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International Criminal Court

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No. ICC-02/04-01/15 A
Date: 15 December 2022

THE APPEALS CHAMBER

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

SITUATION IN UGANDA

IN THE CASE OF THE PROSECUTOR v. DOMINIC ONGWEN

Public Redacted

Judgment
on the appeal of Mr Ongwen against the decision of Trial Chamber IX of 4 February 2021 entitled "Trial Judgment"

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

The Office of the Prosecutor
Mr Karim A. A. Khan, Prosecutor
Ms Helen Brady

Counsel for the Defence
Mr Charles Achaleke Taku
Ms Beth Lyons

Legal Representatives of Victims
Mr Joseph Akwenyu Manoba
Mr Francisco Cox

Ms Paolina Massidda

Others
Dr. Mohammad Hadi Zakerhossein

Felicity Gerry QC, Wayne Jordash QC, Ben Douglas-Jones QC, Anna McNeil, Philippa Southwell, Dr. Beatrice Krebs and Jennifer Keene-McCann

Erin Baines, Anne-Marie de Brouwer, Annie Bunting, Eefje de Volder, Kathleen M. Maloney, Melanie O'Brien, Osai Ojigho, Valerie Oosterveld, Indira Rosenthal

Louise Arimatsu, Adejoké Babington-Ashaye, Kirsten Campbell, Danya Chaikel, Christine Chinkin; Carolyn Edgerton, Priya Gopalan; Gorana Mlinarević, Angela Mudukuti, Cynthia T. Tai

Sareta Ashraph, Stephanie Barbour, Kirsten Campbell, Alexandra Lily Kather, Jocelyn Getgen Kestenbaum, Maxine Marcus, Gorana Mlinarević, Valerie Oosterveld, Kathleen Roberts, Susana SáCouto, Jelia Sané, Hyunah Yang

Professor Jean Allain, Monash University, Castan Centre for Human Rights Law

Prof. Dr. Mario H. Braakman

Mr Arpit Batra

Professor Bonita Meyersfeld and the Southern African Litigation Centre Trust

Ms Ardila, Mariana; Ms Fernández-Paredes, Teresa; Ms Ibáñez, María Cecilia; Ms Kravetz, Daniela; Ms SáCouto, Susana; Ms Seoane, Dalila

Dr. Rosemary Grey, Global Justice Center (GJC); Amnesty International (AI), Women's Initiatives for Gender Justice (WIGJ)

NIMJ - National Institute of Military Justice

Tina Minkowitz, Robert D. Fleischner

Public International Law & Policy Group

Justice Francis M. Ssekandi

Professor Erin Baines, Professor Kamari M. Clarke, Professor Mark A. Drumbl

Dr. Paul Behrens, University of Edinburgh

Association of Defence Counsel Practicing before the International Courts and Tribunals (ADC-ICT)

Siobhán Mullally, UN Special Rapporteur on Trafficking in Persons, especially women and children

REGISTRY

Registrar
Mr Peter Lewis

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The Appeals Chamber of the International Criminal Court,

In the appeal of Mr Dominic Ongwen against the decision of Trial Chamber IX entitled 'Trial Judgment' of 4 February 2021 (ICC-02/04-01/15-1762-Red),

After deliberation,

Unanimously,

Delivers the following

JUDGMENT

The "Trial Judgment" of Trial Chamber IX is confirmed.

REASONS

I. KEY FINDINGS

1. In circumstances where the operative part of a confirmation decision defines the acts that an accused person is alleged to have committed, and the legal characterisation given to such acts (including the mode of liability charged for each crime) and is provided to an accused in a language that he or she fully understands and speaks, a further translation of the reasoning underpinning such decision and any related separate or dissenting opinion, in a language that an accused fully understands and speaks, may not be essential to place an accused on notice of the charges in order to enter a plea pursuant to article 64(8)(a) of the Statute.

2. In cases of indirect co-perpetration, where the control over the crimes is retained through the use of an organised power apparatus, the particular features of this mode of liability need to be considered when addressing an alleged violation of the right to notice under article 67(1)(a) of the Statute. Indeed, in cases where it is alleged that the accused and the other indirect co-perpetrators retained control over the crimes through the use of an organised power apparatus, a more generic identification of the other indirect co-perpetrators may suffice to comply with the notice requirement.

3. In the absence of a specific provision in the Statute regulating the burden and standard of proof with respect to grounds excluding criminal responsibility, the general provisions of article 66 of the Statute apply. Generally, the Prosecutor does not bear the

burden *per se* to "disprove each element" of a ground excluding an accused's criminal responsibility. However, he or she must establish the guilt of the accused beyond reasonable doubt, even when a ground for excluding criminal responsibility is raised. In doing so, the Prosecutor may address and rebut the Defence's allegations and evidence adduced in support of the alleged ground for excluding criminal responsibility.

4. When raising grounds purporting to exclude an accused's criminal responsibility, it is not enough to merely give notice of such an intention. The Defence must also present evidence to substantiate its allegations. This so-called "evidentiary burden" on the part of the Defence does not equate to a shift in the burden of proof as the Prosecutor is not absolved of his or her burden to establish the elements of the crimes (including the mental element) and the modes of liability beyond reasonable doubt.

5. A trial chamber's duty under article 74(5) of the Statute to provide a reasoned statement of findings on the evidence is of particular significance when any party raises an issue concerning the relevance, probative value or a potential prejudicial effect of a piece of evidence, especially when the opposing party raised an objection.

6. Indirect perpetrators control the actions of the direct perpetrators in different ways, including when the direct perpetrator is not responsible – for example because he or she is a minor, when the direct perpetrator is mentally disabled, or when the direct perpetrator is coerced – and through controlling the will of the direct perpetrators through the use of an organised power apparatus. In the latter case, an indirect perpetrator retains control over the actions of those executing the material elements of the crimes "by subjugating their will".

7. Whether an indirect perpetrator retains control over the actions of the physical perpetrators by virtue of controlling their will through the functioning of an organised hierarchical organisation (also known as an organised power apparatus and which may or may not be criminal in nature), is a factual consideration. As a result, the use of an organised power apparatus is not a legal requirement for establishing this specific mode of responsibility.

8. Generally, the following features of an organised power apparatus may be of assistance in determining whether the indirect perpetrator retained control over the

crimes by virtue of controlling the will of the physical perpetrators: the hierarchical organisation of the apparatus; the functional automatism; the replaceable nature of its members on the ground; and the fact that the criminal acts of the direct perpetrator are to the benefit of the organisation. Therefore, in an organised power apparatus, typically those at the top of the organisation, retain functional control over the crimes committed and the low-level members are interchangeable (fungible).

9. As to the proximity or remoteness of the indirect perpetrator to the criminal act, it is correct that in cases of direct perpetration the further removed a person is from the criminal act, the more he or she is pushed to the margins of events and excluded from control over the acts. However, in cases of indirect perpetration through the use of an organised power apparatus, the converse is generally true. In such cases, the loss of proximity to the act is compensated by an increasing degree of organizational control by the leadership positions in the apparatus. The physical presence of the indirect perpetrator is not required to establish control over the crimes charged.

10. Regardless of the labelling, the fundamental aspect is that indirect co-perpetration as a mode of liability is encompassed in article 25(3)(a) of the Statute. This article accounts for the possibility of holding someone accountable both as an indirect perpetrator and as a co-perpetrator. In this regard, indirect co-perpetration constitutes an integrated mode of liability provided for in the Statute that combines the constitutive elements of indirect perpetration and co-perpetration and is therefore, compatible with the principle of legality and the rights of the accused.

11. The main elements of indirect co-perpetration are: the control of the crime by the indirect co-perpetrators which, in cases of commission through organised power apparatus, occurs by virtue of controlling the will of the direct perpetrators through the automatic functioning of the apparatus; and the existence of an agreement or common plan between those who carry out the elements of the crime through another individual or other individuals, including when those persons form part of an organised power apparatus.

12. In cases of indirect (co-)perpetration through an organised power apparatus, the indirect (co-)perpetrator controls both the crime by virtue of his or her position within the organisation and the essential features of the organisation, which secures the

functional automatism resulting in the commission of crimes. If the person is aware of the circumstances that enable this functional automatism, the identities and mental state of those who physically commit the crimes are irrelevant – they are interchangeable and the focus is on the automatic functioning of the organised power apparatus.

13. Article 7(1)(k) of the Statute provides for the category of "other inhumane acts", which serves as a "residual category" of crimes against humanity and is designed to criminalise an act that does not specifically qualify as any of the other crimes under article 7(1) of the Statute. However, the Statute and the Elements of the Crimes set out the legal elements for this crime and make it clear that not any act will amount to "an other inhumane act" within the meaning of article 7(1)(k) of the Statute. The scope of "other inhumane acts" under this article of the Statute is therefore sufficiently clear and precise to satisfy the principle of *nullum crimen sine lege*.

