen's arguments challenging the reliability and credibility of the logbook entries[1738]—in particular that they were, allegedly, not a contemporaneous reflection of the events,[1739] but merely "a repackage of inconsistent rough notes of the recollection of interceptors memories"[1740]—completely ignore the meticulous process used by the interceptors in producing the logbooks. Even if some interceptors may have faced occasional difficulty in entering information into the logbooks, this does not undermine the credibility of the logbooks as a whole or show error in the Chamber's approach to particular entries.[1741] The Chamber was alive to these difficulties and took them into account before crediting the logbooks.[1742]

474. Indeed, given the methodical manner by which the logbooks were produced, Ongwen does not show error in the Chamber's preference of logbooks over other LRA intercept-related material, such as shorthand notes,[1743] intercept evidence in intelligence reports,[1744] and the Prosecution analyst's evidence.[1745] The Chamber reasonably accorded these three items little weight.[1746] Although interceptors' shorthand notes were a more immediate record of the LRA communications compared with the logbook entries, they were not as complete a record of the conversation as when the interceptors could "collect their thoughts for the full logbook entry."[1747] Indeed, with shorthand notes—unlike logbook entries—"[s]ometimes their speed is high, you have to draft very fast and you do not write everything, you skip some things. Then you start rewriting directly in the logbook".[1748] Additionally, the Chamber noted that, unlike logbook entries, the shorthand notes were hard to read, lacked full translation since they were written in a mixture of Acholi and English, and did not always use full sentences; they were not intended for persons other than the authors to comprehend them.[1749]

[1737] Judgment, para. 659.
[1738] Appeal, paras. 756-761, 767-772.
[1739] Appeal, paras. 769, 772.
[1740] Appeal, para. 769.
[1741] Appeal, para. 770.
[1742] Judgment, para. 559.
[1743] Judgment, paras. 667-669. *Contra* Appeal, para. 767.
[1744] Judgment, paras. 673-674. *Contra* Appeal, paras. 759, 771.
[1745] Judgment, paras. 589, 684. *Contra* Appeal, paras. 759, 771. The Prosecution notes that Ongwen appears to mix up the Prosecution analyst's evidence (P-0403) with intercept evidence in intelligence reports. Regardless, Ongwen's claims are without merit.
[1746] Judgment, paras. 589, 669, 674.
[1747] Judgment, para. 668.
[1748] Judgment, para. 668 (fn. 1235).
[1749] Judgment, para. 668.

475. Nor does Ongwen show error in the Chamber according limited weight to the Prosecution analyst's evidence (P-0403).[1750] The evidence—in the form of a detailed report describing the Prosecution's intercept evidence collection, typed summaries of all relevant ISO logbooks and a chart with range of dates covered by each logbook entry and a spread sheet providing all information corresponding to each recording in evidence—was only meant to facilitate the Chamber's *understanding* of the actual intercept evidence, but did not constitute the actual intercept evidence itself.[1751] Similarly, while making use of intelligence reports in some limited circumstances,[1752] the Chamber reasonably considered overall that the probative value of intercept evidence in intelligence reports was minimal.[1753] Since the information used to create the intercept sections of the intelligence reports seemed be the same logbook entries, these reports "d[id] not provide any meaningful information about intercepted communications beyond the logbooks."[1754] And because the intelligence reports' recounting of an intercepted communication was derivative at least twice over—an LRA communication was first summarised into a logbook entry, and this logbook entry was then communicated and further summarised by the author of the intelligence report—they omitted many details.[1755]

476. Consequently, Ongwen is misguided in claiming that the Chamber ignored 'comprehensive' records— either in the form of intercept evidence in intelligence reports, or the Prosecution analyst's evidence—in preference for logbook entries that are "secondary sources of interceptors (sic) recollections and inconsistent rough notes".[1756] This ignores the careful analysis of the means by which logbook entries were produced, and the limitations to the reliability of the intelligence reports or the Prosecution analyst's evidence. Ongwen merely disagrees with the Chamber's reasonable assessment without showing any error. It is immaterial that some intelligence reports may have been analysed together with 'directional findings'.[1757] The Chamber discussed 'directional findings' elsewhere in the Judgment, and did not find them reliable.[1758] Given their 'derivative nature' discussed above,[1759] the mere fact that intelligence

[1750] Judgment, paras. 589, 684. *Contra* Appeal, paras. 759, 771.
[1751] Judgment, paras. 589, 684. *Contra* Appeal, paras. 759, 771.
[1752] Judgment, para. 676.
[1753] Judgment, paras. 673-676.
[1754] Judgment, para. 674.
[1755] Judgment, para. 675.
[1756] Appeal, para. 771.
[1757] *Contra* Appeal, para. 759.
[1758] Judgment, paras. 811-846.
[1759] Judgment, para. 675.

reports may have seemed to contain more information than a single logbook entry does not make them more reliable, nor does it make them exculpatory as Ongwen suggests.[1760]

477. Finally, Ongwen's claims of error and prejudice based on the Chamber's view of the limited relevance of TONFAS codes lacks merit.[1761] Although the Prosecution had presented the codes as some of the material which could facilitate an understanding of the intercept collection,[1762] none of the specific intercepted communications—including those relied on in the Judgment—required the Chamber to consult the codes in order to understand those intercepts.[1763] The Chamber thus reasonably concluded that the evidence related to the codes was of limited relevance to the Chamber.[1764] Consequently, Ongwen's speculative claims that other information might have been contained in the codes—for example, concerning Kony's use of TONFAS codes themselves as a communication tool, or that they somehow showed Ongwen was a quiet commander[1765]—had no impact because there was no showing that the logbook entries on which the Chamber relied could only reasonably be interpreted with reference to the TONFAS codes. Not only did the actual interceptors testify to the production and content of the logbook entries, but the entries were also corroborated by witnesses—including eyewitnesses to the events on the ground.[1766]

X.B.5. The Chamber entered reasonable and correct findings based on intercept evidence[1767]

478. Largely by repeating some of the preceding arguments, Ongwen further wrongly claims that it was unreasonable or impermissible for the Chamber to conclude that the logbook entries were reliable and to reach any conclusions based on them.[1768] His arguments are generally unsubstantiated and mischaracterise the Judgement. They should be dismissed.

479. First, as demonstrated above, the Chamber did not conclude that the logbook entries were reliable merely by executing a generalised reliability assessment, based on a limited logbook sample.[1769] To the contrary, it undertook a two-tier assessment—the *first* level identifying

[1760] Appeal, para. 760.
[1761] Judgment, paras. 677-683. *Contra* Appeal, paras. 756-758. While not all witnesses had a uniform understanding of the meaning of this term, one witness suggested that TONFAS is an acronym which refers to "'Time of opening/closing net, Operator, Nicknames, Frequencies, Address group, and Security": Judgment, para. 677 (fn. 1248).
[1762] Judgment, para. 677.
[1763] Judgment, para. 683.
[1764] Judgment, para. 683.
[1765] Appeal, paras. 756-758.
[1766] *See above* paras. 467-468.
[1767] *Contra* Appeal, paras. 773-801.
[1768] Appeal, paras. 773-801.
[1769] Appeal, paras. 773-784, 791-792.

general considerations applying to all the intercept evidence in this case, and the *second* level carrying out an item-by-item assessment of particular logbook entries that the Chamber actually relied upon.[1770] Consequently, Ongwen misreads the Judgment when he claims that the Chamber drew impermissible and unjustified inferences— including on the "overall reliability of the logbooks"—based on a limited sample of logbooks.[1771] Nor was the Chamber required to have all the logbook entries' corresponding audio-recordings transcribed and translated in order to carry out either the *first* or *second* level of its assessment.[1772] Given the diverse tools for authenticating and assessing documentary evidence,[1773] it was sufficient and reasonable for the Chamber on occasion to rely only on witnesses, including the interceptors themselves.[1774]

480. Nor was the existence of limited discrepancies between some ISO and UPD logbook entries of the same date (for instance, one missing a detail contained in another) sufficient in and of itself to undermine the Chamber's findings of the general considerations applying to all intercept evidence (under the Chamber's *first* level of analysis). Certainly, such discrepancies did not automatically require the Chamber to order production of the entire body of LRA communications intercepted during the period of the charges.[1775] Rather, once the Prosecution had submitted the intercept evidence, it was open to Ongwen to identify and bring to the attention of the Chamber any material that he considered might undermine the reliability of intercept evidence generally (under the Chamber's first level of analysis), or the authenticity or reliability of certain logbook entries in particular (under the Chamber's *second* level of analysis).[1776] Furthermore, and in any event, the Chamber carefully addressed the discrepancies in its item-by-item assessment—including those now highlighted by Ongwen[1777]—and provided a reasoned opinion why it preferred one logbook entry to another.[1778] As previously emphasised, it relied only on logbook entries to corroborate witness testimony—a fact that Ongwen is forced to concede.[1779] Accordingly, Ongwen's claim that the Chamber should have "order[ed] transcripts or assistance from […] witnesses […] [or should have] refuse[d] to rely

[1770] *See above* paras. 462-466.
[1771] Appeal, paras. 773-784, 791-792.
[1772] Judgment, para. 650. *Contra* Appeal, paras. 780-784.
[1773] *See e.g. Gbagbo & Blé Goudé* Submission of Evidence AD, para. 52; *Lubanga* TJ, para. 109; *Katanga* Bar Table Decision, para. 23.
[1774] Judgment, para. 650. *Contra* Appeal, paras. 780-784.
[1775] *Contra* Appeal, paras. 782-784.
[1776] *See e.g. Bemba et al.* AJ, para. 1618.
[1777] Appeal, para. 782 (fns. 1000-1001).
[1778] *See e.g.* Judgment, fns. 2299, 2416-2417, 2459-2460, 5833, 5835, 5837.
[1779] Appeal, para. 782.

upon these entries without corroboration of the specific events"[1780] is contradictory, and cannot show any error in the Chamber's assessment.

481. Second, the Chamber correctly characterised and treated logbooks of intercepted LRA radio communications as direct evidence—and therefore, Ongwen's claims that the Chamber impermissibly drew inferences from them which were not the only reasonable inferences (which is the test for circumstantial evidence) are misconceived.[1781] As discussed above, logbook entries were summaries of the actual LRA communications that were first audio-recorded on cassettes, before the interceptors contemporaneously prepared a logbook entry of each respective LRA communication exclusively based on the cassette recording.[1782] These same interceptors testified in court following the same procedure summarised above—notably by first listening to the audio recordings, and then commenting on their contents.[1783] The Chamber only relied on logbook entries when corroborated.[1784]

482. In this context, the fact that logbook entries were summaries of the intercepted communications does not undermine their character as direct evidence[1785]—because they summarised the actual LRA communications that were also audio-recorded on cassettes. Nor in any event does the fact of being a summary translate the logbook entries into *anonymous* hearsay[1786]—because their authors were not only the actual interceptors of the LRA communications, but testified specifically to those entries. During their testimony, they first listened to the recording of the actual LRA communications and explained whether the logbooks reflected the respective communication.[1787] Equally, any challenges faced by the interceptors in creating the logbook entries—which the Chamber carefully considered[1788]—did not undermine their character as direct evidence.[1789]

483. Third, Ongwen's reliance on other case-law to challenge the Chamber's evaluation and reliance on logbooks is misguided.[1790] Much like the present case, the *Ntaganda* Trial Judgement found that the relevant logbook of UPC/FPLC communications over the

[1780] Appeal, para. 782.
[1781] *Contra* Appeal, paras. 785-790, 793, 795.
[1782] *See above* paras. 463-464.
[1783] *See above* para. 464.
[1784] *See above* paras. 467-468.
[1785] *Contra* Appeal, para. 786.
[1786] *Contra* Appeal, para. 786.
[1787] *See e.g.* Judgment, paras. 557-558. *Contra* Appeal, paras. 786-787.
[1788] *See e.g.* Judgment, paras. 559, 616.
[1789] *Contra* Appeal, para. 786.
[1790] Appeal, paras. 788-790.

radiophonie was authentic and reliable based, *inter alia*, on the testimony of a witness (P-0290 in that case).[1791] The Chamber identified certain limitations to conclusions it could draw from the logbooks, not as a matter of law that applies to *all* logbook evidence—as Ongwen suggests[1792]—but with regard to specific matters for which the Prosecution had sought to use the logbooks in that case.[1793] No such matters arose in Ongwen's case, nor did the Prosecution seek to use or draw general inferences from the logbooks in that way. Ongwen cites no evidence to justify his suggestion that the intercepted LRA communications were necessarily compromised by the mere fact that, unlike those in the *Ntaganda* case, they were collected by an adversary.[1794]

484. Moreover, given that the logbook entries summarised the *actual* LRA communications that were audio-recorded on cassettes by the interceptors themselves—and were thus direct evidence in this case, rather than circumstantial evidence[1795]—Ongwen does not show how the Chamber erred in concluding that they reflected what was said in the LRA communications.[1796] As such, he fails to explain why the approach in *Bemba et al* in which the Chamber scrutinised—as here—the *contents* of the recorded communications does not also apply appropriately to this case.[1797]

485. Fourth, the Chamber correctly reached conclusions regarding persecution and sexual and gender-based crimes based on logbook entries, which were reliable evidence as to their contents. Even so, the Chamber relied on them only where they were corroborated, including by eyewitness testimonies.[1798] Concerning *persecution*, the Chamber did not rely solely on general logbook entries detailing the LRA's persecutory policy and intent for attacking civilians in Northern Uganda—namely, for allegedly supporting the Uganda government—but also on specific logbook entries and witness testimonies detailing Ongwen's own intent.[1799] For example, when participating in the Pajule IDP assault, Rwot Oywak testified that Ongwen

[1791] *Ntaganda* TJ, paras. 59-64.
[1792] Appeal, para. 789-790 (claiming that the Chamber does not follow the *Ntaganda* TJ "precedent").
[1793] Specifically, the Chamber did not accept the Prosecution's proposed inference that the absence of messages on a given day means that "Ntaganda was close enough to his troops to use the Motorola or to speak in person." Nor could "any inference be drawn from the proposition of outgoing messages recorded as sent by Ntaganda, given that the logbooks were prepared by a signaller personally assigned to Ntaganda": *Ntaganda* TJ, para. 66.
[1794] Appeal, para. 789. *See also* Judgment, para. 555 (dismissing a related argument).
[1795] Judgment, para. 659 (also noting that the actual interceptors or other witnesses familiar with the logbook entries testified to their content as reflecting the LRA communications). *Contra* Appeal, paras. 785-790, 795.
[1796] Appeal, para. 790.
[1797] *Contra* Appeal, para. 790 (referring to *Bemba et al.* AJ, para. 1003).
[1798] *Contra* Appeal, paras. 793-801 (generally claiming, with limited elucidation, that the Chamber impermissibly drew inferences from logbook entries to make fundamental findings).
[1799] *Contra* Appeal, paras. 793-796.

stated that "all people from Pajule were going to be killed because they were supporting the government."[1800] Likewise, logbook entries corroborated Ongwen's own persecutory intent rather than being the sole evidence.[1801] All the logbook entries cited by Ongwen as allegedly constituting the sole basis (or "pillars") for the Chamber's findings regarding the LRA's persecutory policy against civilians in Northern Uganda—and in particular those in IDPs—simply corroborated witness testimony.[1802]

486. The Chamber took the same approach regarding sexual and gender based crimes,[1803] and in reaching findings regarding Ongwen's participation in a common plan to abduct (including of children under 15 years of age), his control over abductions and his *mens rea*.[1804] In finding an LRA coordinated policy and common plan of abducting girls generally, and of Ongwen's and other commanders' participation therein, the Chamber relied on logbook entries to corroborate witness testimony—including P-0205, P-0142, P-0070, P-0233, P-0264, and P-0054[1805]—and a radio recording (and written transcripts) of a broadcast on Mega FM radio station in December 2002 (whose authenticity was never contested by Ongwen).[1806] It is immaterial how many logbook entries the Chamber relied on this regard.[1807] Nor does the fact that a few UPDF logbook entries omitted some detail contained in ISO logbook entries of the same date (and vice versa), undermine the Chamber's reasonableness in relying on the logbook entries.[1808] The Chamber provided a reasoned opinion why it preferred some entries to others.[1809] The Chamber similarly relied on logbook entries to corroborate witness testimonies regarding Ongwen's participation in a common plan to abduct children under the age of 15 years,[1810] and Ongwen's *mens rea*.[1811] Consequently, although the case-law Ongwen cites does

[1800] Judgment, para. 1274.
[1801] Judgment, para. 1119.
[1802] *See* Judgment, paras. 1092-1106 (referring to witnesses, such as P-0070, D-0032, P-0138, P-0145, P-0264, P-0101, P-0205, P-0269 and Daniel Lagen). *See also* paras. 1107-1147 (where logbook entries are recounted "beyond witness evidence" on the same subject: Judgment, para. 1107). *Contra* Appeal, paras. 795-796 (fns. 1017-1018, 1024).
[1803] *Contra* Appeal, paras. 797-800.
[1804] *Contra* Appeal, para. 800.
[1805] Judgment, paras. 2100-2123.
[1806] Judgment, paras. 2100-2101.
[1807] *Contra* Appeal, para. 797 (claiming—in fact, wrongly, given the numbers of witnesses also relied upon—that logbook entries form the *majority* of material relied on by the Chamber).
[1808] Judgment, paras. 2103-2104 (fns. 5835, 5837). *Contra* Appeal, paras. 798-799.
[1809] Judgment, paras. 2103-2104 (fns. 5835, 5837). *Contra* Appeal, paras. 798-799.
[1810] Judgment, paras. 2315-2321, 2323-2327, 2329-2365 (including P-0233, P-0070, P-0205, P-0138, P-0097, P-0264, P-0309, P-0330, P-0142, P-0306, P-0406, and P-0314, and also referring some of the corroborating logbook entries in paras. 2331-2334). *Contra* Appeal, para. 800 (claiming, without elaboration, that logbook evidence was a decisive element).
[1811] Judgment, paras. 223, 3112-3113 (which. *inter alia*, refer to the nature of Ongwen's crimes, Ongwen's orders to Sinia soldiers to abduct children, and Ongwen's own abduction of children—all of which support his *mens*

not support the proposition that *all* logbook entries must be corroborated as a matter of law,[1812] they actually were corroborated in this case.