14. In addition, since article 7(1)(k) of the Statute is an open provision, meaning that different types of conduct may amount to other inhumane acts as long as they satisfy the elements of article 7(1)(k) of the Statute, in order to determine whether a specific conduct qualifies as a form of other inhumane acts, a chamber may have recourse to any relevant international instruments, such as conventions and treaties.

15. The central element of forced marriage is the imposition of a conjugal union and the resulting spousal status on the victim. The notion of "conjugal union" is associated with the imposition of duties and expectations generally associated with "marriage". Forced marriage is not necessarily sexual in nature but entails a "gendered harm", which is essentially the imposition on the victim of socially constructed gendered expectations and roles attached to "wife" or "husband".

16. Forced marriage describes a situation in which a person is forced, regardless of his or her will, into a conjugal union with another person by the use of physical or psychological force, or threat of force, or taking advantage of a coercive environment. Crucially, the imposition of such a union violates a person's right to marry, *i.e.* to freely choose one's spouse and consensually establish a family, which is recognised as a fundamental right under international human rights law.

17. Forced marriage as a form of other inhumane acts is a continuing crime and, as such, it criminalises not only the conduct of entering into a conjugal relationship, but the entire continued forced relationship.

18. The crime of forced pregnancy seeks to protect, among others, the woman's reproductive health and autonomy and the right to family planning.

19. In order to exclude an accused's criminal responsibility, 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.

20. The terms "imminent" and "continuing" in article 31(1)(d) of the Statute refer to the threatened harm, which is either death or serious bodily harm. The timing of the materialisation of the threat is linked to the terms "imminent" and "continuing" and is one of the criteria to take into account in the assessment of the existence of a threat.

21. While article 31(1)(d) of the Statute also encompasses threats of harm which may occur at a later point in time, for a person to be compelled to commit a crime under the jurisdiction of the Court, the threat must be "present" and real, at the time of the charged conduct.

22. The existence of a threat must be objectively assessed. Any prior traumatic experiences of an accused person that may have an impact on him or her at the time relevant to the charges, which does not satisfy the threshold required for excluding the criminal responsibility of the accused pursuant to article 31(1)(d) of the Statute, may nonetheless be relevant for the purposes of sentencing, in case of a conviction, as provided for in rule 145 of the Rules.

23. The *ne bis in idem* principle as formulated in article 20(1) of the Statute serves to prevent a retrial of a person who has been convicted or acquitted on the basis of the same conduct before this Court. […] this provision is not concerned with the question of whether a trial chamber can impose cumulative convictions on a person for the same underlying conduct in one and same trial proceedings.

24. The legal interests protected by each crime can only be discerned by reference to the elements of that specific crime. When two or more crimes have materially distinct elements, the interests protected are necessarily different and a conviction for only one of these crimes will therefore not be reflective of the full extent of the culpability of an accused person. Whether and to what extent a crime may be fully subsumed in another crime can only be answered by reference to the elements of each crime. If these elements require proof of a fact not required by the other, cumulative convictions are permissible. The above approach strikes a careful balance between the need to reflect the full culpability of an accused person while safeguarding his or her rights and ensuring that the person is not being unlawfully punished.

25. The inclusion of the contextual elements as constitutive elements of the crimes allows the identification of the legal interests protected by each provision which, given the materially distinct contextual elements contained therein, indicate that they protect different legal interests.

II. INTRODUCTION

26. This Appeals Chamber judgment concerns an appeal filed by Mr Ongwen against the Conviction Decision rendered by the Trial Chamber on 4 February 2021.

27. The present case relates to the events that took place in Northern Uganda between 1 July 2002 and 31 December 2005, and Mr Ongwen's alleged role as a high level commander of the Lord's Resistance Army (hereinafter: "LRA") in the context of an armed conflict with the forces of the Government of Uganda.[1]

28. The charges against Mr Ongwen, as confirmed by the Pre-Trial Chamber, included (i) crimes committed within the context of four specific attacks against the camps of Internally Displaced Peoples (hereinafter: "IDP") of Pajule, Odek, Lukodi and Abok, including attacks against the civilian population, murder, attempted murder, torture, enslavement, outrages upon personal dignity, pillaging, destruction of property and persecution;[2] (ii) sexual and gender-based crimes directly committed by

[1] *See* Conviction Decision, paras 1-14, 134-143.
[2] Confirmation Decision, Charges, paras 14-65; Conviction Decision, paras 33-34, 144-204 (counts 1 to 59).

Mr Ongwen against seven women who were abducted and placed into his household, including forced marriage as a form of other inhumane acts, torture, rape, sexual slavery, enslavement, forced pregnancy and outrages upon personal dignity;[3] (iii) other sexual and gender-based crimes, not directly committed by Mr Ongwen, including forced marriage as a form of other inhumane acts, torture, rape, sexual slavery and enslavement;[4] and (iv) the crime of conscription and use in hostilities of children under the age of 15.[5]

29. The proceedings against Mr Ongwen before the Court started with warrants of arrest issued by the Pre-Trial Chamber on 8 July 2005 against Joseph Kony, Vincent Otti, Raska Lukwiya, Okot Odhiambo[6] and Mr Ongwen.[7] On 16 January 2015, Mr Ongwen was surrendered to the Court by the Central African Republic authorities.[8] He made his initial appearance before the Pre-Trial Chamber on 26 January 2015.[9]

30. On 23 March 2016, the Pre-Trial Chamber confirmed the charges against Mr Ongwen,[10] which included 70 counts and "concern[ed] both war crimes and crimes against humanity, all allegedly committed […] against civilians in Northern Uganda in the relevant time frame between 1 July 2002 […] and 31 December 2005".[11]

31. The trial commenced on 6 and 7 December 2016, with the opening statements of the Prosecutor, Victims Group 1 and Victims Group 2.[12] The presentation of evidence started on 16 January 2017 and was completed on 12 December 2019.[13] The Prosecutor

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[3] Confirmation Decision, Charges, paras 66-117; Conviction Decision, paras 33, 35, 205-211 (counts 50 to 60).
[4] Confirmation Decision, Charges, paras 118-124; Conviction Decision, paras 33, 35, 212-221 (counts 61 to 68).
[5] Confirmation Decision, Charges, paras 125-131; Conviction Decision, paras 33, 36, 222-225 (counts 69 and 70).
[6] The Pre-Trial Chamber terminated proceedings with respect to Okot Odhiambo and Raska Lukwiya due to their deaths. *See* Decision on Okot Odhiambo; Decision on Raska Lukwiya.
[7] As concerns Mr Ongwen, *see* Warrant of Arrest Decision. On 27 November 2015, the Registry received from the Central African Republic relevant authorities "a waiver of the requirement of the rule of speciality, under article 101(1)" of the Statute. *See* Registry's Submissions on Request for Cooperation, paras 1-4.
[8] Registry's Report on Mr Ongwen's Surrender and Transfer to the Court.
[9] T-4.
[10] Confirmation Decision, pp. 71-104.
[11] Conviction Decision, para. 32.
[12] T-26; T-27.
[13] Conviction Decision, para. 19. Conviction Decision, para. 23, *referring to* Declaration on the Closure of the Submission of Evidence.

presented 116 witnesses in total.[14] Victims Group 1 and Victims Group 2 were authorised to present evidence[15] and called seven witnesses in total.[16] The Defence presented 63 witnesses in total.[17] The parties and participants filed their closing briefs on 24 February 2020[18] and presented their closing statements from 10 to 12 March 2020.[19]

32. On 4 February 2021, the Trial Chamber rendered the Conviction Decision, in which it found Mr Ongwen guilty of 61 crimes, comprising crimes against humanity and war crimes.[20]

33. More specifically, Mr Ongwen was found criminally responsible as an indirect perpetrator of crimes committed in the context of the attacks on the Lukodi and the Abok IDP camps, carried out on or about 19 May 2004[21] and on or about 8 June 2004, respectively.[22] He was also found criminally responsible as an indirect co-perpetrator of crimes committed (i) in the context of the attacks on the Pajule IDP camp on or about 10 October 2003[23] and the Odek IDP camp on or about 29 April 2004;[24] (ii) of sexual