XI. ONGWEN WAS RESPONSIBLE FOR THE CRIMES COMMITTED DURING THE FOUR IDP CAMP ATTACKS: GROUNDS 74-82

XI.A. ONGWEN WAS RESPONSIBLE FOR THE PAJULE IDP CAMP ATTACK (GROUNDS 74-76)

487. Based on reliable evidence from insider witnesses,[1813] the Chamber correctly found that Ongwen participated in a common plan, together with Vincent Otti, Raska Lukwiya, Okot Odhiambo, and other LRA commanders to prepare, plan and carry out an attack on the Pajule IDP camp.[1814] Ongwen also directly participated on the ground in the attack itself.[1815] Ongwen's challenges to his conviction under Grounds 74, 75 and 76 do not show any error. Instead, he makes unsubstantiated claims, reargues his failed trial arguments, second-guesses the Chamber's reasonable assessment—often selectively or misleadingly—and speculates on alternative (and unsupported) interpretations of the evidence.[1816] Grounds 74, 75 and 76 should therefore be rejected.

XI.A.1. Ongwen's conviction for the Pajule attack is consistent with the LRA's hierarchical structure

488. The Chamber correctly rejected Ongwen's argument equating the LRA organisation with Kony and attributing all its actions and crimes (including those at Pajule, Odek, Abok and Lukodi IDP camps), only to Kony.[1817] Based on all the evidence, it reasonably found that while the LRA had a functioning hierarchy, it was also a collective project which relied on independent actions and initiatives of commanders at division, brigade and battalion levels.[1818] As explained above, Ongwen's suggestion that the two findings were contradictory and that his conviction was incompatible with the LRA's 'hierarchical structure,'[1819] lacks merit and should be rejected.[1820] First, Ongwen does not fully present the Chamber's findings. The Chamber held

rea—and were mainly proven by witness testimony). *See further e.g.* paras. 2312-2321, 2342-2365 (P-0097, P-0264, P-0307, P-0309, P-0205, P-0406, P-0015, P-0144, P-0138, P-0252, P-0275, P-0284). *Contra* Appeal, paras. 800-801 (again claiming, without elaboration, that the Chamber heavily relied on logbook entries).

[1812] Appeal, para. 801.
[1813] Judgment, paras. 1176-1369.
[1814] Judgment, paras. 144-158; 1176-1383, 2851-2854.
[1815] Judgment, paras. 1294-1300; 2862.
[1816] *See above* paras. 3-8.
[1817] Judgment, para. 873.
[1818] Judgment, paras. 869, 873.
[1819] Appeal, paras. 803-808.
[1820] *See above* paras. 431-433, 439-445.

that while the LRA was a hierarchical organisation,[1821] with Kony as the highest authority,[1822] commanders, including Ongwen, ensured the LRA's capability to carry out operations, and in doing so they enjoyed a measure of choice and independence.[1823] The Chamber also held that often Kony's orders were general, and for much of the relevant period of the charges, Kony was in Sudan while LRA units were in Uganda.[1824] Therefore, it was up to the commanders closer to the units on the ground to translate Kony's general orders into concrete acts.[1825] Accordingly, the Chamber reasonably rejected the Defence's evidence that all times Kony gave specific instructions to attack concrete locations, and that disobedience would always be punished by execution.[1826]

489. Second, Ongwen's specific conduct relating to the Pajule IDP attack—including his participation in meetings with other LRA commanders to plan the attack, and his eventual participation in the attack itself, by personally commanding his group to attack the UPDF barracks and the trading centre[1827]—all demonstrate Ongwen's criminal responsibility. His general reference to alleged indoctrination by Kony and other related 'defences'[1828] is addressed elsewhere,[1829] and should be dismissed.

490. Moreover, and to the extent that Ongwen suggests that the LRA hierarchical structure and the potential command responsibility of Kony, is incompatible in law with his conviction for co-perpetrating the same crimes,[1830] his argument is wrong. Jointly committing a crime only requires that two or more persons—regardless of their ranks or respective positions in a hierarchy *inter se*—shared a common plan or agreement and worked together in the commission of the crime,[1831] and that the accused made an essential contribution to the crime or the common plan within the framework of the agreement.[1832] Ongwen is responsible for his own conduct, irrespective of whether Kony or indeed any other LRA commander, may also be responsible under command or any other form of responsibility in relation to the same crimes.

[1821] The LRA was divided into four brigades, including the Sinia brigade. The brigades were then divided into battalions, and further into companies. Each unit was led by a commander. *See* Judgment, paras. 854-856.
[1822] Judgment, paras. 854-864, 2799.
[1823] Judgment, para. 871.
[1824] Judgment, paras. 872, 1392.
[1825] Judgment, paras. 872, 2799.
[1826] Judgment, para. 872.
[1827] Judgment, paras. 146-147, 149-150, 2861-2862.
[1828] Appeal, para. 807.
[1829] *See above* paras. 262-266, 303-331.
[1830] *Contra* Appeal, para. 806.
[1831] *Lubanga* AJ, para. 445.
[1832] *Lubanga* AJ, para. 473; *Ntaganda* AJ, paras. 1040-1041; *Bemba et al.* AJ, paras. 812, 820-821.

XI.A.2. Ongwen agreed to attack the Pajule IDP camp

491. Ongwen's claim that there was "no proof beyond reasonable doubt that (he) engaged in an agreement or common plan to attack the IDP camp in Pajule,"[1833] ignores the wealth of reliable evidence which the Chamber found clearly established all legal elements of a criminal agreement—namely, a plurality of persons who agreed and concertedly worked together to attack the Pajule IDP camp.[1834]

492. In particular, Ongwen ignores that in finding that he engaged in an agreement with other LRA commanders to attack the Pajule IDP camp,[1835] the Chamber considered the whole record which showed that Ongwen—then a lieutenant colonel in the LRA and a second-in-command of the of Sinia brigade[1836]—participated in meetings with other LRA commanders, such as Vincent Otti, to plan the attack.[1837] In their meeting on the eve of attack, Ongwen and other commanders agreed on, selected and briefed the LRA fighters to execute the attack.[1838] Following this, Ongwen and other LRA fighters departed to launch the assault.[1839] Vincent Otti remained behind.[1840] Ongwen commanded one of the LRA units which first attacked the UPDF barracks (whose role was to protect the IDPs in the camp) before attacking a trading centre within the camp, while other commanders and their fighters attacked other parts of the camp.[1841] They committed many atrocities against civilians, including murders and abductions.[1842] Even if Otti had initially ordered other units to join him and to go and attack Pajule, this does not exclude Ongwen's own personal responsibility for agreeing to and participating in the concerted actions to attack the Pajule IDP camp.[1843]

493. Nor does Ongwen elucidate how the Chamber misinterpreted the testimony of P-0070, P-0101, P-0309, P-0330 on whether he was with Vincent Otti and/or had attended a meeting with Otti, to plan the attack.[1844] To the contrary, the Chamber correctly found that these 'insider witnesses'[1845] – besides other witnesses that Ongwen ignores in his Appeal, including P-

[1833] Appeal, p. 193, sub-heading (c).
[1834] For elucidation of these elements, *see e.g.* *Lubanga* AJ, para. 445; *Bemba et al.* AJ, para. 764.
[1835] Judgment, paras. 2851-2854; *contra* Appeal, paras. 809-816.
[1836] Judgment, paras. 136, 2860.
[1837] Judgment, paras. 146, 1189-1223, 2866.
[1838] Judgment, paras. 146, 1204-1223, 2866.
[1839] Judgment, paras. 146, 1224-1231.
[1840] Judgment, paras. 146, 1232.
[1841] Judgment, paras. 147, 149-150, 1233-1288.
[1842] Judgment, paras. 152-157, 1289-1355.
[1843] *Contra* Appeal, para. 810.
[1844] Judgment, para. 1187. *See also* paras. 1176, 1179-1181, 1185; *contra* Appeal, paras. 810-812.
[1845] Judgment, para. 1203.

0372,[1846] D-0032,[1847] P-0209,[1848] P-0045,[1849] and P-0144[1850]— "testified (…) reliably,"[1851] providing largely consistent evidence that at the time of the attack, Ongwen and his forces had joined Otti, and also offered "detailed and contextualised (…) evidence placing Ongwen at the meeting"[1852] to plan the attack. The evidence relied on by the Chamber is further corroborated by defence witness D-0032,[1853] and 'external' evidence from P-0084—a UPDF intelligence officer[1854]— and an ISO logbook recording, *inter alia*, Otti's radio communication to Kony of Ongwen's presence with Otti.[1855] Ongwen neither offers any evidence to support his claim that Otti's above communication was motivated by personal interest, nor demonstrates what impact such personal motivation would have had.[1856] Furthermore, Ongwen does not substantiate why the Chamber's reliance on D-0032 regarding Ongwen's presence with Otti was incorrect as a matter of law.[1857] It should be dismissed *in limine*. The Chamber also reasonably rejected other evidence seeking to contradict Ongwen's presence with Otti, for instance because it "consisted of suppositions rather than […] personal observations or identifiable source of knowledge."[1858]

494. Ongwen further claims that there were other inferences available from the evidence to contradict that he was moving with Otti's unit as a commander with a Sinia unit under him, and that the Sinia brigade and the Oka battalion soldier who participated in the Pajule IDP attack were under his command.[1859] However, Ongwen merely disagrees with the Chamber's findings and offers an alternative reading of the evidence, which is unreasonable given the totality of the evidence that the Chamber considered. In addition to P-0070, who explicitly testified that at the time of the attack Ongwen was moving with Otti, and that Ongwen had the Sinia unit under him,[1860] other witnesses, including Sinia members P-0309 and P-0330, as well as Ongwen's so-

[1846] Judgment, para. 1176.
[1847] Judgment, para. 1179.
[1848] Judgment, para. 1181.
[1849] Judgment, para. 1181.
[1850] Judgment, paras. 1181, 1190.
[1851] Judgment, paras. 267, 1181, 1185, 1198 (P-0070); 395, 1185, 1198, 1214 (P-0101); 342, 1185, 1198 (P-0309); 349-353; 1185, 1198 (notwithstanding incoherence in some of P-0330's testimony, the Chamber had none regarding his testimony that Ongwen and his forces had joined Otti at the time of the Pajule IDP attack).
[1852] Judgment, para. 1200.
[1853] Judgment, para. 1179.
[1854] Judgment, para. 1203.
[1855] Judgment, paras. 1180.
[1856] *Contra* Appeal, para. 612.
[1857] Appeal, para. 817; *see* Judgment, para. 1179.
[1858] Judgment, para. 1198.
[1859] *Contra* Appeal, paras. 813-820.
[1860] T-106, 34:4-19; Judgment, paras. 1181, 1185.

called 'wife' P-0101, testified that they were with Ongwen and his group at the time of the attack on the Pajule IDP camp.[1861]

495. Nor did the Chamber simply rely on the presence of *one* Sinia brigade soldier during the attack on Pajule to show that Ongwen participated in it as a commander of his group.[1862] Instead, it relied on multiple credible insider witnesses who testified that Ongwen was with his group at the time of the attack.[1863] This was also corroborated by other evidence – including a defence witness,[1864] and UPDF logbook entries.[1865] Ongwen selectively reads this logbook, which recorded the presence with Otti of a Sinia commander Abudema, on or around 5 October, to speculate that the Sinia fighters in Pajule may have been under Abudema, rather than Ongwen.[1866] Ongwen ignores other portions of the logbook, which confirm that on 7 October, Abudema separated with Otti and left for Teso, while Ongwen remained with Otti.[1867] Finally, even assuming *arguendo* that Abudema had participated in the attack, this would not exclude Ongwen's criminal responsibility for his actions.

XI.A.3. Ongwen was not indisposed by arrest or physical injury

496. Ongwen challenges the Chamber's conclusion regarding his presence with Vincent Otti and his ability to command his troops based on his alleged arrest by Vincent Otti in April 2003 and his physical injury.[1868] He does not substantiate his claims. In any event, the Chamber reasonably concluded that Ongwen's alleged arrest by Otti did not totally render him inactive. Rather, it was brief and did not affect his position and authority for any significant period of time.[1869] Likewise, the Chamber did not rule out that at the time of the attack, Ongwen still suffered from *some* physical limitation as a result of the injury, but found that this did not incapacitate him nor his authority.[1870] In any event, from at least December 2002—which is nine months before the Pajule IDP attack—Ongwen exercised his authority as a commander.[1871]

[1861] Judgment, paras. 1185, 1214, 1356, 1367.
[1862] *Contra* Appeal, para. 813.
[1863] *See e.g.* Judgment, paras. 1185-1186.
[1864] Judgment, para. 1188.
[1865] Judgment, paras. 1187-1188.
[1866] Appeal, paras. 818-819.
[1867] Judgment, para. 1188.
[1868] Appeal, paras. 814, 821-824.
[1869] Judgment, paras. 1050-1070 (showing the shortness of the arrest, and that even during that time, Ongwen remained active, e.g. paras. 1056-1057); para. 1182, fn. 2424 (P-0144 stated that at the time of the Pajule attack, Ongwen was no longer in detention – stressing that "if you were in detention, they would not give you the task to go and carry out an operation").
[1870] Judgment, paras. 1018-1049; 1183 (showing the shortness of the sickness, but also that even then, Ongwen stayed with and retained command over his battalion, and would order them to carry out operations, e.g. paras. 1034-1049). *See also above* para. 496.
[1871] Judgment, para. 1183.

As submitted above,[1872] Ongwen's participation in the planning and execution of the attack was established by multiple diverse evidence, not limited to intercepted LRA radio communications.[1873]

XI.A.4. Ongwen possessed the requisite *mens rea*

497. Contrary to Ongwen's contention, the Chamber did not assess whether Ongwen possessed the requisite *mens rea* for the crimes for which he was convicted by merely referring to its findings concerning the contextual elements of the crimes.[1874] Rather, the Chamber determined his *mens rea* underlying the crimes separately and in a detailed manner. It found, first that given his participation in the planning and in the execution of the attack,[1875] Ongwen meant for civilians to be attacked during the attack on the Pajule IDP camp.[1876] Second, it found that Ongwen was also *aware* that the execution of the attack as planned and with the instructions that were given to LRA fighters, would in the ordinary course of events, lead to killing of civilians, forcing abducted civilians to carry heavy loads, beating of civilians and threats of beating or death.[1877]

498. The Chamber was not required to analyse and make findings on the *mens rea* element of each individual crime committed in each of the attacks, including on the Pajule IDP camp.[1878] As established by the Appeals Chamber, it is sufficient that Ongwen as a co-perpetrator possessed *mens rea* with respect to crimes more generally in the sense that he intended the types of crimes such as killings or abduction to be committed, or he knew they would be committed in the ordinary course of implementing the common plan.[1879]

XI.A.5. Ongwen essentially contributed to the common plan

499. Ongwen generally argues that the Chamber did not find beyond reasonable doubt the existence of an agreement or common plan and that the evidence did not establish Ongwen's essential contribution and his control over the crime.[1880] First, Ongwen's submissions should be dismissed for impermissibly cross-referring to his previous submissions on pleading defects

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[1872] *See above* paras. 489, 492.
[1873] *Contra* Appeal, para. 822.
[1874] *Contra* Appeal, paras. 825-826.
[1875] Judgment, paras. 2865-2867.
[1876] Judgment, paras. 2865-2867.
[1877] Judgment, paras. 2869-2870.
[1878] *Contra* Appeal, para. 826.
[1879] *Ntaganda* AJ, paras. 1065, 1126. See also *Bemba et al.* AJ, para. 1308. In the context of joint criminal enterprise, *see e.g. Šainović et al.* AJ, para. 1491; *Kvočka et al.* AJ, para. 276; *Brđanin* AJ, paras. 418, 420-425; *Brima et al.* AJ, para. 76.
[1880] Appeal, paras. 828-829.

regarding his participation in and contribution to the common plan and on *his mens rea*.[1881] Likewise, they should also be dismissed for lack of substantiation. In any event, and as explained above, the Charges clearly set out the factual allegations relevant to indirect co-perpetration.[1882]

500. Second, Ongwen's submissions are incorrect. On the basis of a wealth of reliable evidence, the Chamber found beyond reasonable doubt the existence of a common plan or agreement to attack Pajule and that Ongwen provided an essential contribution.[1883] Moreover, in convicting Ongwen for co-perpetration, including in relation to attacks against Pajule, it was sufficient for the Chamber to focus on *his* essential contribution to the common plan or the crimes, and not that of his co-perpetrators.[1884] In any event, the evidence and the Chamber's findings summarised above,[1885] also show the conduct of other co-perpetrators that was attributed to Ongwen under the mode of liability of indirect co-perpetration—for instance, they met with Ongwen to plan the attack; some participated, together with Ongwen, in the actual attack; and as part of their share or role in the common plan, they attacked different parts of the Pajule IDP camp, while Ongwen attacked the UPDF and later the trading centre within the camp.[1886]

501. In sum, Ongwen fails to show any error in the Judgment. Grounds 74, 75 and 76 should therefore be rejected.

XI.B. ONGWEN WAS RESPONSIBLE FOR THE ODEK IDP CAMP ATTACK (GROUNDS 77-79)

502. Based on all the evidence—including but not limited to P-0410, P-0205 and P-0054[1887]—the Chamber correctly found that Ongwen planned, instructed and coordinated with subordinate battalion commanders (in the Sinia brigade) to order LRA soldiers to attack everyone in the Odek IDP camp, including civilians, to loot food and to abduct civilians. He did so with knowledge of Kony's instructions for the Odek IDP camp to be attacked.[1888] The Chamber thus correctly convicted Ongwen for committing, together with Kony and other Sinia brigade

[1881] Appeal, para. 828; Page Limit AD, para. 15; *Lubanga* Second Redactions AD, para. 29.
[1882] *See above* paras. 74-78.
[1883] Judgment, paras. 2853, 2864.
[1884] *Contra* Appeal, paras. 808, 829.
[1885] *See above* para. 492.
[1886] *See e.g.* Judgment, paras. 2851, 2855-2856, 2859-2861.
[1887] *Contra* Appeal, paras. 831-845 (confining all challenges to these witnesses). Other witnesses relied on by the Chamber include: P-0205 (Judgment, para. 1396); P-0264 (Judgment, para. 1398); P-0142 (Judgment, para. 1399); P-0330 (Judgment, para. 1399); P-0372 (Judgment, para. 1405); P-0406 (Judgment, para. 1405).
[1888] Judgment, paras. 160-161, 1384-1428, 2910-2927.

commanders and through LRA soldiers, multiple crimes perpetrated during the Odek IDP camp attack.[1889]

503. Ongwen's arguments largely challenge that his participation in the common plan was proven beyond reasonable doubt because three witnesses were allegedly not reasonably assessed and were not credible.[1890] Ongwen does not show any error. Rather, he reargues his failed trial arguments, second-guesses the Chamber's reasonable assessments and speculates with alternative (and unsupported) interpretations of the evidence of P-0410, P-0205 and P-0054.[1891] Grounds 77, 78 and 79 should therefore be rejected.

XI.B.1. Ongwen agreed to attack the Odek IDP camp

504. In convicting Ongwen for jointly committing crimes at Odek pursuant to a common plan or agreement to attack it, the Chamber properly assessed the evidence of witnesses P-0410, P-0205 and P-0054, among other evidence that corroborated their testimony, and that Ongwen does not refer to in his appeal.[1892] The Chamber carefully evaluated both the strengths and limitations of the witnesses' testimony before relying on it.

XI.B.1.a. The Chamber correctly assessed P-0410's testimony

505. P-0410, a former LRA fighter, testified that he was present at a gathering in Sudan when Kony told LRA members that Odek should be attacked, and ordered the commanders to start the operation.[1893] He was also present at a subsequent gathering of LRA fighters and commanders during which Ongwen ordered the attack on Odek to exterminate everything.[1894] The Chamber properly found that P-0410 was candid and forthright,[1895] and was extremely specific, detailed and comprehensive in recounting events.[1896] His testimony carefully distinguished between events he witnessed himself and what he heard from others.[1897] He showed no bias and did not incriminate the accused at all cost.[1898] For instance, while he

[1889] Judgment, para. 2927.
[1890] Namely that (a) no reasonable chamber would have relied on witnesses P-0410, P-0205 and P-0054 (Appeal, sub-heading (b), paras. 835-838); (b) the decision crediting the witnesses was unreasonable (Appeal, sub-heading (c), paras. 839-843); (c) there was no corroboration based on inconsistent findings (Appeal, sub-heading (d), paras. 844-845); (d) the Chamber disregarded evidence raising a reasonable doubt (Appeal, sub-heading (e), paras. 846-851); and (e) the common plan was not proved beyond a reasonable doubt (Appeal, sub-heading (f), paras. 852-856).
[1891] Appeal, paras. 830-856.
[1892] *See e.g.* P-0340, P-0264, P-0330, P-0314, P-0352, P-0309, P-0372, and P-0406. Judgment, paras. 1396-1408.
[1893] Judgment, para. 1387.
[1894] T-151, 33:22-34:8; 34:12-21; Judgment, paras. 1394-1395.
[1895] Judgment, para. 363.
[1896] Judgment, paras. 363, 1395.
[1897] Judgment, para. 364.
[1898] Judgment, para. 364.

assumed Ongwen was present in the attack on Odek and Lukodi, because in his view all high ranking commanders would be there, he did not testify that he actually saw Ongwen.[1899]

506. The Chamber properly assessed that P-0410's testimony had an aspect which differed from other reliable witness accounts, namely that Buk Abudema and Vincent Otti participated in the planning and actual attack on Odek and Lukodi IDP camps,[1900] and relatedly, that 'most groups' participated in the attack and all senior commanders went.[1901] The Chamber rejected this aspect because there was no independent corroboration, but based on the whole record, it correctly concluded that the rejected aspects did not have a general impact on the reliability of P-0410's evidence.[1902]

507. As explained above and established by the Court's jurisprudence,[1903] the Chamber did not err in accepting the rest of P-0410 testimony, while also rejecting the above described aspect, as Ongwen seems to suggest.[1904] The Chamber provided a reasoned opinion for this[1905] and noted that the part of P-0410's testimony that it rejected was separable from the rest of his testimony that it had found credible.[1906] After recounting the salient aspects of P-0410's testimony, the Chamber found that when discussing the presence of senior commanders, P-0410 was stating what he believed to be the case in light of what usually happened, rather than recounting facts as observed.[1907]

508. Further, it is irrelevant that Ongwen did not personally lead the attack. Having participated in the planning stage, including coordinating with his subordinate commanders, appointing leaders of the attack, and ordering the attack,[1908] his presence at the crime scene was not mandatory to be criminally responsible as a co-perpetrator or indirect co-perpetrator.[1909] Nor was P-0410's reliability affected when he testified that he participated in an assembly during which Ongwen ordered the attack, merely because he did not know Ongwen before the

[1899] T-151, 41:5-11; 42:1-11; 42:15-20; T-152, 37:14- 38:3; Judgment, fn. 576.
[1900] Judgment, para. 365. *Contra* Appeal, paras. 832, 840.
[1901] Judgment, fn. 3274.
[1902] Judgment, paras. 365-374, 1394.
[1903] *See above* para. 436; *see also* *Ntaganda* AJ, paras. 776, 988; *Ngudjolo* AJ, para. 168; *Ntagerura et al.* AJ, para. 174; *Halilović* AJ, para. 125.
[1904] Judgment, paras. 365-373, 1411, and fn. 3274; *contra* Appeal, paras. 832, 853.
[1905] Judgment, paras. 365-373; *contra* Appeal, para. 832.
[1906] Judgment, para. 373.
[1907] Judgment, paras. 372, 1411, fn. 3274.
[1908] Judgment, paras. 2915.
[1909] *Ntaganda* SAJ, paras. 1, 45; *Lubanga* AJ, paras. 458, 460, 465-466; 473 (what is required is that the co-perpetrator made an essential contribution, even if such contribution was not made at the execution of the crime); *Bemba et al.* AJ, para. 810; *contra* Appeal, para. 854.

assembly.[1910] Ongwen ignores that P-0410 testified that Ongwen introduced himself at the assembly,[1911] and that the witness was present throughout when Ongwen instructed those present to attack the Odek IDP camp.[1912] Finally, the Chamber did not find that "two fighters of the Gilva brigade did not take part in the attack on Odek". Rather it found on the basis of ample reliable evidence that aside from P-0142's testimony that these two fighters participated in the attack, there was "no credible evidence […] that other LRA groups [than soldiers of the Sinia brigade subordinated to Ongwen] participated in the attack on Odek IDP camp".[1913]

XI.B.1.b. The Chamber correctly assessed P-0205's testimony

509. P-0205 testified that he was present when Ongwen addressed soldiers and ordered them to attack Odek, to destroy it completely, and to abduct boys and girls.[1914] The Chamber properly assessed P-0205's evidence. It found that as a former LRA fighter, his testimony reflected a detailed and precise recollection.[1915] His testimony included details that the Chamber would expect from a witness of his rank and time spent in the LRA. P-0205 also distinguished between information he gained from personal experience as opposed from those events he was informed about.[1916]

510. Ongwen does not elucidate how the Chamber erred in its evaluation of a discrepancy in P-0205's testimony concerning his own involvement in the attack—namely that he did not participate in the attack and stayed behind.[1917] In any event, as explained above[1918] the Chamber reasonably assessed that given P-0205's in-court testimony, the manner in which he recounted the events, as well as corroboration by other witnesses, that discrepancy in his testimony did not affect the overall reliability of his evidence as to the preparation of the attack.[1919] Even *arguendo*, in light of evidence corroborating P-0205's testimony—including from P-410 and P-0054—any error in assessing P-0205 on that aspect would have no impact on the Chamber's overall assessment and reliance on P-0205.

[1910] *Contra* Appeal, para. 835.
[1911] Judgment, para. 1395.
[1912] Judgment, para. 1395.
[1913] Judgment, paras. 1410-1411; *contra* Appeal, para. 853.
[1914] Judgment, para. 1396.
[1915] Judgment, para. 272.
[1916] Judgment, para. 272.
[1917] Appeal, para. 833.
[1918] *See above* paras. 387-388.
[1919] Judgment, para. 1396; *see also Ntaganda* AJ, paras. 776, 988.

511. Nor is there any merit in Ongwen's claim that P-0205 and other [REDACTED] commanders who attacked Odek, Lukodi and Abok did not function as Ongwen's tools.[1920] Merely that commanders (including possibly P-0205) could at times act freely, does not show that they no longer functioned as Ongwen's tools, because they still operated under his general instructions in line with the LRA's functioning hierarchy. In any event, given what happened in this precise situation – namely, that P-0205 and other LRA fighters acted pursuant to Ongwen's decision and order to attack the Odek IDP camp[1921] — it is clear that they acted as Ongwen's tools.

XI.B.1.c. The Chamber correctly assessed P-0054's testimony

512. Ongwen also does not show that the Chamber wrongly assessed the evidence of P-0054.[1922] P-0054, a former LRA fighter, testified about his participation in the LRA attacks on Odek and Abok IDP camps.[1923] He was forthcoming, thoughtful, detailed and his testimony "frequently distinguished between events he had witnessed himself, such as the attack on Abok ID camp, and events he had heard about, such as the attack on Lukodi IDP camp."[1924] In alleging an inconsistency between P-0054's testimony and a prior statement, Ongwen ignores that although P-0054 initially testified that he did not remember any further order by Ongwen, he later confirmed as truthful his prior testimony that Ongwen also ordered to 'attack the civilians'[1925] in Odek. P-0054 further stated he was present when Ongwen issued the instructions for civilians to be attacked.[1926]

XI.B.2. The testimonies of P-0410, P-0205 and P-0054 were compatible and corroborative

513. Ongwen wrongly claims that the evidence of P-0410 and P-0205 was not corroborated by P-0054 due to alleged inconsistencies among their testimony.[1927] Yet, as noted above, while P-0054 initially testified that he did not remember any further order by Ongwen, he later confirmed as truthful his prior testimony that Ongwen also ordered to 'attack the civilians,'[1928] thus corroborating P-0410 and P-0205 who also testified that Ongwen instructed the attack on civilians.[1929]

[1920] Appeal, para. 833.
[1921] Judgment, paras. 1393; 2910-2927; *contra* Appeal, para. 833.
[1922] *Contra* Appeal, para. 834.
[1923] Judgment, para. 295.
[1924] Judgment, para. 295.
[1925] Judgment, para. 1397.
[1926] Judgment, para. 1397.
[1927] Appeal, paras. 844-845.
[1928] Judgment, para. 1397.
[1929] Judgment, paras. 1394-1396.

514. P-0054's corroboration of P-0410 and P-0205 on this point stands regardless of whether P-0054 additionally stated that Ongwen had led the attackers into the centre of Odek, while P-0205 testified that Ongwen did not participate in the attack.[1930] As noted above, credible testimonies need not be identical in all aspects or describe the same events in the same way to corroborate each other.[1931]

515. The Chamber reasonably did not rely on P-0054's testimony that Ongwen had physically led the attacks in Odek,[1932] just as it had not relied on P-0410 on the same point.[1933] It provided a reasoned opinion for doing so.[1934] The Chamber did not err in not accepting this aspect of P-0054's and P-0410's, while accepting that both witnesses, like P-0205, had heard Ongwen issue orders to kill civilians in Odek.[1935] Nor was it required, in the circumstances of this case, for the witnesses to all have identified the same precise location where the meeting at which Ongwen ordered the attack took place for their testimony to corroborate each other.[1936] As noted above, to be corroborative two *prima facie* credible testimonies need not be identical in all respects, and it was sufficient that their testimony was compatible in its general description of the location. Here, after assessing the relevant factors, namely the witnesses' unfamiliarity with the area and the meandering movement of the LRA, the Chamber correctly concluded that the meeting took place in the bush, in a location west of Aswa River and northwest of Odek, at a distance of several walking hours, and that the witnesses' evidence on this point was compatible.[1937] Ongwen does not elucidate how, in the totality of these circumstances, any disparities among the testimonies is a sufficient reason to discredit the Chamber's findings on their testimonies.[1938]

516. Finally, given that co-perpetration under article 25(3)(a) does not require the physical presence of the accused or his co-perpetrators at the planning location and the crime scene,[1939]

[1930] *Contra* Appeal, para. 844.
[1931] *See above* para. 396.
[1932] Judgment, para. 1416.
[1933] Judgment, para. 1419.
[1934] Judgment, para. 1416 (finding that P-0054 went to attack the barracks – not the centre of the camp – and his source of information on this point was not clear; but it was clear to the Chamber that he did not testify to seeing Ongwen within the camp himself), paras. 1417-1428 (The Chamber relied on other witnesses to conclude that although Ongwen physically moved with the attacking group towards the camp, he did not actually enter the camp to attack).
[1935] *Ntaganda* AJ, *e.g.*, paras. 776, 988.
[1936] *Contra* Appeal, para. 845.
[1937] Judgment, para. 1406.
[1938] *Contra* Appeal, paras. 841, 844.
[1939] *Lubanga* AJ, paras. 458, 460, 465-466; 473 (what is required is that the co-perpetrator made an essential contribution, even if such contribution was not made at the execution stage of the crime); *Bemba et al.* AJ, para. 810; *Ntaganda* SAJ, paras. 1, 45.

that none of the witness mentioned the presence of Kony does not undermine the Chamber's findings on their testimonies in any way.[1940]

XI.B.3. The Chamber correctly considered the witnesses as credible

517. Ongwen's interrelated claims that no reasonable trier of fact could have relied on the testimony of witnesses P-0410 and P-0205 have no merit.[1941] As submitted above,[1942] the Chamber correctly assessed and relied on these witnesses. Indeed, in support of his claims, Ongwen largely relies on many of the same arguments already addressed above—such as the fact that P-0410 did not know Ongwen before the meeting during which he ordered the attack;[1943] the alleged inconsistences among witnesses on the location of the meeting;[1944] that P-410 was not credible because the Chamber rejected an aspect of his testimony concerning Otti's and Abudema's participation in the common plan;[1945] and generally, that the witnesses were not credible and did not corroborate each other.[1946] Ongwen's arguments are littered with abstract claims or summaries of what the Chamber allegedly did, without elucidating exactly what the Chamber did wrong.[1947] They should be dismissed *in limine*.

XI.B.4. There was no evidence raising a reasonable doubt

518. Ongwen's claim that the Chamber disregarded evidence that raised a reasonable doubt ignores or misreads the record.[1948] Ongwen selectively cites the Chamber's findings regarding P-0264's testimony.[1949] P-0264—in line with other witnesses, such as P-0410, P-0205 and P-0054—testified that Ben Acellam stated that during the meeting, Ongwen instructed civilians to be targeted—namely, they should be abducted to carry food and to be recruited into the LRA.[1950]

519. Nor do witnesses P-0314, P-0340, or P-0352 necessarily contradict P-0410, P-0205, P-0054 and P-0264, when they testified to Ongwen's instructions to the soldiers at the meeting.[1951] The Prosecution refers to its response to the same arguments in grounds 60 to 70.[1952] Finally,

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[1940] *Contra* Appeal, para. 845.
[1941] Appeal, paras. 835-843.
[1942] *See above* paras. 386-388, 505-507.
[1943] Appeal, para. 835.
[1944] Appeal, paras. 837, 841.
[1945] Appeal, para. 840.
[1946] Appeal, paras. 838-839.
[1947] *See e.g.* Appeal, paras. 836-838 (recounting the Chamber's findings on P-0410 and P-0205, but without explaining how or why they are wrong).
[1948] Appeal, paras. 846-851.
[1949] *Contra* Appeal, para. 846 (only quoting a few lines of Judgment, para. 1398).
[1950] T-64, 44:4-15; Judgment, paras. 1395-1408; *Contra* Appeal, paras. 846-847.
[1951] *Contra* Appeal, paras. 847, 848.
[1952] *See above* para. 396.

and as noted above,[1953] the Chamber reasonably found that the witnesses corroborated each other regarding the location of the meeting.[1954] Ongwen's claim that the Chamber justified the alleged inconsistencies or ignored 'directional findings'[1955] is thus without merit. The Chamber discussed 'directional findings' and did not find them reliable.[1956]

XI.B.5. Ongwen essentially contributed to the common plan

520. Ongwen does not elucidate how his participation in the common plan with Kony, and other Sinia brigade commanders, to attack Odek, his essential contribution, his ability to frustrate the crimes and his *mens rea* were either not properly pleaded, or not proven beyond reasonable doubt.[1957] His arguments should be summarily dismissed. In any event, they are incorrect. First, concerning alleged pleading defects, Ongwen incorporates arguments by reference to a previous filing before the Trial Chamber.[1958] Such practice is impermissible, and accordingly these arguments should be disregarded.[1959] In any event, and as explained above the Charges clearly and in detail, set out the facts relevant to the mode of liability of indirect co-perpetration for the Odek attack.[1960]

521. Second, as articulated above, the Chamber correctly assessed all relevant evidence and made the necessary findings concerning Ongwen's participation in the common plan and his contributions.[1961] Having established Ongwen's own essential contribution to the common plan, the Chamber also described the conduct of other co-perpetrators and their contributions to the common plan that were attributed to Ongwen under the mode of liability of indirect co-perpetration. The Chamber explained how the co-perpetrators coordinated together to prepare and execute the attack following Ongwen's orders.[1962]

522. In sum, Ongwen fails to show any error in the Judgment. Grounds 77, 78 and 79 should therefore be rejected.

[1953] *See above* para. 515.
[1954] *Contra* Appeal, para. 849.
[1955] *Contra* Appeal, paras. 849-850.
[1956] Judgment, paras. 811-846.
[1957] Appeal, paras. 857-858.
[1958] Appeal, para. 857.
[1959] Page Limit AD, para. 15; *Lubanga* Second Redactions AD, para. 29.
[1960] *See above* paras. 74-89.
[1961] *See above* paras. 502, 505, 508-509.
[1962] Judgment, paras. 2916-2917, 2927.