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[14] Of the 116 witnesses presented by the Prosecutor, 69 appeared before the Trial Chamber and 47 had their testimony introduced in writing. Conviction Decision, para. 19.
[15] Decision on LRV Request to Present Evidence.
[16] Conviction Decision, para. 20.
[17] Of the 63 witnesses presented by the Defence, 54 appeared before the Trial Chamber and a further nine had their testimony introduced in writing. Conviction Decision, para. 22.
[18] Prosecutor's Closing Brief; Victims' Group 1 Closing Brief; Victims' Group 2 Closing Brief; Defence Closing Brief.
[19] T-256; T-257; T-258.
[20] Conviction Decision, para. 3116, pp. 1068-1076.
[21] Conviction Decision, paras 2928-2942, 2947-2973, 3116 (the crimes of attack against the civilian population as a war crime, murder as a crime against humanity and a war crime, attempted murder as a crime against humanity and a war crime, torture as a crime against humanity and a war crime, enslavement as a crime against humanity, pillaging as a war crime, destruction of property as a war crime and persecution as a crime against humanity) (counts 24 to 30 and 33 to 36).
[22] Conviction Decision, paras 2974-2988, 2993-3020, 3116 (the crimes of attack against the civilian population as a war crime, murder as a crime against humanity and a war crime, attempted murder as a crime against humanity and a war crime, torture as a crime against humanity and a war crime, enslavement as a crime against humanity, pillaging as a war crime, destruction of property as a war crime and persecution as a crime against humanity) (counts 37 to 43 and 46 to 49).
[23] Conviction Decision, paras 2822-2833, 2838-2874, 3116 (the crimes of attack against the civilian population as a war crime; murder as as a crime against humanity and a war crime, torture as as a crime against humanity and a war crime, enslavement as a crime against humanity, pillaging as a war crime and persecution as a crime against humanity) (counts 1 to 5 and 8 to 10).
[24] Conviction Decision, paras 2875-2889, 2894-2927, 3116 (the crimes of attack against the civilian population as a war crime; murder as a crime against humanity and a war crime, attempted murder as a crime against humanity and a war crime, torture as a crime against humanity and a war crime, enslavement as a crime against humanity, pillaging as a war crime, outrages upon personal dignity as a war crime and persecution as a crime against humanity) (counts 11 to 17 and 20 to 23).

and gender-based crimes;[25] and (iii) the crime of conscription of children under the age of 15 years and their use in armed hostilities.[26] Furthermore, Mr Ongwen was found to be criminally responsible as a direct perpetrator of a number of sexual and gender-based crimes.[27]

34. In its appeal against the Conviction Decision, the Defence raises 90 grounds of appeal alleging legal, factual and procedural errors that, in the Defence's view, materially affected this decision, and requests that the Appeals Chamber reverse all convictions against Mr Ongwen and enter a "verdict of acquittal".[28] In particular, the Defence challenges the Trial Chamber's findings on Mr Ongwen's fair trial rights and other alleged violations, including notice and scope of the charges, the modes of liability and Mr Ongwen's criminal responsibility, the defences of mental disease and duress under article 31(1)(a) and (d) of the Statute, respectively, on sexual and gender-based crimes, and on cumulative convictions.

35. The issues raised in a number of these grounds of appeal often contain extensive overlap. Such issues include allegations that some of the Defence's submissions were overlooked, that evidence "favourable" to the accused was disregarded or that evidence was wrongly assessed, and that the Conviction Decision was not sufficiently reasoned. Other grounds of appeal contain novel and at times complex issues, including the assessment of grounds for excluding criminal responsibility, such as mental disease or defect and duress, and the interpretation of the elements of certain sexual and gender-based crimes, in particular forced marriage and forced pregnancy. Furthermore, this case concerns an accused person, who, as acknowledged by the Trial Chamber, was also a victim of a serious crime, as he was abducted at the age of nine years, trained and

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[25] Conviction Decision, paras 3069-3100, 3116 (the crimes of forced marriage as an inhumane act as a crime against humanity, torture as a crime against humanity and a war crime, rape as a crime against humanity and a war crime, sexual slavery as a crime against humanity and a war crime, enslavement as a crime against humanity) (counts 61 to 68).
[26] Conviction Decision, paras 3101-3116 (counts 69 and 70).
[27] Conviction Decision, paras 3021-3068, 3116 (the crimes of forced marriage as an inhumane act as a crime against humanity, torture as a crime against humanity and a war crime, rape as a crime against humanity and a war crime, sexual slavery as a crime against humanity and a war crime, enslavement as a crime against humanity, forced pregnancy as a crime against humanity and a war crime and outrages upon personal dignity as a war crime) (counts 50 to 60). Finally, the Trial Chamber found that Mr Ongwen was not guilty of the crimes of other inhuman acts as a crime against humanity (counts 7, 18, 31, 44) and cruel treatment as a war crime (counts 6, 19, 32, 45). Conviction Decision, paras 2834-2837, 2890-2893, 2943-2946, 2989-2992, 3116.
[28] Appeal Brief, paras 7, 1001.

integrated as a fighter into the LRA ranks. Mr Ongwen's abduction as a young child and his early years spent in the adverse and extremely violent environment of the LRA brought to him great suffering.[29] .

36. In light of the number of novel and complex issues arising from this appeal, the Appeals Chamber decided to invite 19 *amici curiae* to participate in these proceedings given their expertise and high qualifications on some of these issues. It received written and oral observations from the *amici curiae*, in addition to the submissions it had received from the parties and the legal representatives of the victims.

37. At the outset, the Appeals Chamber notes that certain grounds of appeal, although originally listed with a brief description in the Notice of Appeal, are either not mentioned or developed in the Appeal Brief (*i.e.*, grounds of appeal 35, 57, 59 and 67).[30] Consequently, these grounds are not discussed in this judgment.

38. Moreover, the Appeals Chamber observes that in several instances in the Appeal Brief, the Defence has grouped two or more of its grounds of appeal without making a distinction between "the legal and/or factual reasons in support of *each* ground of appeal", as required by regulation 58(2) of the Regulations.[31] As a result, not only is it unclear as to which arguments relate to which grounds of appeal, but it is also unclear as to the basis on which the Defence has decided to group its grounds of appeal. The Appeals Chamber finds that this practice infringes on the clear wording of regulation 58(2) of the Regulations and it reminds the Defence of its duty to comply at all times with the procedural regime applicable before the Court. Nevertheless, in order to prevent any prejudice to Mr Ongwen's rights, the Appeals Chamber has addressed these arguments.[32] In addition, the Appeals Chamber has, in some instances, grouped the grounds of appeal and/or arguments, as presented in the Appeal Brief differently, for ease of presentation.[33] In some of those instances, the Appeals Chamber has addressed

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[29] Conviction Decision, paras 27-30, 2672. *See also* paras 72-76, 83, 370, 388.
[30] Notice of Appeal.
[31] Emphasis added. *See e.g.* grounds of appeal 7, 8, 10 (in part), 25 and 45 (paras 198-226), 14-15 (paras 247-255), 26 and 47 (paras 307-319), 50 and 56 (paras 542-544), 71 and 24 (paras 731-742).
[32] *See for example* grounds of appeal 14 and 15.
[33] *See for example* ground of appeal 23 which the Appeals Chamber will address together with other alleged fair trial violations.

parts of a ground of appeal in different sections and has indicated this by referring to the ground of appeal (in part), where necessary.

39. Given the Defence's presentation of its grounds of appeal in the Appeal Brief and the overlap between them, the Appeals Chamber's analysis has been structured to allow for a proper and full consideration of the issues raised. In that regard, the Appeals Chamber will first address the grounds of appeal challenging the Trial Chamber's findings concerning Mr Ongwen's right to a fair trial and "other human rights violations" (grounds of appeal 1 to 18, 23, 25 and 45), and other specific evidentiary assessments and findings (grounds of appeal 24, 71, 72 and 73 and 60). It will then address the Defence's challenges to the Trial Chamber's findings on Mr Ongwen's individual criminal responsibility as an indirect perpetrator and as an indirect co-perpetrator with respect to the crimes committed during the attacks carried out on the four IDP camps; and the crime of conscription of children under the age of 15 (grounds of appeal 28 (in part) 60, 64, 65, 68 to 70, and 74 to 86). The Appeals Chamber will then address the Defence's submissions related to the Trial Chamber's findings concerning sexual and gender-based crimes (grounds of appeal 66 (in part), and 87 to 90); those concerning the grounds for excluding criminal responsibility, *i.e.* mental illness or defect (grounds of appeal 19, 27, and 29 to 43), and duress (grounds of appeal 26, 28 (in part), 44, 46 to 56, 58, and 61 to 63), pursuant to article 31(1)(a) and (d) of the Statute, respectively; and, finally, those related to cumulative convictions (grounds of appeal 20 to 22).

40. For the reasons set out in this judgment, the Appeals Chamber rejects all the Defence's grounds of appeal and confirms the Conviction Decision.

41. Notably, as addressed in more detail in the relevant sections of the judgment, the Appeals Chamber discusses the crime of forced marriage as a form of other inhumane acts pursuant to article 7(1)(k) of the Statute, and it confirms, *inter alia*, the Trial Chamber's findings that convicting an accused of such a crime is not *ultra vires* and does not violate the principle of *nullum crimen sine lege*,[34] and that the interest

[34] *See* section VI.E.2(d)(i) (Alleged errors in the Trial Chamber's legal interpretation of forced marriage and the principle of *nullem crimen sine lege*) below.

protected by this crime is distinct from that of sexual slavery.[35] It further discusses the crime of forced pregnancy, finding that it seeks to protect, *inter alia*, a woman's reproductive health and autonomy and the right to family planning,[36] and that the second sentence of article 7(2)(f) of the Statute (that "[the definition of forced pregnancy] shall not in any way be interpreted as affecting national laws relating to pregnancy") was inserted to alleviate the concern that this provision might be interpreted as interfering with a State's approach to abortion.[37] In this judgment the Appeals Chamber also sets out the legal framework relevant to the mode of liability of indirect perpetration and indirect co-perpetration.

42. Finally, for ease of reference, an annex containing the designations of terms used and materials cited in this judgment is appended.[38]

43. Before addressing the merits of the appeal in detail, the Appeals Chamber will first provide a brief overview of the historical context of the conflict relevant to the charges, as established by the Trial Chamber on the basis of the evidence presented at trial, and some relevant information about Mr Ongwen. It will then set out the relevant procedural history of the case, in particular, the proceedings before the Appeals Chamber, followed by the standard of review that will guide the Appeals Chamber's analysis of this appeal.

III. RELEVANT BACKGROUND INFORMATION

A. Historical background

44. The Appeals Chamber notes that the Trial Chamber made detailed findings on the historical background leading to the events relevant to the charges.[39] The Appeals

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[35] *See* section VI.E.2(d)(ii) (Alleged errors in the Trial Chamber's factual findings on forced marriage and other related findings) below.
[36] *See* section VI.E.3(a) (Alleged error in the Trial Chamber's legal interpretation of forced pregnancy) below.
[37] *See* section VI.E.3(a) (Alleged error in the Trial Chamber's legal interpretation of forced pregnancy) below.
[38] *See* Annex: Table of Designations and Cited Materials.
[39] Conviction Decision, paras 1-14. The Trial Chamber's findings are based on "Professor Allen's report [UGA-OTP-0270-0004] as well as his testimony [T-28 and T-29]". *See* Conviction Decision, para. 1, fns 2-4.

Chamber recalls some of these findings in order to set this appeal in its proper historical context.

45. The Trial Chamber first noted that, while the evidence presented during the trial and the factual findings made in the Conviction Decision focussed on events which took place in Northern Uganda between 1 July 2002 and 31 December 2005, the LRA "ha[d] been active since the 1980s, and the related conflict in Northern Uganda has spanned [over] four decades".[40]

46. The Trial Chamber noted that in 1985, President Milton Obote was overthrown by army commander Tito Okello who became president for a brief period of time, and that in 1986 "the National Resistance Army (NRA) under Yoweri Museveni seized power in Uganda and established the National Resistance Movement (NRM) government".[41] The Trial Chamber found that "[a] number of groups continuing to oppose the Ugandan government appeared in the Acholi homelands […]. One such group was led by a young man called Joseph Kony".[42]

47. The Trial Chamber further found that "[i]n 1988, President Museveni's government signed a peace agreement with the Uganda People's Democratic Army (hereinafter: "UPDA"), and many of those unwilling to surrender turned to Joseph Kony [including] one of the UPDA's most effective commanders, Odong Latek".[43] Odong Latek had significant influence on the movement and Joseph Kony appeared to "have learnt considerably about guerrilla tactics from him".[44] "Odong Latek was killed in battle, but by 1990 Joseph Kony's forces was the only significant armed unit still fighting in the Acholi homelands".[45]

48. Shortly after "Odong Latek's death, Joseph Kony changed the name of the movement to […] LRA".[46] Joseph Kony's forces "maintained a guerilla campaign against the government and, increasingly, against those who collaborated with it",[47] and

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[40] Conviction Decision, para. 1.
[41] Conviction Decision, para. 2. *See also* UGA-OTP-0270-0004, para. 12.
[42] Conviction Decision, para. 5. *See also* UGA-OTP-0270-0004, para. 18.
[43] Conviction Decision, para. 6. *See also* UGA-OTP-0270-0004, para. 20.
[44] Conviction Decision, para. 6. *See also* UGA-OTP-0270-0004, para. 20.
[45] Conviction Decision, para. 6. *See also* UGA-OTP-0270-0004, para. 20.
[46] Conviction Decision, para. 6. *See also* UGA-OTP-0270-0004, para. 20.
[47] Conviction Decision, para. 7. *See also* UGA-OTP-0270-0004, para. 30.

the LRA also "became associated with forced recruitment or abductions".[48] The Trial Chamber noted that the "objectives of the LRA, and the activities put in place to realise them […] are directly relevant to the charges".[49]

49. Furthermore, the Trial Chamber found that "[i]n 1991, the Ugandan government mounted an intensive four-month military operation against the insurgency, called Operation North [… and] the LRA responded with violence against people thought to be government collaborators".[50] "In the mid-1990s, Yoweri Museveni's NRA became the Ugandan People's Defence Force (UPDF)".[51]

50. Moreover, the Trial Chamber found that the Ugandan government adopted an "anti-insurgency strategy" which consisted of removing "the population from rural areas where it might assist the rebels" and "from the mid-1990s", it adopted a "more systematic policy […] of moving people into [IDP] camps".[52] The Trial Chamber found that the camps "were supposed to be protected by small groups of UPDF soldiers and 'local defence units' under UPDF command".[53] "By the end of the 1990s, about half a million people were living in the camps", and "[a]t the peak, around 2004, there were hundreds of IDP camps and while there were still some people living around the towns, almost the entire population of the region was in IDP camps, amounting to 1.5 million people".[54] A significant number of charges brought against Mr Ongwen, which are recalled below, relate to attacks carried out against some of these IDP camps and the population living therein.[55]

51. Finally, the Trial Chamber found that the LRA received support from Sudan, in the form of weapons and military training and that it established base camps in South Sudan.[56] Following international pressure in the late 1990s on the Sudanese government, which was "further intensified following the attacks on the United States

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[48] Conviction Decision, para. 7. *See also* UGA-OTP-0270-0004, para. 31.
[49] Conviction Decision, para. 7.
[50] Conviction Decision, para. 8. *See also* UGA-OTP-0270-0004, para. 33.
[51] Conviction Decision, para. 9.
[52] Conviction Decision, para. 10. *See also* UGA-OTP-0270-0004, para. 36.
[53] Conviction Decision, para. 10. *See also* UGA-OTP-0270-0004, para. 36.
[54] Conviction Decision, para. 10. *See also* UGA-OTP-0270-0004, para. 36; T-28, p. 57, lines 11-12, p. 58, lines 3-10.
[55] Conviction Decision, para. 11.
[56] Conviction Decision, para. 12. *See also* UGA-OTP-0270-0004, para. 37.

of America on 11 September 2001", the "Sudanese government was persuaded to give permission for the so called 'Iron Fist' incursion from Uganda, which officially started in 2002".[57] This military campaign destroyed the LRA bases in Sudan and hundreds of people were killed.[58] "Joseph Kony and almost all of his senior commanders evaded capture, and as fast as abducted people were captured, killed, freed or escaped, others were taken".[59] Consequently, the "LRA […] broke up into smaller units which were able to outflank the Ugandan forces".[60] The Trial Chamber further found that "[a] number of events which unfolded therefrom led to the referral of the situation to the Court by Uganda on 16 December 2003" and to the present case.[61]

B. Mr Ongwen

52. The Trial Chamber noted that Mr Ongwen "was born in Uganda and hails from Coorom in Northern Uganda".[62] It found that he was abducted by the LRA as a young child.[63] The Trial Chamber further noted that Mr Ongwen "spent the entire period between his abduction and the beginning of the period relevant for the charges, *i.e.* 1 July 2002, in the LRA" and during the period relevant to the charges he was approximately between 24 and 27 years old.[64] The Trial Chamber found that during the period relevant to the charges, Mr Ongwen quickly ascended within the LRA hierarchy, from battalion commander to commander of the Sinia Brigade with the rank of brigadier.[65]

53. As noted above,[66] Mr Ongwen was also a victim of a serious crime, as he was abducted as a young child and integrated as a fighter into the LRA ranks. He spent his formative years in the adverse and violent environment of the LRA.

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[57] Conviction Decision, para. 13. *See also* UGA-OTP-0270-0004, para. 39.
[58] Conviction Decision, para. 13. *See also* UGA-OTP-0270-0004, para. 40.
[59] Conviction Decision, para. 13. *See also* UGA-OTP-0270-0004, para. 40.
[60] Conviction Decision, paras 13-14. *See also* UGA-OTP-0270-0004, para. 40.
[61] Conviction Decision, para. 14.
[62] Conviction Decision, para. 26. *See also* reference cited in fn. 27.
[63] Conviction Decision, paras 27-30.
[64] Conviction Decision, para. 31.
[65] *See* Conviction Decision, paras 134-138, 1078-1083.
[66] *See* paragraph 35 above.