XI.C. ONGWEN WAS RESPONSIBLE FOR THE ABOK IDP CAMP ATTACK (GROUND 80)

523. Ongwen's challenge to his conviction for the Abok ID camp attack should be dismissed.[1963] Based on all the relevant evidence—including but not limited to a logbook of intercepted LRA radio communications[1964]—the Chamber properly found that Ongwen initiated, ordered and oversaw the Abok attack by his LRA subordinates and thereby committed through his LRA subordinates the crimes that ensued.[1965] Ongwen does not show any error in the Chamber's Judgment. Instead, he misreads the record, makes sweeping claims,[1966] or speculates with alternative and unsupported interpretations of the evidence. Ground 80 should therefore be rejected.

XI.C.1. The Chamber properly assessed intercepted radio communications

524. The Chamber properly assessed the reliability of specific intercepted radio communications concerning Kony's and Otti's orders to Ongwen, considering, among others, that they contemporaneously memorialised the relevant radio communications.[1967] However, it did not rely on Kony's or Otti's orders to find that Ongwen ordered LRA fighters to attack Abok, as Ongwen seems to suggest.[1968] Rather, the Chamber relied on a wealth of credible evidence, including oral testimonies and more intercepted radio communications that showed, *inter alia*, that Ongwen personally initiated, ordered and oversaw his LRA subordinates to attack Abok.[1969] For instance, P-0406, a Sinia fighter under Ongwen's command, testified that he was present at a gathering when Ongwen ordered the fighters to attack the camp, to collect food, abduct people, attack the barracks and burn down the camp and barracks.[1970] After addressing them, the fighters left him and moved ahead.[1971] His testimony is corroborated by other LRA fighters, including P-0205,[1972] P-0054,[1973] P-0252,[1974] P-0330,[1975] and Cyprian

[1963] Appeal, paras. 860-870.
[1964] *Contra* Appeal, paras. 866-867 (which challenge alleged 'inferences' from logbook of radio communications as if they are the sole evidence relied on by the Chamber).
[1965] Judgment, paras. 190-204, 1864-1876, 3010, 3020; *contra* Appeal, paras. 866-867.
[1966] *Contra* Appeal, paras. 860-870, in particular paras. 866-868 (wrongly suggesting reliance on logbook of radio communications concerning orders from Kony and Otti to convict him).
[1967] Judgment, paras. 1861-1863; *contra* Appeal, paras. 866-868.
[1968] Appeal, paras. 866-868.
[1969] Judgment, paras. 1864-1876, 2975, 3010-3020.
[1970] Judgment, para. 1865.
[1971] Judgment, para. 1865.
[1972] Judgment, para. 1866.
[1973] Judgment, para. 1867.
[1974] Judgment, para. 1868.
[1975] Judgment, para. 1869.

Ayoo.[1976] The Chamber also reasonably rejected Defence witness D-0085 who, *inter alia*, claimed that there were two gatherings of fighters.[1977]

525. Further, logbook entries recorded Ongwen describing the fighting that had occurred in the camp, the burning of huts and the barracks and the capturing of civilians therein.[1978] Given the ample evidence—including intercepted radio communications and direct testimonial evidence—Ongwen's unsubstantiated claims suggesting that his conviction was merely based on inferences (and which allegedly were not the only reasonable inferences of guilt),[1979] are devoid of any merit.

526. Nor was it required for Ongwen to be culpable for committing crimes through his LRA subordinates (as an indirect perpetrator), that he was present and personally perpetrated the attack and/or the resulting crimes.[1980] Finally, Ongwen's unsubstantiated suggestion that Kalalang conducted the attack without following Ongwen's instructions,[1981] ignores the ample evidence to the contrary and offers an alternative interpretation unsupported by the evidence.[1982] Not only did witnesses testify that Kalalang was Ongwen's subordinate, but they also confirmed that Ongwen designated him to lead the attack that Ongwen had ordered.[1983] Merely asserting that commanders (including possibly Kalalang) could at times act freely, does not undermine what happened in this precise situation—namely, Ongwen designated Kalalang who acted under Ongwen's order to lead the attack on the Abok IDP camp.[1984]

XI.C.2. The Chamber did not change the confirmed charges

527. Ongwen's unsubstantiated claim that the Chamber impermissibly changed the nature of the confirmed charges should be rejected. He argues that although he was charged with 'launching' an attack, he was convicted for the attack launched by the LRA fighters subordinate to him.[1985] Ongwen misreads the Charges. Ongwen was charged for *committing* crimes through LRA fighters, who attacked Abok following his order. Hence, even though the Charges set out

[1976] Judgment, para. 1872.
[1977] Judgment, fn. 4923 (D-0085, however, did not recall what happened during the first gathering).
[1978] Judgment, paras. 1871, 2001-2008.
[1979] Appeal, paras. 886-868. Ongwen's argument assumed that the evidence relied upon by the Chamber was only circumstantial: *see e.g.* *Bemba et al.* AJ, para. 868; *Čelebići* AJ, para. 458; *Ntagerura et al.* AJ, para. 304.
[1980] *Ntaganda* SAJ, paras. 1, 45; *contra* Appeal, paras. 866, 868-869.
[1981] Appeal, para. 869.
[1982] Judgment, para. 1873; fn. 4949 (referring to witnesses P-0351 and P-0054, who testified that Kalalang was Ongwen's subordinate commander).
[1983] Judgment, paras. 1864-1876. *See e.g.* T-93, 33:1-7; T-131, 19:23-20:2; T-138, 35:11-15; 36:21-37:11.
[1984] Judgment, paras. 1873-1875.
[1985] Appeal, paras. 861-863.

that "Ongwen launched an attack on Abok IDP camp"[1986] (meaning that he 'set it in motion'),[1987] the Charges clearly pleaded that he exerted control over the crimes through the LRA fighters who carried out the attack following his orders.[1988] Moreover, Kony's or Otti's orders[1989] were, as Ongwen admits, a 'contextual' and evidentiary matter[1990] which, as shown above, did not form the basis for Ongwen's conviction.

528. In sum, Ongwen fails to show any error in the Judgment. Ground 80 should therefore be rejected.

XI.D. ONGWEN WAS RESPONSIBLE FOR THE LUKODI IDP CAMP ATTACK (GROUNDS 81-82)

529. Based on all the relevant evidence, including but not limited to P-0205,[1991] the Chamber properly convicted Ongwen for the Lukodi IDP attack.[1992] Ongwen's arguments in grounds 81 and 82 are largely limited to alleged errors concerning the Chamber's findings on the location of the meeting (where he instructed the fighters to attack the camp) and the Chamber's assessment of P-0205.[1993] These arguments repeat failed trial arguments and do not show any error. Grounds 81 and 82 should therefore be rejected.

XI.D.1. The Chamber properly assessed P-0205's testimony

530. P-0205 testified that during a meeting ('RV') Ongwen instructed the Sinia's brigade Terwanga battalion to select and send soldiers to him.[1994] He also testified to a subsequent meeting during which Ongwen ordered the assembled standby force to attack Lukodi to kill everybody there.[1995] The Chamber properly assessed his evidence. It noted an inconsistency between his in-court testimony and a prior out-of-court statement (in which he had stated that Ongwen's order was to attack the military at Lukodi, rather than everyone, including civilians), and relied on his oral testimony after exercising caution.[1996] The Chamber assessed and rejected P-0205's explanation for the inconsistency but nevertheless found his in-court testimony reliable, considering his insistency on his oral testimony; the fact that he incriminated himself

[1986] Confirmation Decision, section on Confirmed Charges, para. 54.
[1987] The Oxford Thesaurus (American Edition, OUP, 1992), p. 257.
[1988] Confirmation Decision, section on Confirmed Charges, para. 55. *See also* para. 83 (section on findings)
[1989] *Contra* Appeal, paras. 864-865.
[1990] Appeal, para. 864. *See also Ntaganda* Temporal Scope Decision, para. 30.
[1991] *Contra* Appeal, paras. 876-891(which mainly challenge P-0205. He was not the sole source of evidence that the Chamber relied on. To the contrary, his testimony was corroborated by P-0018, P-0142, P-0145, P-0410 and P-0406. Judgment, paras. 1676-1681).
[1992] Judgment, paras. 1662-1674.
[1993] Appeal, paras. 871-891.
[1994] Judgment, paras. 1647-1648.
[1995] Judgment, paras. 1673-1674.
[1996] Judgment, para. 1675.

in his in-court testimony; the fact that he testified under oath; and because his in-court testimony was corroborated by other evidence.[1997]

531. Ongwen's claims that the Chamber erred in its assessment of P-0205's testimony lack merit.[1998] First, the existence of an inconsistency between P-0205's in-court testimony and his prior out-of-court statement is not by itself sufficient to find that he perjured himself,[1999] nor does it automatically render his testimony unreliable.[2000] Rather, it was open to the Chamber to accept his evidence notwithstanding the inconsistency, because it fell to the Chamber to determine whether the alleged inconsistency was sufficient to cast doubt on his testimony.[2001]

532. Second, merely that the Chamber was not persuaded by P-0205's explanation regarding the discrepancies between his in-court testimony and his prior out-of-court statement was not sufficient reason for the Chamber to automatically reject his entire evidence, and to prevent it from carefully assessing his testimony further.[2002] As the trier of fact, the Chamber retained the primary responsibility to resolve any inconsistency, by carefully evaluating it and considering, alongside the witness' explanation, whether the evidence taken as whole was nevertheless reliable.[2003] This is what the Chamber did with P-0205.

533. In preferring his in-court testimony over his out-of-court statement, the Chamber carefully assessed that P-0205 had testified under oath after rule 74 assurances were granted.[2004] Unlike his prior out-of-court statement, in court he was examined by both Parties including on the alleged inconsistency. The Chamber was best placed to assess his whole testimony, also benefiting from seeing and hearing him testify. Its approach is supported by the case-law of the Court.[2005] In addition, the Chamber's consideration that P-0205 self-incriminated himself during his oral testimony on his involvement in the attack (compared to the more decidedly favourable out-of-court statement),[2006] was a relevant consideration to rule out that he had a

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[1997] Judgment, para. 1675.
[1998] Appeal, paras. 876-891.
[1999] *Ntaganda* AJ, paras. 806, 981; Simba AJ, para. 32; *contra* Appeal, paras. 881, 883.
[2000] *Bemba et al.* AJ, para. 1081; *Ntaganda* AJ, paras. 806, 981; *contra* Appeal, paras. 876-891.
[2001] *Rutaganda* AJ, para. 325; *Muvunyi* Second AJ, para. 44; *Rukundo* AJ, paras. 86.
[2002] *Contra* Appeal, para. 880-881.
[2003] *Ntaganda* AJ, para. 806; *Bemba et al.* AJ, para. 95; *Lubanga* AJ, para. 23; *Rutaganda* AJ, para. 365; Setako AJ, para. 58; Simba AJ, para. 103; *Kupreškić et al.* AJ, para. 31. On the role of a Chamber's candid assessment of disparities in testimony, *see e.g.* *Bemba et al.* AJ, paras. 1021-1022; *contra* Appeal, para. 891.
[2004] Judgment, para. 1675. *See also* *Ntaganda* TJ, para. 84 (rule 74 assurances do not, in and of themselves, negatively impact a witness's credibility); *Bemba et al.* AJ, para. 1022 (underlining the sufficiency of caution, as the Chamber exercised in this case).
[2005] *See e.g.* *Bemba* Admissibility AD, para. 76. *See also* *Lukić & Lukić* AJ, para. 614; *Haradinaj et al.* AJ, para. 201; *Akayesu* AJ, para. 134.
[2006] Judgment, para. 1675.

motivation to lie. The Chamber's approach was consistent with international criminal jurisprudence on assessing accomplice witnesses.[2007] Finally, even assuming that the Chamber erred in assessing P-0205's testimony, the ample corroborating testimony meant that such error could not have had any impact on its finding.[2008] Indeed, Ongwen's order to attack anybody in Lukodi including civilians, is further supported by the testimony of witnesses P-0018, P-0142, P-0145, P-0410, P-0406. [2009]

XI.D.2. The Chamber properly assessed the location of the meeting

534. Based on all the relevant evidence—including but not limited to P-0205's testimony—the Chamber properly found that, following initial preparatory steps, Ongwen subsequently assembled and instructed fighters during a meeting in a relatively precise location,[2010] to attack the camp to kill civilians. They did so following his decision and order.[2011] Ongwen's assertion that there was "no proof beyond reasonable doubt that [he] attacked Lukodi and committed the charged crimes,"[2012] should be dismissed because it is not substantiated,[2013] and because it misrepresents the Judgement. First, Ongwen was convicted not for *personally* attacking the camp, but for *indirectly committing* crimes through LRA soldiers who assaulted Lukodi IDP camp following his decision and order.[2014] Nor does Ongwen advance any argument to contest his conviction for commission by virtue of the fact that he exerted control over the attackers he had ordered to assault the camp.[2015]

535. Second, the Chamber found that the location where LRA fighters gathered and Ongwen instructed them to launch the attack, was a *relatively precise area*,[2016] rather than absolutely precise.[2017] It reasonably considered that the witnesses' unfamiliarity with the area, and the meandering movements of the LRA units, among other factors, meant that the witnesses could not all point to an absolutely precise location.[2018] Nevertheless, their evidence was compatible

[2007] *Nchamihigo* AJ, para. 48; *Brima et al.* AJ, para. 128; *Ntaganda* AJ, para. 655 (finding that a Chamber must provide sufficient reasoning for relying on a witness who had been involved in the criminal events, and to consider any motives or incentives the witness had to implicate the accused).
[2008] On corroboration in related situations, *see e.g.* *Ntaganda* AJ, para. 981; *Haradinaj et al.* AJ, para. 252.
[2009] Judgment, paras. 1675-1681.
[2010] Judgment, para. 1667; *contra* Appeal, para. 874.
[2011] Judgment, 1647-1660, 1662-1674, 2963-2973; *contra* Appeal, paras. 871-892.
[2012] Appeal, p. 206, sub-heading (b); and paras. 872-875.
[2013] *See above* paras. 4-6.
[2014] Judgment, paras. 2963-2973.
[2015] Appeal, paras. 872-873 (merely repeating the Confirmation Decision's finding to that effect).
[2016] Judgment, para. 1667; *contra* Appeal, para. 874.
[2017] *Contra* Appeal, para. 874.
[2018] Judgment, para. 1667.

and consistent.[2019] P-0205 identified the location as Omel Boke,[2020] and P-0145 as "an area around Omel Kuru and Kanu, around Awacha area."[2021] While P-0410 did not identify the location precisely, he explained that moving towards Lukodi, they reached the Awacha road and turned in the direction of Gulu.[2022] The Chamber reasonably concluded that P-0410's testimony "indicate[d] that the LRA attackers came from the south-east, and is compatible with the evidence of P-0142 and P-0205, as is, due to the presence of the Aswa River, P-0145's reference to a 'riverbank.''[2023] Consequently, Ongwen's unsubstantiated allegation of inconsistencies between the witnesses' testimony[2024] is incorrect and should be dismissed.

XI.D.3. Ongwen had the required *mens rea*

536. Ongwen impermissibly cross-refers to his trial submissions without providing relevant citations.[2025] This justifies summary dismissal.[2026] In any event, and as explained above, the Charges specifically pleaded his *mens rea*.[2027] Further, the evidence before the Chamber, summarised above, including on the nature of Ongwen's participation in the planning and execution of the attack, clearly established his *mens rea*.[2028]

537. In sum, Ongwen fails to show any error in the Judgment. Grounds 81 and 82 should therefore be rejected.

XII. ONGWEN WAS RESPONSIBLE FOR THE CONSCRIPTION AND USE OF CHILDREN UNDER THE AGE OF 15: GROUNDS 83-86

538. Ongwen's arguments challenging the Chamber's findings regarding the conscription and use of children under the age of 15 in the Sinia brigade should be rejected. Ongwen does not accurately describe the Judgement or the ample reliable evidence considered by the Chamber in making its findings. In addition, many of Ongwen's arguments should be summarily dismissed due to lack of substantiation. In particular: (i) Ongwen's general arguments claiming that the Chamber erred in not applying the beyond reasonable doubt standard, disregarding evidence and reversing the burden of proof;[2029] (ii) Ongwen's general arguments that the

[2019] *Contra* Appeal, para. 875.
[2020] T-47, 58:13-18; Judgment, para. 1664.
[2021] T-70, 43:19-21; Judgment, para. 1663.
[2022] T-152, 43:11-45:3; Judgment, para. 1667.
[2023] Judgment, para. 1667.
[2024] *Contra* Appeal, para. 875.
[2025] Appeal, para. 892.
[2026] Page Limit AD, para. 15; Lubanga Second Redactions AD, para. 29.
[2027] Confirmation Decision, section on Confirmed Charges, paras. 15-19.
[2028] Judgment, paras. 2965-2972.
[2029] Appeal, para. 895 (fns. 1140-1141). Ongwen cites paragraphs of the Judgment without further development.

Chamber improperly relied on impermissible hearsay and untested logbook summaries of LRA radio intercepts;[2030] and (iii) Ongwen's undeveloped reference to his trial submissions.[2031]

XII.A. THE TRIAL CHAMBER'S APPROACH ON AGE DETERMINATION FOR CHILDREN UNDER 15 WAS CORRECT AND BASED ON DETAILED ASSESSMENT OF AMPLE EVIDENCE

539. Ongwen argues that the "age attribution by the Chamber was arbitrary, unreasonable, speculative and inconsistent",[2032] and that the Chamber failed to adopt a discernible and credible criterion for establishing the children's age, and instead relied on estimates of laymen.[2033] Further, he vaguely argues that the charges were defective.[2034] Ongwen's arguments, which are largely repetitive of his closing submissions,[2035] are without merit.

540. First, the Chamber's approach to determine that children under 15 years of age were conscripted and used in the Sinia brigade was correct and consistent with the Court's jurisprudence. The Chamber correctly noted that "there are no considerations generally speaking against the estimation of ages by witnesses" and that "[w]hile it is true that the witnesses were not experts on the issue of age, this does not mean that a layman can never make a reliable estimation of a person's age".[2036] Significantly, the Chamber observed that witnesses "routinely provided an explanation on what they based their estimate on" and that "[i]t is therefore possible for the Chamber to evaluate how a witness arrived at his or her conclusions".[2037] The Chamber's approach is fully consistent with the approach adopted by the Trial Chambers in *Ntaganda*[2038] and *Lubanga*,[2039] which was confirmed by the Appeals Chamber.[2040] Indeed, it is well established that "it is feasible for non-expert witnesses to differentiate between a child who is undoubtedly less than 15 year old and who is undoubtedly over 15",[2041] and that a chamber is competent to assess the age of individuals on the basis of the evidence before it. This is part of the chambers' routine function of assessing and evaluating credibility and reliability of evidence.[2042] Moreover, the Trial Chamber *was not* required to make an explicit finding about the exact birth date or age in order to conclude that an individual

2030 Appeal, para. 904. Ongwen does not explain his submissions.
2031 Appeal, para. 894 (referring to the Defence Closing Brief and the Defence Defects filings).
2032 Appeal, paras. 905, 908.
2033 Appeal, paras. 896, 899, 902, 906.
2034 Appeal, para. 907.
2035 Defence Closing Brief, para. 508.
2036 Judgment, para. 2314.
2037 Judgment, para. 2314.
2038 *Ntaganda* TJ, paras. 77-88, 170, 1125-1132.
2039 *Lubanga* TJ, para. 641-731.
2040 *Lubanga* AJ, para. 198, *Ntaganda* AJ, paras. 799-821.
2041 *Lubanga* TJ, para. 643.
2042 *Lubanga* TJ, para. 643.

was a child under 15; rather, the Chamber must be satisfied that the person was younger than 15 at a particular time.[2043]

541. Second, Ongwen ignores the fact that the Chamber comprehensively assessed a wealth of reliable evidence,[2044] such as the testimony of former LRA fighters,[2045] nine Prosecution witnesses who were themselves child soldiers in Sinia Brigade during the charged period,[2046] forced "wives" in the LRA,[2047] and victims of LRA attacks and other persons who testified about children under 15 years old in the LRA.[2048] The Chamber also relied on logbook records of intercepted LRA radio communications,[2049] and considered different materials documenting the age of children in the brigade.[2050] Further, in assessing the age estimates of the witnesses, the Chamber considered the basis of their knowledge. For example, many witnesses who testified about the age of children in the Sinia Brigade were themselves children or young adults at the time. Some were under 15 or not much older.[2051] These individuals were well placed to estimate the ages of children whose age was close to theirs, and often used their age as a point of reference and/ or considered their size and physical features to estimate the age of other children around them.[2052] In addition, most witnesses who testified about the age of children in Sinia Brigade were also from the same geographical region and similar background as the children they were describing, and very often from the same ethnicity.[2053] Most witnesses were

[2043] *Lubanga* AJ, para. 198.
[2044] Judgment, paras. 2310-2447; *contra* Appeal, para. 904.
[2045] *See e.g.* P-0205, P-0054, P-0379, P-0231, P-0233, P-0144, P-0372, P-0406, P-0070, P-0138, P-0142, D-0056, D-0068.
[2046] P-0097, P-0252, P-0264, P-0275, P-0307, P-0309, P-0314, P-0330, P-0410.
[2047] P-0226, P-0236, P-0352, P-0396, P-0366.
[2048] *See e.g.* P-0006, P-0015, P-0284, P-0189, P-0249, P-0269, P-0359, P-0047, P-0293.
[2049] Judgment, paras. 222-225; 2323-2327.
[2050] Such national ID cards, witness immunisation cards, birth certificates, driving license and NGO documents: *e.g.* Judgment, paras. 334-335, 345, 374. The Prosecution refers to its arguments above regarding the reliability of the intercepts. *Contra* Appeal, para. 908; *see above* paras. 461-466.
[2051] *See e.g.* P-0379, P-0054 and the nine former child soldiers: P-0097, P-0252, P-0264, P-0275, P-0307, P-0309, P-0314, P-0330, P-0410.
[2052] *See e.g.* Judgment, paras. 2314 and 299, 2342 (P-0097, comparing his size with other children), 2344, 2371, 2423, 2424 (P-0264, using his age and size as a point of reference), 340, 2388 and 2348 (P-0307, comparing his size), 2352, 2398 (P-0309, using his age as a point of reference), 2380 (P-0406, who was 16 years, testified that he received training with three other persons amongst whom one was younger, around 12 years old); 2391 ("P-0054 came to the conclusion about the age of the new recruits because he remembered the time when he was abducted himself as a child and stated that he also observed how they would execute their assigned tasks"), 2399 (P-0314 testifying on the age of escorts he had met), 2427 (P-0144, relying on the physical features and using his age as a point of reference), 2428 (P-0249, considering the size),
[2053] *See e.g.* Judgment, paras. 2405-2411; P-0189: T-95, 41:15-22 (testifying that he was "very much used to the situation in Africa and in Uganda and particularly in northern Uganda" and noting that "I could look at a kid, [], I could look at a group, a group of humans and I could segregate them in terms of estimated ages" and also "because I have kids too, and you could really grade them as children by observation"). Although these events occurred after the charging period, the Chamber is entitled to rely on them as evidence to establish Ongwen's *mens rea*, among others.

themselves members of the LRA and lived in the same environment and shared the same living conditions with the observed children.[2054] In some cases Ongwen asked the witnesses and other abductees about their age, and some children explicitly responded that they were under 15 years old.[2055] This further enhances the reliability of the age estimates provided by the witnesses.

542. Further, the Chamber thoroughly considered all relevant evidence regarding the witnesses' own age and their age estimates as well as Ongwen's arguments; it identified possible contradictions and routinely explained the basis for its conclusion.[2056] In some cases the Chamber noted that even assuming a margin of error, the children would still have been under 15 years of age during the charging period.[2057] The Chamber also considered the impact that the potential unreliability of a person's evidence about their own age had on their evidence about the age of other individuals.[2058] The Chamber's approach to determining that children under 15 were in the Sinia brigade was therefore reasonable, and correct.

543. Third, the Chamber did not attribute responsibility to Ongwen "by inference and by association" because children under 15 years of age were generally abducted or within the LRA.[2059] The Chamber found Ongwen responsible on the basis of a wealth of *direct* evidence, as well as permissible and reliable circumstantial evidence.[2060] Among others, the Chamber heard the testimony of nine prosecution witnesses (P-0097, P-0252, P-0264, P-0275, P-0307, P-0309, P-0314, P-0330 and P-0410), who were themselves under 15 and *members of the Sinia brigade* during the charged period.[2061] Ongwen also disregards that the Chamber found that he (as well as Kony and the Sinia brigade leadership) ordered the abduction of children under 15, that he abducted them, regularly interacted with them and assigned abducted children to service within the Sinia brigade and that he had children under 15 serve as his escorts.[2062] Ongwen

[2054] *See e.g.* Judgment, paras. 2358-2359, 2399.
[2055] Judgment, paras. 2346, 2413 (P-0309 testified that Ongwen asked people for the age and "P-0309 replied that he was 14" and that other abductees were "13, 12, 15, 16"), 2414 (P-0396, a so-called wife to [REDACTED], testified that Ongwen asked her and the group of abductees their age; she said 14 and a boy said 10 years old).
[2056] *See e.g.* Judgment, paras. 334-340 (P-0307); 344-346 (P-0309); 330-332 (P-0264); 299 (P-0097); 348 (P-0314); 418-427 (P-0396); *Contra* Appeal, paras. 899, 914.
[2057] *See e.g.* Judgment, paras. 299 (P-0097), 339 (P-0307).
[2058] Judgment, para. 301 ("P-0097 conceded that it was difficult for him to determine the age of people based only on their appearance when they are not his age and stated that one of the factors used to determine how old other abductees were was his own age. The Chamber – also in light of the fact that it is unable to establish the witness's precise age on the basis of the available evidence – will take this into account in its consideration the age of person whose age was estimated by the witness").
[2059] *Contra* Appeal, paras. 908-909, 915.
[2060] *Contra* Appeal, paras. 908, 915-917; Judgment, paras. 2310-2447.
[2061] Judgment, paras. 299-487, 2340-2365.
[2062] Judgment, paras. 223-224, 2329-2365.

undoubtedly knew that children under 15 years of age were integrated as soldiers.[2063] Moreover, the Chamber considered Ongwen's different formal positions within the Sinia in assessing his criminal responsibility.[2064]

544. Finally, some of the arguments advanced by Ongwen are unclear and undeveloped. In any event, they do not demonstrate an error in the Chamber's reasoning and findings. As noted, in addition to Kony and Sinia brigade leadership, Ongwen himself ordered Sinia soldiers to abduct children to serve as Sinia soldiers,[2065] and Sinia soldiers in execution of those orders abducted a large number of children under 15 years of age in Northern Uganda between 1 July 2002 and 31 December 2005.[2066] Further, as the Prosecution has explained above, the Charges need not identify by name all the co-perpetrators.[2067] In this case, the members of the common plan were identified as Kony, Ongwen and members of the Sinia brigade leadership, which is a sufficiently specific and clear category of persons.[2068] Finally, Ongwen's argument that the Prosecution had the obligation to obtain birth certificates to ascertain the person's age is without merit.[2069] The Prosecution is responsible for conducting its own independent and objective investigation.[2070] Moreover, chambers of this Court have afforded limited or no corroborative value to official documents (such as birth certificates) produced on the basis of the witness' account, or that of their parents, and when no further verification as to the accuracy of the information provided was effectuated and other official documents.[2071]

545. In conclusion, Grounds 83 to 86 should be dismissed.

XIII. ONGWEN WAS RESPONSIBLE FOR SEXUAL AND GENDER BASED CRIMES: GROUNDS 66 (IN PART), 87-90[2072]

546. The Trial Chamber correctly convicted Ongwen, as a direct perpetrator and indirect co-perpetrator, of SGBC.[2073] Ongwen's challenge shows no error. Rather, it omits to acknowledge the overwhelming evidence (correctly assessed) and reasonable findings (correctly entered).

[2063] Judgment, para. 224, 2403-2414.
[2064] Judgment, paras. 1013-1083; *contra* Appeal, paras. 909, 916-917.
[2065] Judgment, paras. 223, 2329-2339.
[2066] Judgment, paras. 223, 2340-2365.
[2067] *Contra* Appeal, paras. 910. *See above* para. 96.
[2068] Confirmation Decision, p. 102, para. 126; Judgment, para. 3115.
[2069] Appeal, paras. 897-900.
[2070] *Afghanistan* AD, para. 63.
[2071] *See Ntaganda* AJ, para. 802, quoting *Ntaganda* TJ, para. 86; *see also* Judgment, para. 337 (where the Chamber stated that "[t]aking this into account, the Chamber finds that a system of the issuance of national ID cards or other public documents does not constitute automatic proof of the truthfulness of the information contained therein")
[2072] In addition, this section contains the response to some overlapping SGBC issues, also raised in Grounds 1-3, 5-6, 64, as identified in Appeal, paras. 45-49, 79, 89, 147-149, 178-181, 193-196, 662.
[2073] Judgment, paras. 3021-3100.

While Ongwen objects to the parameters of the charges (their pleading and their assessment), he overlooks the plain text and established evidentiary principles. Likewise, while he takes issue with the legal interpretations of other inhumane acts (forced marriage) and forced pregnancy, his submissions fundamentally misunderstand the crimes of which he is convicted—sometimes preferring a convoluted interpretation over common sense. Similarly, his factual challenges misinterpret the record, showing no error. His submissions should be dismissed.

XIII.A. THE CHAMBERS CORRECTLY INTERPRETED THE PARAMETERS OF THE SGBC CHARGES

547. Ongwen challenges the parameters of the SGBC charges in two ways: *first*, he claims that the SGBC charges are defective because they did not provide "specific geographic notice" as to whether "the crimes" were committed in Uganda or Sudan, and that such defects had not been cured;[2074] and *second*, he argues that the Chamber incorrectly relied on various uncharged acts/allegations and evidence outside of the geographic/temporal scope of the charges to convict him.[2075] Ongwen's arguments misinterpret the scope of the confirmed charges and convictions and the relevant findings. They demonstrate no error, let alone one with impact.

XIII.A.1 The SGBC charges regarding P-0099, P-0101 and P-0214 were properly pled

548. First, Ongwen's challenge to the pleading of SGBC is itself defective. While his earlier motion from trial was dismissed *in limine*, his effort to revive the merits of that motion on appeal (requesting that the Appeals Chamber decide it) fails to cogently argue the alleged error.[2076] Disregarding the Appeals Chamber's reminder, he impermissibly incorporates submissions *via* a single sentence and footnote.[2077] This should be dismissed summarily.[2078]

549. Second, and nonetheless, Ongwen's challenge to the pleading of the SGBC, and in particular to its geographic scope, must fail.[2079] In arguing that he had no notice if the crimes were committed in Uganda or in the Sudan, he misinterprets the confirmed charges and the

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[2074] Appeal, para. 79, fn. 86 (Ground 5); Defence SGBC Defects, paras. 3-59; SGBC Defects Decision, paras. 16-20.
[2075] Appeal, paras. 45-49 (Grounds 1-3), 178-181 (Ground 6), 662 (Ground 64), 920-924; 941-944; 990-991 (Grounds 66, 87-90).
[2076] Appeal, para. 79, fn. 86; Defence SGBC Defects, paras. 3-59; SGBC Defects Decision, paras. 16-20 (18:"[…] arguments raised in the Motion could and should have been raised at an earlier stage of the proceedings in accordance with Rule 134(2) of the Rules, since they relate to the conduct of proceedings between the confirmation hearing and the beginning of trial", 19: "the Defence fails to provide a reasoned justification for the Chamber to nevertheless grant leave to raise the challenges"), dismissing the motion *in limine*; *Lubanga* AJ, para. 30; *Ntaganda* AJ, para. 48.
[2077] Page Limit AD, para. 15 ("it is impermissible to attempt to incorporate by reference submissions […]").
[2078] *See above* paras. 7-8.
[2079] While Ongwen has failed to address the alleged error in his appeal, the Prosecution will briefly address the issues raised in Defence SGBC Defects, in relation to P-0099, P-0101 and P-0214.

convictions. While Ongwen misapprehends that the alleged crimes took place in the Sudan,[2080] the charges concerned events which took place in northern Uganda between 1 July 2002 and 31 December 2005. They were confirmed and the convictions entered on this basis.[2081] The geographic and the temporal scope of the case were related: the LRA began crossing from Sudan back into Uganda in June 2002, but the start date of the charges against Ongwen began only from 1 July 2002 (also when the Court's temporal jurisdiction began).[2082] Further, the pleading of contextual elements (crimes against humanity and war crimes) expressly referred to events in Uganda or northern Uganda.[2083] With respect to SGBC perpetrated indirectly by Ongwen, the Confirmation Decision situated the alleged conduct in northern Uganda.[2084]

550. Regarding the SGBC perpetrated directly by Ongwen (against P-0099, P-0101, P-0214, the three victims/witnesses Ongwen takes issue with),[2085] the Confirmation Decision sets out, with respect to P-0099 and P-0101, that the conduct within the Court's temporal jurisdiction (after 1 July 2002) underpinning the charges took place in northern Uganda.[2086] Moreover, the Trial Chamber convicted Ongwen for crimes within this same temporal and geographic scope.[2087] To the extent that the Confirmation Decision referred to conduct before 1 July 2002 in Sudan, as the Chamber correctly found, facts and evidence of such conduct may be relevant to establish the facts and circumstances described in the charges, and as context (albeit not as

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[2080] Defence SGBC Defects, paras. 4-5.
[2081] Confirmation Decision, para. 2 (the alleged conduct under articles 7 and 8 (jurisdiction *ratione materiae*) was committed on the territory of Uganda (jurisdiction *ratione* loci) between 1 July 2002 and 31 December 2005 (jurisdiction *ratione temporis*) and falls within the parameters of the situation referred by Uganda); *see* *Uganda* Referral Decision, p. 4; Judgment, paras. 1 ("The charges in this case concern events which took place in Northern Uganda between 1 July 2002 and 31 December 2005."), 14 ("Shortly before the entry into force of the Rome Statute on 1 July 2002, which corresponds to the beginning of the period of the charges […] a number of LRA units crossed from Sudan back into Uganda. A number of events [then] led to the referral of the situation to the Court by Uganda on 16 December 2003 and… to the present case."), 32-33 (the confirmed charges (including for SGBC) related to crimes committed in northern Uganda between 1 July 2002 and 31 December 2005).
[2082] Confirmation Decision, paras. 3, 4, 67, 73, 82 (operative part, pp. 71, 90-92); Prosecution Pre-Confirmation Brief, paras. 21-22; Prosecution Pre-Trial Brief, paras. 20-21.
[2083] Confirmation Decision, paras. 4 ("The conduct that forms the basis for the charges […] was committed as part of a widespread or systematic attack directed against the civilian population of northern Uganda."), 5 ("from at least 1 July 2002 to 31 December 2005, a protracted armed conflict not of an international character […] existed in northern Uganda.") (operative part, p. 71).
[2084] Confirmation Decision, paras. 119-120 (operative part, p. 99).
[2085] Defence SGBC Defects, para. 9.
[2086] Confirmation Decision, paras. 67 ("Unless otherwise indicated, the conduct alleged below took place in northern Uganda and Sudan prior to 1 July 2002 and **continued uninterrupted in northern Uganda after 1 July 2002 until [P-0099's] escape in September 2002.**"); 73 ("The conduct described below took place in northern Uganda and Sudan before 1 July 2002 and **continued uninterrupted after 1 July 2002 in northern Uganda until [P-0101's] escape in July 2004.**) (emphasis added); DCC, paras. 67, 73; Prosecution Pre-Confirmation Brief, heading above para. 433.
[2087] Judgment, pp. 1073-1075 (Counts 50, 57: forced marriage and enslavement as CAH of P-0099 between 1 July 2002 and September 2002**;** Counts 50-59: forced marriage, torture, rape, sexual slavery, forced pregnancy as CAH and torture, rape, sexual slavery, forced pregnancy as war crimes, of P-0101 between 1 July 2002 and July 2004**).**

charges themselves).[2088] Ongwen fails to distinguish between the charges within the Court's geographic and temporal jurisdiction (for which he was convicted), and other conduct pertinent to the charges (for which he was not convicted). Ongwen had proper and consistent notice that the charged conduct vis-à-vis P-0099 and P-0101 took place in northern Uganda, but—in claiming that he could not discern its location (Uganda or Sudan)—fails to read the confirmed charges and related submissions in their proper context.[2089] Nor do his submissions on "continuing crimes" assist him to further his objections to the geographical parameters of the charges, when all the charged conduct in relation to P-0099 and P-0101 took place in Uganda.[2090]