IV. RELEVANT PROCEDURAL HISTORY

54. On 11 February 2021, the Appeals Chamber designated Judge Luz del Carmen Ibáñez Carranza as the Presiding Judge in any appeal arising from the Conviction Decision.[67]

55. On 24 February 2021, the Appeals Chamber extended the time limit for the filing of the notice of appeal and the appeal brief to 21 April 2021 and 21 June 2021, respectively.[68] On 9 April 2021, following a second request by the Defence, the Appeals Chamber extended these time limits to 21 May 2021 and 21 July 2021, respectively.[69]

56. On 21 May 2021, the Defence filed its Notice of Appeal.[70]

57. On 27 May 2021, the Defence sought an extension of the page limit for its appeal brief.[71] On 2 June 2021, the Prosecutor responded to this request and requested an extension of the time limit to file her response to the appeal brief.[72] On 4 June 2021, the Defence filed a request for leave to reply to the Prosecutor's request.[73]

58. On 8 June 2021, the Appeals Chamber extended the page limit for the Defence to file its appeal brief to 250 pages, and granted the same extension to the Prosecutor for her response.[74] It further set a deadline to 11 June 2021 for any responses to the Prosecutor's request for extension of time,[75] which the Defence and Victims Group 1 filed on that date.[76] It also dismissed as moot the Defence's Request for Leave to Reply.[77]

59. On 11 June 2021, the Appeals Chamber issued a decision on the modalities of victim participation, holding, *inter alia*, that the two groups of participating victims

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[67] Decision on the Presiding Judge of the Appeals Chamber re the Conviction Appeal.
[68] Decision on Time Extension Request for Notice of Appeal.
[69] Decision on Second Request for Time Extension.
[70] Notice of Appeal.
[71] Defence's Request for Page Limit Extension.
[72] Prosecution's Response to Defence's Request for Page Limit Extension. *See also* Victims Group 2's Response to Defence's Request for Page Limit Extension.
[73] Defence's Request for Leave to Reply.
[74] Decision on Page and Time Limit Extensions, para. 15.
[75] Decision on Page and Time Limit Extensions, para. 17.
[76] Defence's Response to Prosecution's Request; Victims Group 1's Response to Prosecution's Request.
[77] Decision on Page and Time Limit Extensions, para. 17.

should file their observations, not exceeding 80 pages each, within 60 days of notification of the appeal brief.[78]

60. On 17 June 2021, the Appeals Chamber extended the time limit for the Prosecutor to file his response to 21 October 2021, and, in line with its Decision on Victims Participation, granted the same extension of time to the participating victims to file their observations on the appeal brief.[79]

61. On 21 July 2021, the Defence filed its Appeal Brief,[80] and on 21 October 2021, the Prosecutor, Victims Group 1 and Victims Group 2 filed their respective responses to the Appeal Brief.[81]

62. On 25 October 2021, the Appeals Chamber issued an order inviting expressions of interest as *amici curiae* in judicial proceedings on the legal questions presented in the order.[82]

63. Between 27 October 2021 and 15 November 2021, 18 *amici curiae* filed requests for leave to submit observations under rule 103 of the Rules.[83]

64. On 17 November 2021, the Appeals Chamber issued an order scheduling a hearing from 14 to 18 February 2022, to hear submissions and observations by the parties and participants on the merits of the appeal.[84]

65. On 24 November 2021, the Appeals Chamber granted leave to 18 individuals or groups of individuals to submit, by 23 December 2021, written observations of no more than 15 pages on the issues identified in paragraph 19 of the Order Inviting Expressions of Interest.[85] The Defence, the Prosecutor and the participating victims were allowed to

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[78] Decision on Victims Participation, paras 6, 8-9.
[79] Decision on Prosecution's Request, para. 18.
[80] Appeal Brief.
[81] Prosecutor's Response; Victims Group 1's Observations; Victims Group 2's Observations.
[82] Order Inviting Expressions of Interest.
[83] Request of ADC-ICT; Request of Dr Behrens; Request of Akenroye *et al.*; Request of Justice Ssekadi; Request of PILPG; Request of Grey *et al.*; Request of Ardila *et al.*; Request of Prof Meyersfeld and SALCT; Request of Mr Batra; Request of Prof Braakman; Request of Ashraph *et al.*; Request of Minkowitz and Fleischner; Request of MINJ; Request of Prof Allain; Request of Arimatsu *et al.*; Request of Oosterveld *et al.*; Request of Gerry *et al.*; Request of Dr Zakerhossein.
[84] Scheduling Order for Hearing.
[85] Decision under Rule 103, paras 18-19, *referring to* Order Inviting Expressions of Interest.

submit consolidated responses, of no more than 25 pages, to the written observations of the *amici curiae*, by 17 January 2022.[86]

66. Between 20 and 23 December 2021, the Appeals Chamber received written observations from the *amici curiae*.[87]

67. On 14 January 2022, the Appeals Chamber granted the Prosecutor's request for an extension of the page limit for his response to the written observations of the *amici curiae* by 5 pages, totalling 30 pages.[88] It also afforded the same extension to the Defence and the participating victims for the filing of their respective responses.[89]

68. On 17 January 2022, the Defence, the Prosecutor, Victims Group 1 and Victims Group 2 filed their respective consolidated responses to the written observations of the *amici curiae*.[90]

69. On 20 January 2022, the Appeals Chamber granted leave to Ms Siobhán Mullally, United Nations Special Rapporteur on trafficking in persons, especially by women and children, to submit observations as *amicus curiae*.[91]

70. On 21 January 2022, Ms Mullally filed her observations.[92]

71. On 28 January 2022, the Defence, the Prosecutor, and Victims Group 1 filed their respective responses to Ms Mullally's observations.[93]

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[86] Decision under Rule 103, para. 22.
[87] Observations of Justice Ssekandi; Observations of Prof Allain; Observations of Dr Zakerhossein; Observations of Gerry *et al.*; Observations of Minkowitz and Fleischner; Observations of NIMJ; Observations of Arimatsu *et al.*; Observations of Ardila *et al.*; Observations of Ashraph *et al.*; Observations of Oosterveld *et al.*; Observations of Clarke *et al.*; Observations of ADC-ICT; Observations of Grey *et al.*; Observations of Mr Batra; Observations of PILPG; Observations of Prof Meyersfeld and SALCT; Observations of Prof Braakman; Observations of Dr Behrens.
[88] Decision on Prosecution's Request for Extension of Pages, para. 11; Prosecution's Request for Extension of Pages.
[89] Decision on Prosecution's Request for Extension of Pages, para. 11.
[90] Defence's Response to the Amici Curiae Observations; Prosecutor's Response to the Amici Curiae Observations; Response of Victims Group 2 to the Amici Curiae Observations; Response of Victims Group 1 to the Amici Curiae Observations.
[91] Decision on Request of Ms Mullally; Request of Ms Mullally.
[92] Observations of Special Rapporteur Mullally.
[93] Response of Victims Group 1 to Ms Mullally's Observations; Defence's Response to Ms Mullally's Observations; Prosecution's Response to Ms Mullally's Observations.

72. On that same date, the Appeals Chamber invited 10 *amici curiae* to participate in the hearing, listed a number of questions on selected issues to be addressed by the parties, the legal representatives of victims, and the *amici curiae* participating in the hearing, and set a schedule for the hearing.[94]

73. On 8 February 2022, the Appeals Chamber issued a revised schedule for the hearing.[95]

74. Between 14 and 18 February 2022, the Appeals Chamber held a hearing, on a partially virtual basis, during which it received submissions from the parties and participants, including a number of *amici curiae*, on the Defence's appeal.[96] These oral submissions were guided by the questions posed by the Appeals Chamber in its directions issued on 28 January 2022.

V. STANDARD OF REVIEW

75. Article 81(1)(a) and (b) of the Statute provides that the Prosecutor or the convicted person, or the Prosecutor on that person's behalf, may appeal on grounds of a procedural error, error of fact, error of law, or any other ground that affects the fairness or reliability of the proceedings or decision. According to article 83(2) of the Statute, the Appeals Chamber may intervene only if it "finds that the proceedings appealed from were unfair in a way that affected the reliability of the decision or sentence, or that the decision or sentence appealed from was materially affected by error of fact or law or procedural error". In the view of the Appeals Chamber, this results in the following standard of review.