551. Further, with respect to P-0214, while the Confirmation Decision referred to relevant conduct (within the temporal scope) that took place in northern Uganda and occasionally in the Sudan, this accurately reflected the repeated and pervasive nature of the criminal conduct within the temporal period.[2091] As Chambers have held, for crimes that are of a continuous nature, coupled with the fact that the armed groups concerned were on the move while those crimes were committed, specific locations and dates need not be provided.[2092] As the Chambers in this case have found, the crimes against P-0214 were committed from at least September 2002 until 31 December 2005.[2093] Since P-0214 was a so-called "wife" of Ongwen in that time, the charges stated that some conduct occasionally occurred in Sudan when the LRA travelled there[2094] This did not preclude its consideration or render the pleading defective in relation to the overall

[2088] Judgment, para. 2009. *See* *Ntaganda* Evidence Admissibility Decision, para. 13; *Lubanga* TJ, paras. 1022, 1352 (Lubanga's actions outside of the period of the charges and temporal jurisdiction were relevant as critical background evidence on the group activities and to establish the existence of the common plan); *Bemba* Evidence Admissibility Decision, paras. 51, 61, 67; *Katanga* CD, paras. 225-228; *Lubanga* CD, para. 152 ("[…] nothing prevents the Prosecution from mentioning any event which occurred before or during the commission of the [charged] acts or omissions, especially [to better understand context in which conduct occurred]."); *Ntaganda* Temporal Scope Decision, para. 30 ("[…] Facts outside the temporal scope may offer useful background information or context, which is useful to understand the facts *within* the temporal scope of the charges, [they] do not extend the temporal scope of the charges.").
[2089] Defence SGBC Defects, paras. 21-48 (37: incorrectly stating the confirmed charges relating to P-0099); Appeal, para. 79, fn. 86; Judgment, para. 41 (charges are contained in the operative part of the Confirmation Decision); *Compare* Defence SGBC Defects, paras. 29-34, 46-48 *with* T-14, 42:17-44:23; T-13, 17:4-22:21.
[2090] *Contra* Defence SGBC Defects, paras. 35-38.
[2091] Confirmation Decision, para. 82 (P-214) (operative part, p. 92).
[2092] *Ntaganda* Confirmation Decision, para. 83 (regarding the continuous nature of the crimes under article 8(2)(e)(vii) and the UPC/FPLC's continuous move, "it may be permissible for the Prosecutor not to identify specific locations and dates […] provided that it demonstrated that a child was integrated in the armed group […]"); *Ntaganda* UDCC Decision, paras. 72, 82; *Ntaganda* AJ, para. 326 ("Depending on the circumstances of the case, the charges may be described […] by specifying a period of time during which and an area where criminal acts were allegedly committed by an identifiable group of perpetrators against an identifiable group of victims."), 340-342; *Lubanga* TJ, paras. 1354-1355.
[2093] Confirmation Decision, pp. 92-93, paras. 81-89 (operative part); Judgment, paras. 2014-2015, 2036, 2048-2050, 2074, 2082, 2089.
[2094] Confirmation Decision, p. 92, para. 82 (operative part).

conduct in the charged period for which Ongwen was convicted—rather, it accurately reflected the repeated and ongoing nature of the conduct. Notwithstanding, the charges and convictions in relation to P-0214 were also properly based on conduct in Uganda.[2095] Further, in contesting the fact that P-0214 and other abductees were taken to Kony's base in the Sudan in 2000 (before the charged period), Ongwen, again, disregards the difference between the charges themselves and facts/evidence outside of the temporal period which were considered as relevant evidence or for context.[2096] Moreover, contrary to his submissions, there is clarity in the date when P-0214 was distributed to Ongwen (*i.e.*, September 2002).[2097]

552. Merely because the charges referred to "[the] Sudan" does not mean that the Prosecutor expanded the geographical parameters of the case, contrary to the initial referral of the situation in Uganda.[2098] In principle, and as Chambers have found, the Court's jurisdictional reach extends to situations when an element of a crime or part of such crime occurred (or is alleged to occur) on the territory of a State Party to the Statute.[2099] The criminal acts were not only repeated and systematic in scope, some of the crimes were continuing in nature.[2100] To the extent, therefore, that Ongwen argues that the Court's jurisdictional scope, as set out in the referral, was altered merely because the Confirmation Decision referred to some acts in the Sudan (other than those in Uganda), his submissions are flawed. They should be dismissed.

XIII.A.2 SGBC acts and evidence were properly relied on

553. Ongwen argues that he had no notice that (i) uncharged acts outside of the temporal and geographic parameters of the charges and (ii) charges of forced marriage and sexual violence by the Sinia leadership including Kony, when Ongwen was not the commander of the Sinia brigade, could be relied on to convict him.[2101] These submissions misread the record and misunderstand the Judgement. Further, while he argues that there was prejudicial use of SGBC evidence,[2102] his claims are legally incorrect. His submissions should be dismissed.

[2095] Judgment, pp. 1073-1076.
[2096] Defence SGBC Defects, para. 52; Prosecution Pre-Confirmation Brief, para. 475.
[2097] Confirmation Decision, para. 84 (operative part, p. 92), Judgment, para. 2015; Appeal, para. 662 (fn. 803, ground 64).
[2098] *Contra* Defence SGBC Defects, paras. 17-19, 49-56; Appeal, paras. 178-181; *see above* paras. 113-115 (Ground 6).
[2099] *Bangladesh* Article 19(3) Decision, para. 79; *Bangladesh* Article 15 Decision , para. 61 ("[…] provided that part of the *actus reus* takes place within the territory of a State party, the Court may thus exercise territorial jurisdiction within the limits prescribed by customary international law.").
[2100] *Nahimana et al.* AJ, para. 722.
[2101] Appeal, paras. 992, 178-181.
[2102] Appeal, paras. 45-49 (ground 3), 89 (ground 5(d)), 193-196 (ground 6), 662 (ground 64), 920-924, 941 (grounds 66, 87, 89).

554. First, Ongwen had clear and consistent notice of the temporal and geographic scope of the SGBC aspects of the case, including the uncharged acts before 2002.[2103] Significantly, Ongwen was not charged with or found criminally responsible for any conduct before 1 July 2002—as is apparent from his own use of the phrase "*uncharged* conduct". Since the uncharged acts were relied on only as relevant evidence or as context, and not as the factual basis of the convictions, article 24(1)—prohibiting the retroactive application of the Statute—was not violated.[2104] Further, although Ongwen suggests cursorily that relying on such uncharged conduct would violate the principle of non-retroactivity in article 28 of the VCLT,[2105] this unsubstantiated claim is incorrect in terms of treaty law and of criminal law. The Rome Statute is a treaty between *States*[2106]—and by its plain text, article 28 of the VCLT, if at all relevant in this context, applies to and binds *parties to the treaty*, in this case, the States Parties and not an individual convicted person like Ongwen. In any event, the more pertinent provision in this context (article 24 of the Statute) was not violated either.

555. Second, in objecting to the SGBC charges for the period when he was not commander of the Sinia brigade,[2107] Ongwen misunderstands the charges. The charges against Ongwen were not limited to when he was commander of the Sinia brigade (on or about 5 March 2004 and after)—but rather covered the entire period between 1 July 2002 and 31 December 2005, when he was a military commander in the LRA, including when he was also the commander of the Sinia brigade specifically.[2108]

556. Third, regarding the purported prejudicial use of SGBC-related evidence, Ongwen advances a series of mistaken submissions. In arguing that the Trial Chamber "violated its own pledge" to confine itself to the temporal and geographic scope of the case,[2109] Ongwen misunderstands that "pledge" to limit itself to the facts and circumstances described in the charges. In so doing, he conflates two distinct issues: complying with article 74(2) and using evidence outside of the temporal scope of the charges as evidence relevant to the charges, or as context. The Chamber properly limited its findings of fact to the facts and circumstances

[2103] *See above* paras. 548-552; Appeal, paras. 178-179; Confirmation Decision, paras. 66-124 (operative part, pp. 90-101); Prosecution Pre-Confirmation Brief, paras. 428-616; Prosecution Pre-Trial Brief, paras. 500-705.
[2104] Article 24(1), Statute.
[2105] Appeal, para. 943; article 28, VCLT.
[2106] *Ruto & Sang* Rule 68 AD, para. 41.
[2107] Appeal, para. 992.
[2108] Confirmation Decision, para. 12 (operative part, p. 73); Prosecution Pre-Confirmation Brief, paras. 89-92; Prosecution Pre-Trial Brief, paras. 104-116.
[2109] Appeal, para. 941 (regarding forced pregnancy, but without further elaboration), 942-944 (conflating the use of evidence outside the charged parameters, with article 74(2)).

described in the confirmed charges and complied with article 74(2).[2110] Ongwen merely repeats his objection to the use of evidence pre-dating the charges, a fundamentally different issue to whether the Chamber correctly applied article 74(2).[2111] Nor is Ongwen's submission correct or consistent with the authority it cites.[2112] The Chamber consistently signalled its correct approach to such evidence[2113], as did the Prosecution[2114]—which Ongwen disregards. Equally, in arguing that the Chamber failed to reason its reliance on evidence outside the scope of the charges, Ongwen misreads the Judgement.[2115]

557. Likewise, in arguing that the Chamber erred in relying on uncharged acts for corroboration,[2116] Ongwen misunderstands the legal framework and misapplies the concept of corroboration.[2117] Ongwen's various objections are neither substantiated nor legally correct. Although Ongwen argues that the Chamber's reliance on corroboration and "impermissible inferences" violated the principle of *ne bis in idem* in article 20 of the Statute, article 20 governs criminal conduct for which a person may have *otherwise* been tried, convicted or acquitted of.[2118] Ongwen has *not* been tried, convicted or acquitted of this conduct *in any other proceedings*, be it at the Court or elsewhere: his reliance on article 20 is inapposite. Moreover, while Ongwen suggests that the Chamber made "fungible use" of evidence on which he was convicted as a direct perpetrator (as corroboration or as evidence outside the temporal scope) to also convict him for crimes as an indirect co-perpetrator,[2119] Ongwen does not explain how the Chamber purportedly erred. That Ongwen himself had so-called "wives" during the charged

[2110] Judgment, para. 122 (clarifying "it has ensured that its findings of fact do not exceed the facts and circumstances [of the confirmed charges]").
[2111] Appeal, paras. 942-944 (conflating the use of evidence outside the charged parameters, with article 74(2)).
[2112] Charging Defects AD, para. 159 ("[…] 'no evidence will be used against the accused in a manner which would exceed the scope of the charges or *could not have been reasonably anticipated*'") emphasis added.
[2113] T-148, 5:13-17 ("[…] we can also go beyond the confirmed charges and the facts and circumstances described in the charges for contextual elements, for modes of liability and, for example, for conscription and use of child soldiers and with all evidence that we receive… the Chamber will consider the appropriate use when it comes to the deliberation of its judgment […]"); Charging Defects Decision, para. 29; Judgment, para. 2009.
[2114] Prosecution Pre-Confirmation Brief, para. 160.
[2115] Judgment, paras. 2009, 2208, 2216-2247, for example; *contra* Appeal, paras. 46, 191.
[2116] Appeal, paras. 46-49, 193-196, 923, 990-991 (referring to *Gbagbo & Blé Goudé* Reasons of Judge Geoffrey Henderson, paras. 46-50), Judgment, paras. 61-68; *contra* Defence Closing Brief, para. 70.
[2117] Rule 63(4), Rules (no legal requirement of corroboration); Judgment, paras. 2216-2227 (relying additionally on testimonies of women whose personal experience while not falling within the charges nevertheless provides corroboration to the testimonies of the charged experiences); *Gbagbo* NCTA AJ, para. 357 359 (agreeing that, contrary to *Gbagbo & Blé Goudé* Reasons of Judge Geoffrey Henderson, para. 46, corroboration and assessing evidence holistically are distinct notions); *Gbagbo* NCTA AJ, Judge Ibáñez Carranza Sep. Op., para. 377 ("[…] Judge Henderson extrapolated corroboration to an [unattainable] level [not even required at the ICC]"); *Ntaganda* AJ, para. 672.
[2118] Appeal, para. 49; article 20, Statute. Ongwen refers to article 21(3), but without substantiation.
[2119] Appeal, paras. 48, 195-196.

period was relevant to finding that Sinia commanders/fighters had "so-called" wives assigned to them.[2120]

558. Further, regarding the direct SGBC for which he was convicted, while Ongwen correctly notes that P-0235 and P-0236 became Ongwen's so-called "wives" after the charged period,[2121] he fails to give this finding its proper import. Ongwen's convictions *vis-à-vis* P-0235 and P-0236 are for enslavement (within the period of the charges), and not for other inhumane acts (forced marriage).[2122] The Chamber properly relied on evidence of acts against P-0235 and P-0236 as relevant evidence as context (in addition to acts against P-0099, P-0101, P-0214, P-0226 and P-0227) to demonstrate the exclusive conjugal relationship that Ongwen imposed on his so-called "wives".[2123] Moreover, while Ongwen takes issue with the Chamber's reliance on evidence that his escort (Nyeko) was killed in 2007 for allegedly having sex with his so-called wife P-0236,[2124] this evidence was only one aspect of the ample evidence demonstrating the exclusivity of the conjugal relationships imposed on the women.[2125] Nor was the Chamber prevented from relying on it, even if outside the parameters of the charges.

559. Regarding the indirect SGBC for which he was convicted, contrary to Ongwen's submissions, the Chamber did not err by "imputing by association" the evidence regarding the LRA as relevant to the Sinia brigade and to Ongwen,[2126] or by considering the evidence of the five witnesses (P-0351, P-0352, P-0366, P-0374 and P-0396).[2127] While the Chamber was guided by the specific scope of charges (limited to the Sinia brigade), along with evidence of victimisation within the Sinia brigade, it correctly relied on evidence of the systematic victimisation of women and girls generally in the LRA, as there was "no clear dividing line" between the victimisation in the Sinia brigade and the LRA.[2128] Likewise, while the Chamber recognised that the evidence of the five witnesses (P-0351, P-0352, P-0366, P-0374 and P-0396) was particularly relevant to the charges, rather than "analogising" their experiences as Ongwen alleges, the Chamber was "mindful" of the difference between the individual facts for

[2120] Judgment, para. 2234 (referring to section IV.C.10).
[2121] Appeal, para. 921; Judgment, para. 2036.
[2122] Judgment, p. 1075 (Counts 57/60: enslavement, P-0235, P-0236; outrages upon personal dignity, P-0235).
[2123] Judgment, para. 2037.
[2124] Appeal, para. 921.
[2125] Judgment, para. 2037; T-14, 39: 25-42:7 (P-0099); T-8, 51:21-53:20 (P-0226); T-10, 50:6-55:15. *Contra* Appeal, para. 662 (fn. 803, ground 64).
[2126] Appeal, paras. 181, 922.
[2127] Appeal, para. 923.
[2128] Judgment, paras. 2094-2096 (the institutionalized [SGBC] within the Sinia brigade, replicated the systematic pattern by which the LRA abducted, (sexually) enslaved, forcibly married, raped, and tortured women and girls).

each of those witnesses and the facts at issue for the charge, which was systemic in nature.[2129] Rather than demonstrating any prejudicial use of SGBC evidence, Ongwen objects to well-established legal and evidentiary principles. His submissions should be dismissed.

XIII.B THE CHAMBER PROPERLY CONVICTED ONGWEN OF FORCED MARRIAGE AS AN INHUMANE ACT

XIII.B.1 Other inhumane acts (including forced marriage) is a crime

560. Like his earlier flawed challenges to the crime of other inhumane acts (forced marriage) at confirmation and trial,[2130] Ongwen's submissions on appeal should also be dismissed *in limine.* They merely incorporate his earlier submissions by reference.[2131] Further, aspects of his argument amounting to a jurisdictional challenge should be dismissed *in limine.*[2132] Those aspects, as the Appeals Chamber has already confirmed,[2133] have been comprehensively decided. Notwithstanding, Ongwen's challenge to the legal interpretation of the crime of other inhumane acts (forced marriage) is incorrect. His argument rests on his mistaken notion on the nature of the crime, disregarding jurisprudence on the issue. Likewise, his cursory challenge to the pleading of the *mens rea* of the crime is both unexplained and incorrect.[2134] His submissions should be dismissed.