A. Errors of law

76. Regarding errors of law, the Appeals Chamber has previously found that

> [it] will not defer to the Trial Chamber's interpretation of the law. Rather, it will arrive at its own conclusions as to the appropriate law and determine whether or not the Trial Chamber misinterpreted the law. If the Trial Chamber

[94] Directions on the Conduct of the Hearing, paras 11, 13-14.
[95] Revised Directions on the Conduct of the Hearing.
[96] T-263; T-264; T-265; T-266; T-267.

committed such an error, the Appeals Chamber will only intervene if the error materially affected the Impugned Decision.[97]

B. Errors of fact

77. In relation to errors of fact, the Appeals Chamber has previously recalled that

> by the terms of article 66(3) of the Statute an accused may only be convicted if a trial chamber is convinced of the guilt of the accused beyond reasonable doubt. Consequently, a trial chamber is required to enter findings to the standard of proof of 'beyond reasonable doubt' in relation to those findings that underpin the charges and upon which a conviction depends. In reviewing factual findings by the trial chamber, the Appeals Chamber will apply the standard of reasonableness […].[98]

78. The Appeals Chamber has further held that

> [i]n the appellate process, it is the role of the Appeals Chamber to review the conviction or acquittal and to ensure that, in arriving at its conclusion, the trial chamber correctly appreciated and applied the standard of beyond reasonable doubt. The Appeals Chamber must ensure that, when making factual findings, the trial chamber carried out a holistic evaluation of the evidence. This is in the sense of assessing in a connected way and weighing of all the relevant evidence taken together, in relation to the fact at issue; rather than evaluating items of evidence without regard to other related evidence. Furthermore, the Appeals Chamber must be satisfied that the trial chamber assessed all factual findings in deciding, pursuant to the applicable law, that the accused person's guilt was established beyond reasonable doubt or that he or she should be acquitted.[99]

79. The Appeals Chamber noted that, "[w]ith these principles in mind", in addressing allegations of factual errors

> the Appeals Chamber will determine whether a trial chamber's factual findings were reasonable in the particular circumstances of the case. In assessing the reasonableness of factual findings, the Appeals Chamber will consider whether the trial chamber's evaluation was consistent with logic, common sense, scientific knowledge and experience, and whether the trial chamber took into account all relevant and connected evidence, and was mindful of the pertinent principles of law (including, as applicable, the standard of proof beyond reasonable doubt). Beyond the foregoing considerations, the Appeals Chamber will not disturb a trial

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[97] *Ntaganda* Appeal Judgment, para. 36; *Gbagbo and Blé Goudé* Appeal Judgment, para. 62, *referring to* *Lubanga* Appeal Judgment, paras 17-18; *Ngudjolo* Appeal Judgment, para. 20; *Bemba* Appeal Judgment, para. 36; *Bemba et al.* Appeal Judgment, para. 99.
[98] *Ntaganda* Appeal Judgment, para. 37; *Gbagbo and Blé Goudé* Appeal Judgment, para. 66.
[99] *Ntaganda* Appeal Judgment, para. 38; *Gbagbo and Blé Goudé* Appeal Judgment, para. 67.

> chamber's factual finding only because it would have come to a different conclusion.[100]

80. It has been further held that

> [w]hen considering alleged factual errors, the Appeals Chamber will allow the deference considered necessary and appropriate to the factual findings of the trial chamber. Such deference is justified by certain considerations that inescapably result from the construction of the Statute. The first consideration is that the Statute has vested the trial chamber with the specific function of conducting the trial. As part of that function and in light of the principle of immediacy, the trial chamber has the primary responsibility to determine the reliability and credibility of the evidence received in the course of the trial and then comprehensively assess the weight of the evidence. In turn, this entails that the trial chamber has the primary responsibility to evaluate the connections and fairly resolve any inconsistencies between the items of evidence received at trial. The trial chamber's function of conducting the trial warrants the presumption that this function has been properly performed, unless and until the contrary is shown. The second consideration is that the Statute requires the appellant to raise specific errors on appeal and the Appeals Chamber reviews the trial chamber's decision through the lens of the errors raised.[101]

81. The Appeals Chamber recalls that nothing in the Statute suggests that an appeal under article 81 in which an error of fact is alleged should automatically contemplate a *de novo* review of the evidence on the record by the Appeals Chamber, in total disregard of the trial chamber's evidentiary assessment,[102] unless there are specific reasons to do so.

82. In this regard, in relation to deference to the factual findings of a trial chamber, the Appeals Chamber noted that

> […] the Appeals Chamber's deference to the factual findings of the trial chamber is not without qualification. The Appeals Chamber may interfere with a trial chamber's factual finding if it is shown to be attended by errors including the following: insufficient support by evidence; reliance on irrelevant evidence; failure to take into account relevant evidentiary considerations and facts; failure properly to appreciate the significance of the evidence on record; or failure to evaluate and weigh properly the relevant evidence and facts. The Appeals Chamber may interfere where it is unable to discern objectively how the trial

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[100] *Ntaganda* Appeal Judgment, para. 39 (footnotes omitted); *Gbagbo and Blé Goudé* Appeal Judgment, para. 68 (footnotes omitted), *referring to* *Lubanga* Appeal Judgment, para. 21, and relevant law and jurisprudence of various national legal systems.
[101] *Ntaganda* Appeal Judgment, para. 40 (footnote omitted); *Gbagbo and Blé Goudé* Appeal Judgment (footnote omitted), para. 69.
[102] *Ntaganda* Appeal Judgment, para. 40; *Gbagbo and Blé Goudé* Appeal Judgment, para. 69.

chamber's conclusion could have reasonably been reached from the evidence on the record.[103]

83. Furthermore, the Appeals Chamber explained that it

> will consider the validity of the challenged factual finding *vis-à-vis* other relevant factual findings in a holistic manner. However, this does not mean that the Appeals Chamber will review the entirety of the evidentiary record. The Appeals Chamber will have regard not only to the arguments put forward by the appellant, but also to the evidence relied upon by the trial chamber and the arguments of all other parties and participants on the point in issue. In assessing the correctness of a factual finding, the trial chamber's reasoning in support thereof is of great significance. In particular, if the supporting evidence appears weak, or if there are significant contradictions in the evidence, deficiencies in the trial chamber's reasoning as to why it found that evidence persuasive may lead the Appeals Chamber to conclude that the finding in question was unreasonable.[104]

84. Finally, the Appeals Chamber has stated that

> [w]here an error of fact is established, the material effect of this error on the trial chamber's decision will have to be assessed, pursuant to article 83(2) of the Statute. Importantly, 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. 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.[105]

C. Procedural errors

85. Regarding procedural errors, the Appeals Chamber has found that

> […] an allegation of a procedural error may be based on events which occurred during the trial proceedings and pre-trial proceedings. However, as with errors of law, the Appeals Chamber will only reverse a […] decision if it is materially affected by the procedural error.[106]

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[103] *Ntaganda* Appeal Judgment, para. 41; *Gbagbo and Blé Goudé* Appeal Judgment, para. 70.
[104] *Ntaganda* Appeal Judgment, para. 42; *Gbagbo and Blé Goudé* Appeal Judgment, para. 71.
[105] *Ntaganda* Appeal Judgment, para. 43; *Gbagbo and Blé Goudé* Appeal Judgment, para. 72.
[106] *Ntaganda* Appeal Judgment, para. 44; *Gbagbo and Blé Goudé* Appeal Judgment, para. 63, *referring to Lubanga* Appeal Judgment, para. 20; *Ngudjolo* Appeal Judgment, para. 21; *Bemba* Appeal Judgment, para. 47; *Bemba et al.* Appeal Judgment, para. 99.

86. Having previously found that procedural errors "often relate to alleged errors in a Trial Chamber's exercise of its discretion",[107] the Appeals Chamber has established that

> […] it will not interfere with the Chamber's exercise of discretion merely because the Appeals Chamber, if it had the power, might have made a different ruling. The Appeals Chamber will only disturb the exercise of a Chamber's discretion where it is shown that an error of law, fact or procedure was made. In this context, the Appeals Chamber has held that it will interfere with a discretionary decision only under limited conditions and has referred to standards of other courts to further elaborate that it will correct an exercise of discretion in the following broad circumstances, namely where (i) it is based upon an erroneous interpretation of the law; (ii) it is based upon a patently incorrect conclusion of fact; or (iii) the decision amounts to an abuse of discretion. Furthermore, once it is established that the discretion was erroneously exercised, the Appeals Chamber has to be satisfied that the improper exercise of discretion materially affected the impugned decision.[108]

87. With respect to the exercise of discretion based upon an alleged erroneous interpretation of the law or an alleged incorrect conclusion of fact, the Appeals Chamber will apply the standard of review with respect to errors of law and errors of fact as set out above.[109] Where a discretionary decision allegedly amounts to an abuse of discretion, the following applies:

> Even if an error […] has not been identified, an abuse of discretion will occur when the decision is so unfair or unreasonable as to "force the conclusion that the Chamber failed to exercise its discretion judiciously". The Appeals Chamber will also consider whether the first instance Chamber gave weight to extraneous or irrelevant considerations or failed to give weight or sufficient weight to relevant considerations in exercising its discretion. The degree of discretion afforded to a Chamber may depend upon the nature of the decision in question.[110]

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[107] *Ntaganda* Appeal Judgment, para. 45; *Gbagbo and Blé Goudé* Appeal Judgment, para. 64, *referring to* *Ngudjolo* Appeal Judgment, para. 21; *Bemba* Appeal Judgment, para. 48; *Bemba et al.* Appeal Judgment, para. 100.
[108] *Ntaganda* Appeal Judgment, para. 45; *Gbagbo and Blé Goudé* Appeal Judgment, para. 64, *referring to* *Bemba* Appeal Judgment, para. 48; *Bemba et al.* Appeal Judgment, para. 100; *Ngudjolo* Appeal Judgment, para. 21; *Kenyatta* OA5 Judgment, para. 22; *Lubanga* Sentencing Appeal Judgment, para. 41; *Ruto and Sang* OA Judgment, paras 89-90; *Kony* OA3 Judgment, paras 79-80.
[109] *Ntaganda* Appeal Judgment, para. 46; *Gbagbo and Blé Goudé* Appeal Judgment, para. 65, *referring to* *Kenyatta* OA5 Judgment, paras 23-24; *Bemba et al.* Appeal Judgment, para. 101.
[110] *Ntaganda* Appeal Judgment, para. 46; *Gbagbo and Blé Goudé* Appeal Judgment, para. 65, *referring to* *Kenyatta* OA5 Judgment, para. 25; *Bemba et al.* Appeal Judgment, para. 101.