561. First, Ongwen's challenge to his conviction for the crime of other inhumane acts (forced marriage) misunderstands the precise nature of the crime he was convicted of.[2135] Ongwen was not convicted of a standalone crime of forced marriage (which he argues "is not in the Rome Statute").[2136] Rather, he was charged with and convicted of the crime of other inhumane acts (forced marriage) under article 7(1)(k).[2137] As is well established, "other inhumane acts" as

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[2129] Judgment, para. 2097.
[2130] Defence Defects Series Part IV, paras. 34-53; Charging Defects Decision, paras. 31-35 (dismissing *in limine* the Defence's jurisdictional challenge to other inhumane acts (forced marriage) under article 19(4), "[as] manifestly too late to file a jurisdictional challenge and [not] justify[ing] exceptional circumstances for raising such arguments at this time"; "[t]his ruling precludes the Defence from future challenges to the existence of […] forced marriage at the ICC. [The Defence may still raise legal arguments]."), 37; Charging Defects AD, paras. 155-158, 161 (no error in dismissing the Defence challenges); Charging Defects ALA Decision, paras. 16-18.
[2131] Appeal, paras. 147-149, 976-978; *Lubanga* Second Redactions AD , para. 29; *Bemba et al.* SAJ, paras. 254-255; *Ntaganda* AJ, para. 901.
[2132] Appeal, paras. 147-148 (arguing that Chambers have no jurisdiction).
[2133] Charging Defects AD, paras. 156-158 (the jurisdictional challenges contained in the Defects Series were ruled upon at the pre-trial stage); Confirmation Decision, paras. 87-95 (the conduct constitutes the crime of an other inhumane act within the meaning of article 7(1)(k) in the form of forced marriage, differing from other crimes charged and warranting a separate charge); Confirmation ALA, paras. 40-44; Confirmation ALA Decision, paras. 33-39 (Ongwen was charged with the crime of 'other inhumane acts', listed in article 7(1)(k) Statute).
[2134] Appeal, paras. 148-149.
[2135] Appeal, paras. 148, 978.
[2136] Appeal, para. 147; Defence Defects Series Part IV, para. 40.
[2137] Confirmation Decision, para. 117, 124 (operative part, pp. 97, 101); Judgment, paras. 2741-2753 (interpreting article 7(1)(k) and its elements to include the inhumane act of forced marriage, namely forcing a person, regardless

crimes against humanity were "deliberately designed as a residual category".[2138] While the provision sets out certain conditions to qualify acts as inhumane, an exhaustive enumeration of those acts was considered to defeat the provision's purpose.[2139]

562. It is equally well established that the notion of "other inhumane acts" contained in the Statutes of the various *ad hoc* international criminal tribunals forms part of customary international law: it does not violate the principle of *nullum crimen sine lege*.[2140] Article 7(1)(k) of the ICC Statute—though explicit in its meaning—merely clarified what was previously implicit.[2141] Some *ad hoc* international criminal chambers have found expressly that the requirement of the principle of legality attaches to the entire category of 'other inhumane acts', and not to its underlying conduct or each sub-category.[2142] Doing otherwise would, in their view, render the crime of 'other inhumane acts' otiose.[2143] Moreover, the notion of other inhumane acts has been found to be sufficiently clear and precise to satisfy the tenets of accessibility and foreseeability deriving from the principle of legality.[2144] This flows from the maxim of *ejusdem generis*, an essential safeguard allowing a person to be held criminally

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of his or her will, into a conjugal union with another person by using physical or psychological force, threat of force, or taking advantage of a coercive environment. Such an act does not fall under any of the acts enumerated in article 7(1)(a)-(j), but is similar in character to them); *Blagojević and Jokić* TJ, para. 624 (other inhumane acts is in itself a crime under international criminal law); Case *002/02* TJ, para. 741 ("The crime relevant to the underlying conduct of forced marriage is other inhumane acts. […] There is no requirement that forced marriage was recognised as a specific category of crime against humanity or even as a specific kind of underlying conduct falling within the category of other inhumane acts by 1975.")

[2138] *Kordić and Čerkez* AJ, para. 117 ("[…] inhumane acts as crimes against humanity were deliberately designed as a residual category, as it was felt undesirable for this category to be exhaustively enumerated. An exhaustive categorization would merely create opportunities for evasion of the letter of the prohibition."); *Stakić* AJ, paras. 315-316; *Kupreškić et al.*TJ, paras. 562-566; *Brima et al.* AJ, para. 198 ("[…] it serves as a residual category designed to punish acts or omissions not specifically listed as crimes against humanity provided these acts or omissions meet [certain] requirements").

[2139] *Kordić and Čerkez* AJ, para. 117; *Stakić* AJ, paras. 315-316; *Kupreškić et al.*TJ, paras. 562-566.

[2140] *Stakić* AJ, para. 315 (fn. 649) (The crime of other inhumane acts has been included in article 6(c) of the Nuremberg Charter; article 5(c) of the Tokyo Charter; article II(c) of Control Council Law No. 10; Principle 6(c) of the Nuremberg Principles of 1950 and the ILC Draft Code of Crimes against the Peace and Security (article 18). Convictions have been entered on this ground pursuant to Control Council Law No. 10 (Medical Judgment (p. 198), the Justice Judgment (pp. 23, 972, 1200), the Ministries Judgment (pp. 467-475, 865) and the High Command Judgment (pp. 465, 580). Numerous human rights treaties also prohibit inhuman and degrading treatment: article 7, ICCPR, article 3, ECHR, article 5, ACHR and article 5, ACHPR); *Brima et al.* AJ, para. 198; *Blagojević and Jokić* TJ, para. 624 (fn. 2027) (noting that convictions have also been entered in *Kupreškić, Kvočka, Naletilić, Galić* and *Akayesu*, for instance). *See also* article 5, ICTY Statute; article 3, ICTR Statute; article 2, SCSL Statute; article 5, ECCC Law; *Case 001* TJ, para. 367; Case *002/02* TJ, paras. 723, 741; *contra* Defence Defects Series Part IV, paras. 41-46.

[2141] *Case 002/01* Ieng Sary Closing Order AD, para. 386.

[2142] *Case 002/01* Ieng Sary Closing Order AD, para. 378 (concurring with *Blagojević and Jokić* TJ, para. 624); *Case 002/01* Nuon Chea Closing Order AD, para. 156; *Case 002/01* TJ, para. 436.

[2143] *Case 002/01* Ieng Sary Closing Order AD, para. 378; *Case 002/01* Nuon Chea Closing Order AD, para. 156.

[2144] Case *002/01* AJ, para. 578.

responsible for committing other inhumane acts 'similar in nature and gravity' to other listed crimes against humanity.[2145]

563. Article 7(1)(k) of the ICC Statute expressly includes this safeguard.[2146] Further, as its drafting history shows, article 7(1)(k) has a more restrictive scope as compared to its antecedents in the Nuremberg Charter and the ICTR and ICTY Statutes, to mitigate any residual concerns of vagueness or lack of legal certainty.[2147] Not only does it require the 'other inhumane act' in question to be 'of a similar character' as the enumerated acts in article 7(1), it also requires that the perpetrator inflict 'great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act'.[2148] These limitations in article 7(1)(k) on both the required action and consequence were inserted to augment legal certainty, and have been considered to accord with the *nullum crimen sine lege* principle.[2149]

564. While there is no requirement that forced marriage—to qualify as the underlying conduct for article 7(1)(k)—should be expressly criminalised in international law,[2150] the criminality of this type of conduct as an inhumane act was nonetheless both foreseeable and accessible. Applying the doctrine of *ejusdem generis*, forced marriage amounts to other inhumane acts, as the pertinent acts are of a nature and gravity similar to other article 7(1) acts.[2151] As has been established, forced marriage involves the perpetrator compelling a person (by force, threat of force, through words or conduct) into a forced conjugal association, resulting in great suffering or serious physical or mental injury for the victim.[2152] As the Trial Chamber correctly found, the central element of forced marriage is the imposition of duties associated with marriage

[2145] Case *002/01* AJ, para. 578. *See also* *Case 002/01* Ieng Sary Closing Order AD, para. 389 and *Case 002/01* Nuon Chea Closing Order AD, para. 161 (the doctrine of *ejusdem generis* applying to other inhumane acts did not violate the rule against analogy found in civil law jurisdictions since it applied to regulated conduct, comparing a subcategory within a crime to another to clarify its definition).
[2146] Article 7(1)(k), Statute: Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.
[2147] Hall and Stahn, p. 236 (mn. 98).
[2148] Hall and Stahn, p. 236 (mn. 98).
[2149] Hall and Stahn, pp. 236 (mn. 98), 241 (104) ("[article 7(1)(k)] would not violate article 22 para. 1 of the Statute in formal terms. Indeed, this provision is no more broadly worded than other provisions [in the Rome Statute]"); Case *002/01* AJ, paras. 578-580 ("[these] limitations on 'other inhumane acts' enjoy broad support within the corpus of modern international criminal law, and that they adequately circumscribe 'other inhumane acts'").
[2150] *Case 002/02* TJ, para. 725; Case *002/01* AJ, para. 584.
[2151] *Case 002/02* TJ, para. 725 (on the need to do a case-specific analysis of the impact on the victims and whether the conduct is comparable to enumerated crimes against humanity); Case *002/01* AJ, paras. 589-590 (on the need to holistically assess the conduct).
[2152] *Brima et al.* AJ, paras. 195-196, 200-201; *Brima et al.* TJ (Judge Doherty Dis. Op.), paras. 46-57; *Sesay et al.* TJ, paras. 1295-1297; *Al Hassan* CD, paras. 552-562; Case *002/02* TJ, paras. 3690-3692; *Also* *Taylor* TJ, paras. 422-430 (noting that forced marriage was not charged in the case, and referring to conjugal slavery as a form of sexual slavery).

(including the exclusivity of the forced conjugal union imposed) on the victim.[2153] Beyond these violated rights, this forced conjugal union has a serious impact on the victim's physical and psychological well-being, compounded by the birth of children beyond the physical effects of pregnancy and child bearing.[2154] Victims are also socially ostracised and suffer a serious attack on their dignity. [2155] This imposition of a conjugal union and associated harm is not fully captured by other article 7(1) acts, but is similar to them so as to be correctly interpreted within the parameters of article 7(1)(k).[2156]

565. Further, even if a requirement of "formal international unlawfulness" of such conduct were to be additionally considered within the parameters of international human rights law,[2157] several affirmative rights in international human rights law protect against the conduct of forced marriage, including the fundamental right to enter into marriage freely.[2158] Uganda has signed, ratified and acceded to several of these conventions.[2159] Moreover, in the circumstances, Ongwen had to be aware that his conduct could only be considered criminal given the systematic abduction and distribution of the victims, the prevailing environment of coercion and since such acts of forced marriage were accompanied by the commission of several crimes recognised under international law such as rape, sexual slavery, torture and enslavement.[2160] Ongwen's submissions suggesting State Party action was required for dispute settlement or amendment of the Statute under articles 119 and 121 misunderstand the nature of the conduct

[2153] Judgment, para. 2748.
[2154] Judgment, para. 2748.
[2155] Judgment, para. 2748; *Case 002/02* TJ, paras. 3691-3692.
[2156] Judgment, paras. 2750-2751.
[2157] Case *002/01* AJ, paras. 582-584 (noting the view in *Kupreškić et al* TJ, para. 566 that infringing a basic set of rights may amount to other inhumane acts, that while it did not have "broader acceptance", it assured foreseeability).
[2158] Case *002/01* AJ, paras. 582-586 ("[…] the principle of *nullum crimen sine lege certa* is respected if the specific conduct which is to be found to constitute other inhumane acts violates a basic right of the victims and is of similar nature and gravity to other enumerated crimes against humanity); Case *002/02* TJ, paras. 743-749; *see* article 16(2), UDHR; article 23, ICCPR; article 10(1), ICESCR, Human Rights Committee, General Comment No. 28, paras 23-25; article 1(1), Marriage Consent Convention ; article 16, CEDAW, 7 November 1967, A/RES/22/226; article 6, ACHPR Protocol, ; article 19, IDHR; article 33, ArCHR; article 17, ACHR; article 8), ECHR; article 5, Protocol No. 7 ECHR. *See also* A/HRC/41/19, para. 4 ("[c]hild, early and forced marriage is a human rights violation, a form of gender-based discrimination, a harmful practice and a form of sexual and gender-based violence, which requires States to take steps to prevent and eliminate it."); Judgment, para. 2748 (fn. 7210); *Brima et al.* TJ (Judge Doherty Dis. Op.), paras. 58-71.
[2159] *See e.g.*, Uganda ratification status, ICCPR (21 June 1995), ICESCR (21 January 1987), CEDAW (22 July 1985).
[2160] *Brima et al.* AJ, paras. 200-201; *Brima et al.* TJ (Judge Sebutinde Sep. Op.), para. 12.

at issue as a "new crime".[2161] Likewise, they also misjudge the difference between sexual slavery and forced marriage.[2162] Ongwen's misconceived submissions should be dismissed.

566. Second, while Ongwen argues that the Confirmation Decision did not identify the elements of the *mens rea* of other inhumane acts (forced marriage),[2163] he misreads that decision.[2164] Nor is he clear or correct when he claims that that there was no common plan charged *vis-à-vis* the acts of other inhumane acts (forced marriage).[2165] His submissions should be dismissed.

XIII.B.2 The Chamber's factual findings on other inhumane acts (forced marriage) were reasoned, reasonable and correct

567. Ongwen challenges the Trial Chamber's factual findings on other inhumane acts (forced marriage) in two ways: (i) the Chamber purportedly failed to reason its findings on the nature and status of the so-called marriages;[2166] and (ii) the Chamber's findings on the exclusivity of the forced conjugal union were allegedly not reasoned and hence, not proven beyond reasonable doubt.[2167] Neither claim has merit. They misinterpret a reasoned opinion and the Judgement.

568. First, the Chamber properly reasoned its findings, consistent with Appeals Chamber's case law.[2168] The Chamber correctly found that Ongwen was responsible for other inhumane acts (forced marriage).[2169] As a direct perpetrator, Ongwen placed P-0099, P-0101, P-0214, P-0226 and P-0227 under heavy guard, once they were "distributed" to him.[2170] They were told or given to understand that that they would be killed if they tried to escape.[2171] As so-called "wives", they had to maintain an exclusive conjugal relationship with him.[2172] Likewise, as an indirect co-perpetrator, Ongwen (along with Kony and the Sinia brigade leadership) designated abducted women and girls as so-called ""wives" to male members of the Sinia brigade.[2173] These women and girls were considered so-called "wives" from the time of their forced sexual

[2161] Defence Defects Series Part IV, paras. 40-53; Appeal, paras. 147-149.
[2162] T-23, 14:13-15:3; *Katanga* CD, para 431 and *Katanga* TJ, para. 978 (addressing sexual slavery, and not forced marriage as other inhumane act); Confirmation ALA Decision, paras. 33-39.
[2163] Appeal, para. 148; Defence Defects Series Part IV, paras. 36-39.
[2164] Confirmation Decision, paras. 71, 80, 89, 98, 106, 112, 117, 119, 124 (operative part, pp. 90, 92-94, 96-99, 101), describing Ongwen's *mens rea* in terms of article 30 of the Statute.
[2165] Appeal, para. 977; Confirmation Decision, para. 119.
[2166] Appeal, paras. 994-997, 934.
[2167] Appeal, paras. 998-999.
[2168] *See e.g.* *Lubanga* First Redactions AD, para. 20.
[2169] Judgment, paras. 3021-3026 (direct perpetrator); 3069-3071 (indirect co-perpetrator), 3088-3100.
[2170] Judgment, para. 3023.
[2171] Judgment, para. 3023.
[2172] Judgment, paras, 2028-2093, 3023.
[2173] Judgment, para. 3070.

encounter with the man they had been assigned to, and were not allowed to have sexual or romantic relations with any other man.[2174] Given the overwhelming evidence and clear factual findings on the nature of these forced marriages, their inherent coercion, and the condition of exclusivity imposed on the women and girls—all of which Ongwen disregards—,[2175] his unsubstantiated complaint must fail. Nor must a "false marriage" be shown, a criterion that Ongwen does not develop, and nonetheless, is unsupported in law.[2176]

569. Second, in claiming that Kony had "exclusive ownership" of the women and girls regarding the forced marriages in Sinia brigade,[2177] Ongwen overlooks his own role.[2178] Moreover, in incorrectly requiring that he exercise "an exclusive right of ownership" in the context of the indirect SGBC,[2179] Ongwen conflates the exclusive conjugal union imposed on the so-called "wife" *vis-à-vis* the man within the Sinia brigade to whom she was assigned, and Ongwen's own role as indirect co-perpetrator. His submissions should be dismissed.

XIII.B.3 Ongwen was responsible for other inhumane acts (forced marriage) (indirect SGBC)

570. The Trial Chamber correctly found that Ongwen, Kony and the Sinia brigade leadership engaged in a coordinated and methodical effort to abduct women and girls to force them to serve as so-called "wives" of members of the Sinia brigade and as domestic servants.[2180] While Kony had issued a standing order to abduct women and girls, Ongwen and others in the Sinia brigade hierarchy gave similar orders.[2181] Sinia brigade soldiers executed those orders, leading to over one hundred abducted women and girls in Sinia brigade at any time between 1 July 2002 and 31 December 2005.[2182] While Kony had the prerogative to "distribute" the abducted women and girls, Sinia brigade and battalion commanders—including Ongwen— also did so in his absence.[2183] Ongwen personally assigned some women and girls and used his authority to enforce the so-called "marriage" in Sinia brigade.[2184]

571. Ongwen's challenge to his responsibility for other inhumane acts (forced marriage) fails in three ways: (i) he insists (incorrectly) that Kony bore exclusive authority to abduct and to

[2174] Judgment, paras. 2098-2309, 3070.
[2175] Appeal, paras. 996-999.
[2176] Appeal, para. 996. *See* Judgment, paras. 2741-2753.
[2177] Appeal, paras. 994-999. "Exclusive conjugal union", not "exclusive ownership", is more accurate here.
[2178] *See above* paras. 418, 422-425, 431-433 (Ground 64).
[2179] Appeal, paras. 998-999 and fn. 1277 (referring to findings of indirect SGBC).
[2180] Judgment, paras. 2098-2113.
[2181] Judgment, paras. 2114-2123.
[2182] Judgment, paras. 2124-2142.
[2183] Judgment, paras. 2143-2182.
[2184] Judgment, paras. 2202-2247.

assign women, despite significant evidence to the contrary; (ii) he misapprehends his involvement in the common plan as somehow linked to his role as the Sinia brigade commander in March 2004; and (iii) he misunderstands the *mens rea* for the crime of other inhumane acts (forced marriage). [2185] In general, he disregards the overwhelming evidence and findings.