D. Substantiation of arguments

88. In relation to the substantiation of arguments, in its most recent final judgments, the Appeals Chamber has held as follows:

> 47. Regulation 58(2) of the Regulations of the Court requires the appellant to refer to "the relevant part of the record or any other document or source of information as regards any factual issue" and "to any relevant article, rule, regulation or other applicable law, and any authority cited in support thereof" as regards any legal issue. It also stipulates that the appellant must, where applicable, identify the finding or ruling challenged in the decision with specific reference to the page and paragraph number.[111]
>
> 48. In addition to these formal requirements, an appellant is obliged to present cogent arguments that set out the alleged error and explain how the trial chamber erred. In 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. In their submissions on appeal, it will be for the parties and participants to 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. Furthermore, in light of article 83(2) of the Statute an appellant is required to demonstrate how the error materially affected the impugned decision. Whether an error or the material effect of that error has been sufficiently substantiated will be determined on a case by case basis.[112]

89. Finally, it was held that

> [w]hen raising an appeal on the ground of unfairness under article 81(1)(b)(iv) of the Statute, 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. If an appellant fails to do so, the Appeals Chamber may dismiss the argument without analysing it in substance.[113]

90. The above standard will guide the Appeals Chamber's determination of the present appeal.

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[111] *Ntaganda* Appeal Judgment, para. 47; *Gbagbo and Blé Goudé* Appeal Judgment, para. 73.
[112] *Ntaganda* Appeal Judgment, para. 48 (footnotes omitted); *Gbagbo and Blé Goudé* Appeal Judgment, para. 74 (footnotes omitted), *referring to* *Lubanga* Appeal Judgment, paras 30-31; *Kony* OA3 Judgment, para. 48.
[113] *Ntaganda* Appeal Judgment, para. 49, *referring to* *Bemba* Dissenting Opinion to Appeal Judgment, para. 386 (footnote omitted).

VI. MERITS

A. Preliminary matters

91. As a preliminary matter, the Appeals Chamber notes that in a number of instances in the Appeal Brief, the Defence "incorporates by reference" arguments made in the Defence Closing Brief or in other filings before the Trial Chamber.[114]

92. According to the Appeals Chamber's well-established jurisprudence, the appellant is required to set out arguments on appeal in the appeal brief. Mere references to arguments developed by the appellant in other filings is inappropriate and the Appeals Chamber has previously found the practice of making such references to be impermissible.[115]

93. The Appeals Chamber recalls that:

> The 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 participant elsewhere. The [incorporation, by reference, of submissions contained in other documents] could also lead […] to a circumvention of the page limits that are stipulated in the Regulations of the Court.[116]

94. Furthermore, the Appeals Chamber recently disapproved of such practice in the *Ntaganda* Case stating that:

> A number of arguments have not been substantiated in the appeal brief and the Appeals Chamber will not consider them as to do so would allow the page limit for the appeal to be circumvented. Therefore, these arguments are dismissed *in limine*.[117]

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[114] *See e.g.* Appeal Brief, paras 15 (grounds of appeal 1-3), 79, 119, 177 (grounds of appeal 5 and 6), 227-232 (grounds of appeal 9-10), 247 (grounds of appeals 14-15).
[115] *Lubanga* OA6 Judgment, para. 29; *Ntaganda* Appeal Judgment, para. 354.
[116] *Lubanga* OA6 Judgment, para. 29.
[117] *Ntaganda* Appeal Judgment, para. 354 (footnote omitted).

95. Importantly, in the present case, the Appeals Chamber has specifically cautioned the Defence against incorporating by reference submissions contained in other documents.[118]

96. The Appeals Chamber is not persuaded by the Defence's argument made during the hearing that, since it did not use the entire 250-page limit for its Appeal Brief, it was permissible for it to incorporate by reference arguments developed in other documents.[119] The suggestion seems to be that incorporation by reference would be permissible if the total number of pages, even with the actual inclusion of such incorporated arguments in the appeal brief, would not exceed the page limit. This is incorrect. Regardless of the number of pages used to present its submissions, the Defence must properly substantiate its grounds of appeal and/or set out its arguments on appeal *in* the appeal brief for the Appeals Chamber to consider them.

97. For these reasons, the Appeals Chamber will generally only consider arguments that are properly developed in the Appeal Brief, and will disregard arguments that the Defence attempts to "incorporate" by reference to other documents in the present judgment.

98. The Appeals Chamber further notes that it has received extensive submissions from the parties, the legal representatives of victims and the *amici curiae* authorised to intervene in the present appeal, both in writing and orally. Only the main arguments raised by the parties and participants are recalled below. Specific arguments will be addressed, where relevant, in the analysis of the grounds of appeal.

99. In this regard, the Appeals Chamber notes that the legal representatives of victims did not make submissions on every ground of appeal. Both teams of legal representatives indicated that in light of the page limit imposed by the Appeals Chamber, they only addressed "selected" grounds of appeal that have a more direct

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[118] Decision on Page and Time Limit Extensions, para. 15 ("the Defence is reminded that 'substantial submissions must be contained within the text of the document itself and that it is impermissible to attempt to incorporate by reference submissions contained in other documents'").
[119] T-263, p. 13, lines 1-20.

interest for the victims that each of them represent.[120] The Appeals Chamber has taken note of this and will not recall it further when addressing the relevant grounds of appeal.

B. Alleged errors concerning Mr Ongwen's right to a fair trial and "other human rights violations"

100. In the first part of the Appeal Brief, the Defence raises a number of alleged violations of Mr Ongwen's rights, which, in its view, were committed throughout the proceedings. In its submission, these violations made a fair trial impossible and resulted in the legitimacy of the Conviction Decision being compromised.[121]

101. The alleged violations raised by the Defence include errors in the conduct of the article 56 proceedings, which took place in the early phase of this case; errors in the procedure in which Mr Ongwen entered a plea of not-guilty; violations of the accused's right to be informed "promptly and in detail" of the charges under article 67(1)(a) of the Statute; errors concerning rulings on documentary evidence; the Trial Chamber's failure to provide Mr Ongwen with relevant translations of documents into Acholi, the language he fully understands and speaks; and the Trial Chamber's discrimination against Mr Ongwen due to his alleged mental disability.[122] The Appeals Chamber will address grounds of appeal 1 to 18, 23, 25 and 45 below. As mentioned above,[123] the Appeals Chamber has in some instances grouped grounds of appeal differently than the Defence has in the Appeal Brief.

1. Alleged violations of Mr Ongwen's rights during his arrest and surrender to the Court

102. Before its submissions on the specific grounds of appeal, the Defence includes in the Appeal Brief a section alleging that "[t]he Chamber erred in finding that no fundamental rights of [Mr Ongwen] were breached during the arrest and surrender".[124]

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[120] Victims Group 1's Observations, para. 4; Victims Group 2's Observations, para. 2. *See also* paras 3-4.
[121] Appeal Brief, para. 269.
[122] Appeal Brief, paras 8-268.
[123] *See* paragraph 38 above. *See also* section II. (Introduction) above.
[124] Appeal Brief, paras 8-11.

(a) Summary of the submissions

103. The Defence submits that during Mr Ongwen's arrest and surrender procedure, "two fundamental rights were violated": Mr Ongwen's right to counsel and his right to remain silent.[125] The following statement, included in a footnote, accompanies these allegations: "Note, the Defence amends it [*sic*] filed Notice of Appeal to include these two violations [*sic*] a ground of appeal".[126]

104. With regard to Mr Ongwen's arrest, the Defence refers to the timeline of the arrest and surrender of Mr Ongwen, annexed to the Defence Closing Brief, and submits that the conduct of the Ugandan and Central African Republic (hereinafter: "CAR") authorities, including questioning Mr Ongwen and asking him to sign documents, took place "on an ICC arrest warrant",[127] and before Mr Ongwen was asked if he wanted legal assistance.[128]

105. Regarding Mr Ongwen's right to remain silent, the Defence argues, by also referring to its submission in the Defence Closing Brief: (i) that a video that was used by P-0446, a mental health expert called by the Prosecutor, was obtained in violation of the Statute and Mr Ongwen's "internationally recognised human rights"; and (ii) that this video, which was part of the materials that P-0446 relied upon to reach her conclusion that Mr Ongwen did not suffer from a mental illness, should "be deemed inadmissible and [should be] excluded".[129]

106. The Prosecutor submits that the Defence's arguments should be dismissed *in limine*.[130] Firstly, the Prosecutor submits that these arguments fall outside the scope of the appeal, as the Defence (i) did not include this issue in the Notice of Appeal and did not seek leave to vary the grounds of appeal to add this issue, pursuant to regulation 61 of the Regulations; and (ii) did not provide any reason or explanation for the late addition of these arguments.[131]

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[125] Appeal Brief, para. 8.
[126] Appeal Brief, fn. 9.
[127] Appeal Brief, para. 10.
[128] Appeal Brief, para. 10.
[129] Appeal Brief, para. 11, *referring, inter alia, to* Defence Closing Brief, paras 57-60.
[130] Prosecutor's Response, paras 11-12.
[131] Prosecutor's Response, para. 11.