572. First, regarding the LRA policy on abduction/ "distribution", the Chamber correctly found that Kony's power to decide was not exclusive, and that Ongwen himself had given such orders.[2186] The Chamber reasonably found that evidence that Kony was the highest authority in the LRA (and also over Sinia) was "entirely compatible" with other evidence that Ongwen and other LRA brigade and battalion commanders decided on the "distribution" of women and girls.[2187] Rather than showing error with this finding (which he cannot), Ongwen raises several tangential issues.[2188] Although Ongwen claims that the Chamber "disregard[ed] favourable testimony" that Kony was the sole authority,[2189] it is Ongwen who selects certain aspects of the evidence,[2190] and fails to show error.

573. Second, Ongwen confuses his participation in the common plan (as an indirect co-perpetrator) for the period of the charges with his appointment as brigade commander in March 2004.[2191] There is no link—as the findings make clear, Ongwen participated in the common plan concerning the LRA system of abduction and abuse of women and girls well before his appointment as Sinia brigade commander.[2192] Ongwen's reliance on Daniel Opiyo's testimony to claim otherwise does not assist: he fails to show why Kony's monitoring of the commander's activities or the different channels of communication within the LRA should excuse Ongwen's culpability.[2193] He also fails to note that the Chamber considered Daniel Opiyo's evidence "radically interpret[ed]" Kony's authority, and correctly dismissed it given abundant and

[2185] Appeal, paras. 925-934; 979-989, 993-994, 1000.
[2186] Judgment, paras. 2114-2123, 2160-2182 (2116: "[…] Joseph Kony's standing or general orders for abductions of women or girls did not include operational particulars. [The] input of LRA commanders was crucial. […]"); 2161: ("[the 'distribution' was Kony's prerogative], or, in his absence, of the [Sinia commanders].")
[2187] Judgment, para. 2182. *Contra* Appeal, paras. 930, 983.
[2188] Appeal, paras. 926, 928 (arguing that Kony was the "overall commander, chairman or President of the LRA", who possessed the "ultimate authority").
[2189] Appeal, para. 929.
[2190] *Compare* Appeal, para. 929 (on Kony revoking his standing order for abduction and his sole authority for distribution) *with* Judgment, paras. 2118-2121 (finding, on the basis of the evidence of P-0205, P-0233 and P-0264 that even though Kony withdrew the standing order, the abductions did not stop) and 2159 (noting that testimony on Kony being the sole authority for distribution was not based on personal observations, but a general understanding from persons not in leadership positions).
[2191] Appeal, para. 926.
[2192] Judgment, paras. 2098-2309.
[2193] Appeal, paras. 926-927.

nuanced evidence to the contrary.[2194] Likewise, merely because the LRA policy of abduction pre-dated Ongwen's own participation in it does not excuse or exclude it.[2195] Further, Ongwen's assertions that the Chamber did not explain his role overlooks significant evidence.[2196]

574. Moreover, the examples that Ongwen gives to exclude his own responsibility fail to persuade. They either wrongly assume that his participation in the common plan was limited to the time when he commanded the Sinia brigade or by his time in the sick bay in 2003,[2197] or otherwise misread the evidence.[2198]

575. Third, Ongwen misinterprets the *mens rea* requirement for the crime of other inhumane acts (forced marriage).[2199] As for most other crimes, article 30 applies to the crime of other inhumane acts—whose requirements the Chamber correctly applied.[2200] It does not require a "specific and special intent".[2201] Nor, given the Chamber's extensive findings, are his claims of "general and declaratory [decisions]", "impermissible inferences" or "guilt by association" accurate.[2202] His submissions should be dismissed.

XIII.C. THE CHAMBER PROPERLY CONVICTED ONGWEN OF FORCED PREGNANCY

576. The Trial Chamber properly convicted Ongwen, as a direct perpetrator, of forced pregnancy vis-à-vis P-0101 and P-0214, pursuant to articles 7(1)(g) and 8(2)(e)(vi) of the Statute.[2203] He had sex by force with his so-called "wives", including P-0101 and P-0214, both of whom became pregnant.[2204] He then confined P-0101 and P-0214, who had both been made forcibly pregnant.[2205] The nature and sustained character of his acts demonstrate that Ongwen

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[2194] Judgment, para. 2169.
[2195] *Contra* Appeal, paras. 925, 933, 980. *See above* paras. 418, 422-425, 431-433 (Ground 64).
[2196] Appeal, paras. 930-931; Judgment, paras. 2098-2309. *See above* paras. 452-486 (Ground 72).
[2197] Appeal, paras. 985-986, 989 (regarding P-0351, P-0352 and P-0396). *See* Judgment, paras. 2203-2206, 2212-2214. Evidence that Ongwen was placed in sickbay until around mid-2003 (Judgment, paras. 135, 1064) does not contradict evidence of P-0352 joining Ongwen's group (Judgment, paras. 2205-2206, reporting a conversation with Okwer, and not Ongwen).
[2198] Appeal, paras. 987-988 (regarding P-0366 and P-0374). *See* Judgment, paras. 2207-2211. It is unclear why timeframes and locations must be specified vis-à-vis P-0366 and P-0374 and the men they were assigned to, since this concerns Ongwen's indirect co-perpetration.
[2199] Appeal, paras. 931-932, 981, 1000.
[2200] Article 30, Statute; Judgment, paras. 3025 (Ongwen meant both to engage in his relevant conduct and to cause the consequence), 3096-3099 (the crimes had been undertaken intentionally, Ongwen meant for them to occur).
[2201] *Contra* Appeal, para. 932.
[2202] Appeal, paras. 928, 932, 981-982; Judgment, paras. 3096-3099.
[2203] Judgment, paras. 3058-3062.
[2204] Judgment, para. 3057 ("P-0101 became pregnant and gave birth to a girl fathered by [Ongwen] sometime between July 2002 and July 2004. In 2004, P-0101 became pregnant and gave birth to a boy fathered by [him] in 2005, P-0214 became pregnant and, in December 2005, gave birth to a girl fathered by [Ongwen]").
[2205] Judgment, paras. 3057-3059 ("Dominic Ongwen had sex by force with [P-0101 and P-0214]…during the time relevant to the charges, the seven women 'distributed' to Dominic Ongwen, including P-0101 and P-0214 during their pregnancies, were not allowed to leave. [Ongwen] placed them under heavy guard. They were told or came to understand that if they tried to escape they would be killed."). *See also* Judgment, paras. 2041, 2068-2070

meant to engage in this conduct.[2206] Further, Ongwen confined P-0101 and P-0214 with the intent of sustaining the continued commission of other crimes, including other inhumane acts (forced marriage), torture, rape and sexual slavery.[2207]

577. Ongwen's challenge must fail. He misinterprets the law and mistakes its purpose.[2208] Further, he contests the factual findings on the basis of his misapprehension of the crime and a misreading of the Judgement.[2209] His submissions should be dismissed.

XIII.C.1 The Chamber correctly interpreted the crime of forced pregnancy

578. The Chamber correctly found that the crime of forced pregnancy concerns the unlawful confinement of a (forcibly made) pregnant woman, depriving her of reproductive autonomy.[2210] The material elements (*actus reus*) require that the woman is forcibly made pregnant (not necessarily by the perpetrator himself)[2211] and unlawfully confined.[2212] The mental elements (*mens rea*) require the perpetrator, in addition to the mental elements specified in article 30, to have a specific intent to confine the woman—either to affect the ethnic composition of a population *or* to carry out other grave violations of international law.[2213]

579. Ongwen's legal interpretation of the crime of forced pregnancy is flawed. First, while he argues that the Chamber's interpretation of the crime "brings forced pregnancy into the political and ideological debate on women's personal and reproductive autonomy and the right to family […] which States Parties wished to avoid",[2214] this mistakes the rationale of the crime. As the drafting history shows, and as the Chamber correctly found, the statutory definition of forced pregnancy is purposely narrow and was a result of delicate compromise, which already reflects and accommodates the various concerns expressed during negotiations.[2215] In particular, to

(Ongwen fathered at least 13 children with the seven so-called "wives". Although not all are covered by the charges, they demonstrate the pattern of sexual violence that Ongwen inflicted on them).
[2206] Judgment, para. 3060.
[2207] Judgment, para. 3061.
[2208] Appeal, paras. 960-964.
[2209] Appeal, paras. 935-940, 945-959, 965-974.
[2210] Judgment, para. 2722.
[2211] Judgment, paras. 2723 ("The perpetrator need not have personally made the victims forcibly pregnant"), 2725 ("forcibly" encompasses the same coercive circumstances described for other sexual violence crimes in the Statute, which vitiate the woman's ability to give genuine consent).
[2212] Judgment, para. 2724 ("unlawful confinement" means that a woman must have been restricted in her physical movement contrary to international law standards).
[2213] Judgment, paras. 2726-2729 (This is regardless whether the accused specifically intended to keep the woman pregnant).
[2214] Appeal, paras. 960-962.
[2215] Judgment, paras. 2717-2721; Von Hebel and Robinson, p. 100 ("The term 'forced pregnancy' was the subject of considerable and careful negotiations. Several delegations were concerned that [it] could be misinterpreted as implying a universal right to abortion, and… pressed for its deletion. Other delegations were committed to its

reflect various concerns raised by delegations, the Statute includes an express safeguard (in article 7(2)(f)) to specify that the provision does not affect national laws on pregnancy.[2216] The Chamber did not need to address any further "concerns" (left unspecified by Ongwen) [2217] — and in any event, the Statute reflects the binding understanding of the scope of the provision.

580. Second, while Ongwen takes issue with the use of two footnotes by the Chamber in its interpretation,[2218] neither claim has merit. The references in the first footnote (footnote 7164) correctly set out established international law, contained in certain international conventions, and accounts of the Statute's drafting history—expressly recognising a woman's right to personal and reproductive autonomy and the right to family.[2219] Ongwen's doubt—expressed in cursory terms—cannot override the will of States expressed through international conventions.[2220] The legal references on reproductive autonomy and the right to family that the Chamber relied on did not amount to "evidence"—let alone "expert evidence" or "amicus curiae opinion".[2221] In any event, Ongwen had ample opportunity to present his interpretations of the crime and he did not.[2222] Nor is it clear why the Trial Chamber's further explanation of the protected values of the crime—elements of which were already set out at confirmation[2223]—is problematic in Ongwen's view. Similarly, Ongwen's objection to the second footnote (footnote 7091) is counter-intuitive. That citation merely supports the established principle that

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inclusion, … to recognise a particular harm inflicted on women and to affirm agreements…such as the Fourth World Conference on Women."); Steins, pp. 365-369; Hall, Powderly and Hayes, pp. 274-275 (mns. 136-140).

[2216] Von Hebel and Robinson, p. 100; Steins, p. 368 ("In an eleventh-hour compromise, the [article 7(2)(f)] definition was agreed upon. […] The rather curious second sentence…was inserted as an additional measure to reassure Catholic and Arab countries that [including] forced pregnancy would not interfere in [States' rights] to regulate nationally with respect to pregnancy (anti-abortion laws)."); Grey, 905-930, pp. 919-922 ("After considerable difficulty,… states agreed on a 'compromise' […] found in article 7(2)(f)", noting that the definition excludes many experiences expected to be covered by the crime of 'forced pregnancy'); La Haye, pp. 193-195.

[2217] *Contra* Appeal, para. 961 (mislabelling the crime as 'forced marriage').

[2218] Appeal, paras. 960-961.

[2219] Judgment, para. 2717 (fn. 7164). *See e.g.*, article 16, CEDAW; article 16, Tehran Proclamation; Schabas (2016), p. 191 ("Prior to the *Rome Statute*, the expression 'forced pregnancy' had been used in the 1993 Vienna Declaration and Programme of Action, and in the 1995 Beijing Declaration."); *generally* Women's Caucus Report. *See also* Vienna Declaration, paras. 36-44 ("[…] All violations of this kind, including in particular murder, systematic rape, sexual slavery, and forced pregnancy, require a particularly effective response" and reaffirming "on the basis of equality between women and men, a woman's right to accessible and adequate health care and the widest range of family planning services, as well as equal access to education at all levels."); Cairo Declaration;. Beijing Declaration, paras. 95-97 ("[Reproductive rights] include their right to make decisions concerning reproduction free of discrimination, coercion and violence, as expressed in human rights documents. […] The human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence.")

[2220] Appeal, paras. 961-962.

[2221] *Contra* Appeal, para. 964.

[2222] *Contra* Appeal, para. 964. *See* Defence Pre-Confirmation Brief, paras. 128-134; Confirmation ALA, paras. 12-44; Defence Closing Brief, paras. 471-485; Defence Closing Oral Submissions.

[2223] Confirmation Decision, paras. 96-101.

individual victims of crimes against humanity need be "persons", and not "civilians" for the purpose of international humanitarian law.[2224] The Chamber then clarified that the Statute and other documents describe victims as "person" or "persons" across all article 7(1) acts—except for forced pregnancy ("women") and other inhumane acts.[2225] This statement, based on the Statute, is not an error—much less has Ongwen shown that it is.

581. Third, contrary to Ongwen's arguments, the Chamber did not need to consider Ugandan national law on abortion in its assessment.[2226] Abortion is not the same as the crime of forced pregnancy, nor is the Chamber permitted to apply national law to judge international crimes in this context.[2227] Likewise, the Chamber did not need to consider aspects of Acholi culture in establishing the crimes. It noted the evidence of Seggane Musisi, but found that his evidence did not directly concern its analysis on whether the facts alleged were established.[2228] Ongwen fails to explain how this evidence was relevant to establishing his *mens rea* for forced pregnancy.[2229] His submissions should be dismissed.

XIII.C.2 The Chamber's factual findings on forced pregnancy were reasoned, reasonable and correct

582. Ongwen's challenge to the Chamber's factual findings on forced pregnancy is imprecise and incorrect.[2230] It also misinterprets the evidence, the findings and the law.

583. First, while Ongwen argues that the Chamber "used different standards" to discuss "confinement, detention or imprisonment in the LRA", he appears to compare his own arrest by Vincent Otti to the unlawful confinement of his so-called "wives" during their pregnancies.[2231] This is misconceived and inapposite.[2232] Further, Ongwen misapprehends the notion of "unlawful confinement" for the purposes of forced pregnancy, and overlooks the proper meaning the Chamber accorded to it.[2233] He fails to show why the Chamber's correct

[2224] Judgment, para. 2675 (fn. 7091), citing *inter alia* *Ntaganda* TJ, para. 669.
[2225] Judgment, para. 2675 (fn. 7091); article 7(2), Statute; article 7, Elements of Crimes.
[2226] Appeal, para. 962.
[2227] Articles 21 and 7(2)(f), Statute (This definition shall not in any way be interpreted as affecting national laws relating to pregnancy).
[2228] Judgment, para. 602.
[2229] Appeal, para. 963.
[2230] Appeal, paras. 937-940, 945-959, 965-968.
[2231] Appeal, para. 945.
[2232] Judgment, paras. 1057-1063 ("[…] the evidence received in relation to 'arrest' and 'prison' within the LRA [indicates] that these concepts referred not to punishment by detention in a confined space, but rather to a specific measure used for commanders, of which the central feature was the (temporal) stripping of usual authority. […] Ongwen's arrest in April 2003 did not for any significant period interrupt the exercise of his authority as commander.")
[2233] Judgment, para. 2724; *see above* para. 578.

reliance on the coercive environment in the LRA was in error.[2234] Nor is he correct when he states that the victims did not testify to these coercive aspects.[2235] Moreover, Ongwen's insistence that Kony "retained command and control" over the women disregards that the forced pregnancy charge concerns Ongwen's direct perpetration of it vis-a-vis P-0101 and P-0214, with mutually corroborative evidence from his other so-called "wives" as a pattern of sexual violence.[2236] Likewise, Ongwen's narration of their evidence is inaccurate, selectively relying on portions of their testimony.[2237] Further, even if a victim may have, on occasion, been sent elsewhere (either "home" or for medical treatment), this did not detract from the overall coercive environment in which they were compelled to live.[2238]

584. Second, Ongwen's claim that the Chamber had not properly reasoned its decision is both unsubstantiated and inaccurate.[2239] It should be dismissed summarily. His arguments on the absence of findings on the contextual elements or material elements merely misread the Judgement.[2240] Likewise, he incorrectly faults the Chamber for not making findings on issues that are not legally required.[2241] Yet again, in claiming that the Prosecution did not present evidence that the forced pregnancies were intended to affect the ethnic composition of the Acholi population, he misunderstands the nature of the crime of which he is convicted and the second and alternative basis of the *mens rea* –to carry out grave violations of international law, namely, rape, inhumane acts (forced marriage), torture and sexual slavery.[2242] His submissions should be dismissed.

585. For the reasons above, Ongwen's challenge to his SGBC convictions should be dismissed.

[2234] Appeal, para. 946; Judgment, para. 2725.
[2235] Appeal, para. 946; Judgment, paras. 2041-2093. *See e.g.*, T-15, 28:15-18 ("A. Because when you're in the bush, regardless of whether you think of escaping, it's impossible to escape because when you do try to escape, when you attempt to escape, they follow you and you are taken back and you may actually be killed as well.")
[2236] Appeal, para. 947; Judgment, para. 2041.
[2237] *Compare e.g.*, Appeal, paras. 948-953 *with* T-13, 19:6-21:10; T-15, 27:14-28:22.
[2238] *See e.g.*, T-15, 30:19-34:11; *contra* Appeal, paras. 951-958.
[2239] Appeal, paras. 965-968.
[2240] Appeal, paras. 969, 972, 973; Judgment, paras. 2041-2070, 2673-2693, 2717-2729, 2798-2817, 3056-3062.
[2241] Appeal, para. 970 (policy requirement of forced pregnancy as a crime against humanity).
[2242] Appeal, paras. 967, 970; Judgment, paras. 2717-2729.

RELIEF SOUGHT

586. For the reasons set out above, the Prosecution respectfully requests the Appeals Chamber to dismiss the Appeal against the Judgment and confirm Ongwen's convictions.

Karim A.A. Khan QC, Prosecutor

Dated this 9th day of November 2021
At The Hague, The Netherlands