107. Secondly, the Prosecutor submits that even if the Appeals Chamber were to consider these additional arguments, they should be rejected because the Defence failed to set out any error or to demonstrate how any such error materially affected the Conviction Decision.[132]

108. Victims Group 1 submit that the Appeals Chamber should dismiss these arguments "at the outset",[133] as the Defence failed to raise them in the Notice of Appeal and did so in the Appeal Brief, without a prior request to modify the grounds of appeal.[134] They submit that, in any event, the Defence "failed to explain the alleged error", and merely "present[ed] a disagreement" with the Chamber's findings, repeating its prior submissions on the issue.[135]

(b) Relevant parts of the Conviction Decision

109. In the Conviction Decision, the Trial Chamber addressed the Defence's arguments concerning alleged violations of Mr Ongwen's rights during his arrest and surrender to the Court.[136] The Trial Chamber found, *inter alia*, that article 55(2) of the Statute, and the rights enumerated therein, did not apply at the time when the alleged violations occurred, *i.e.* at the time Mr Ongwen was in the custody of the Ugandan or CAR authorities.[137] It also found that the facts as brought forward by the Defence and the resulting allegations "would not constitute 'breaches of the fundamental rights [of Mr Ongwen] by his accusers' that would make a fair trial impossible […]".[138]

110. The Trial Chamber also rejected the Defence's arguments concerning the use of a video by P-0446, and the allegation of an infringement of Mr Ongwen's right to remain silent under article 67(1)(g) of the Statute, as he had not been questioned pursuant to article 55(2) of the Statute on that occasion. Furthermore, the Trial Chamber found that the questioning of Mr Ongwen had no nexus to any criminal proceedings, let alone proceedings before the Court.[139]

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[132] Prosecutor's Response, para. 12.
[133] Victims Group 1's Observations, para. 20.
[134] Victims Group 1's Observations, paras 19-20.
[135] Victims Group 1's Observations, para. 20.
[136] Conviction Decision, paras 46-61.
[137] Conviction Decision, paras 50-51.
[138] Conviction Decision, para. 55, *quoting* *Lubanga* OA4 Judgment, para. 37.
[139] Conviction Decision, paras 56-61.

(c) Determination by the Appeals Chamber

111. The Appeals Chamber notes that the present submissions were not included in the Notice of Appeal.[140] As they do not form part of any of the grounds that were set out in the Notice of Appeal, the proper way to introduce them into the Appeal Brief would have been through an application for variation of grounds of appeal under regulation 61 of the Regulations. In this respect, the Appeals Chamber takes note of the Defence's statement made in a footnote which purportedly seeks a variation.[141] However, this footnote does not comply with the procedure set out in regulation 61. Notably, it does not "specify the variation sought and the reasons in support thereof",[142] nor does it indicate when "the reasons warranting [this request] bec[a]me known".[143] Furthermore, despite the extension by the Appeals Chamber of the time limit for seeking variation of the grounds of appeal,[144] the Defence did not file any application therefor. It also did not indicate whether the said footnote is a formal application for variation.

(d) Overall conclusion

112. Accordingly, the Appeals Chamber will disregard these submissions, as they fall outside the scope of the appeal.

2. Grounds of appeal 1-3: Alleged errors related to article 56 proceedings

113. Under grounds of appeal 1 to 3, the Defence raises procedural, legal and evidentiary issues with respect to the article 56 proceedings before the Single Judge of the Pre-Trial Chamber (the "Single Judge") aimed at eliciting testimony of several witnesses in the context of a "unique investigative opportunity".[145] The Appeals Chamber understands the Defence's arguments to raise three main issues: (i) the propriety of a judge's concurrent involvement in the taking of testimony under

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[140] Notice of Appeal.
[141] Appeal Brief, fn. 9.
[142] Regulation 61(1) of the Regulations reads as follows: "An application for variation of grounds of appeal shall state the name and number of the case and shall specify the variation sought and the reasons in support thereof".
[143] Regulation 61(2) of the Regulations reads as follows: "The application for variation shall be filed as soon as the reasons warranting it become known".
[144] Decision related to the translation of the Conviction Decision into Acholi. *See also* Decision on the "Defence Request for Reconsideration of a Decision".
[145] Appeal Brief, paras 12-49.

article 56 of the Statute and the conduct of confirmation proceedings;[146] (ii) alleged procedural irregularities of the proceedings under article 56 in this case;[147] and (iii) the manner in which the Trial Chamber dealt with the Defence's objections to the submission of the evidence obtained under article 56 and its subsequent reliance on that evidence in the Conviction Decision.[148]

(a) Background and relevant parts of the Conviction Decision

114. On 26 June 2015, the Prosecutor requested the Pre-Trial Chamber to order, under article 56 of the Statute, the taking of the testimony of witnesses P-0226 and P-0227.[149] The Prosecutor submitted that resorting to the procedure under article 56 was warranted, as the witnesses were subjected to pressure which might have an impact on their willingness to testify and the content of their testimony.[150]

115. On 27 July 2015, the Single Judge granted the Prosecutor's request.[151] He directed that the testimony of the two witnesses be given under oath before the Pre-Trial Chamber, in the presence of the Prosecutor and the Defence, that it be video recorded and that written transcripts be made and "be available for any future trial".[152] The Single Judge decided that the Defence would be able to participate in the taking of the testimony, including by conducting its questioning after the Prosecutor.[153] He indicated that the testimony thus obtained would be admitted by the Trial Chamber only if it were satisfied that this would not prejudice Mr Ongwen's rights.[154] The Single Judge also held that "[i]f the evidence [were] sought to be presented at the confirmation of charges hearing, [the Pre-Trial Chamber] [would] be bound by essentially the same rules as concerns the guaranteeing of [the] defence rights".[155] The Single Judge rejected the Defence's argument that the taking of the testimony under article 56 would require the Prosecutor to first plead "new counts", noting that measures under article 56 could be taken even before a person was arrested or appeared before the Court in response to a

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[146] Appeal Brief, paras 21, 28, 30-31, 37-38.
[147] Appeal Brief, paras 13-14, 16-18, 30-34, 38-42.
[148] Appeal Brief, paras 42-49.
[149] Prosecutor's First Request under Article 56.
[150] Prosecutor's First Request under Article 56, paras 1-2, 6-8, 14-17, 38.
[151] Decision on Prosecutor's First Request under Article 56, p. 9.
[152] Decision on Prosecutor's First Request under Article 56, para. 9.
[153] Decision on Prosecutor's First Request under Article 56, para. 11.
[154] Decision on Prosecutor's First Request under Article 56, para. 12.
[155] Decision on Prosecutor's First Request under Article 56, para. 12.

summons.[156] The Single Judge also observed that the article 56 procedure was "aimed at collecting evidence in the presence of a risk that it would not be subsequently available" and that "[w]hether any such evidence would eventually be used in the present proceedings or, potentially, in any separate proceedings [was] irrelevant".[157]

116. On 11 August 2015, the Single Judge rejected the Defence's request for leave to appeal the Decision on Prosecutor's First Request under Article 56, on, *inter alia*, the issue of whether "two statements would be enough information for the Defence to participate meaningfully in the taking of testimony of persons which are testifying completely to alleged actions which are in no way described in the Prosecution's application for an arrest warrant or the arrest warrant".[158]

117. On 18 September 2015, the Prosecutor filed the Notice of Intended Charges, which included charges of sexual and gender-based crimes against seven of the eventual article 56 witnesses.[159]

118. On 2 October 2015, the Prosecutor made a second request pursuant to article 56 of the Statute in relation to witnesses P-0099, P-0101, P-0198, P-0214, P-0235 and P-0236.[160]

119. On 5 October 2015, the Prosecutor filed a request to supplement the Notice of Intended Charges by including a concise statement of the account of witness P-0236 and the corresponding legal characterisation of the facts.[161]

120. On 12 October 2015, the Single Judge granted the Prosecutor's Second Request under Article 56 and directed that the testimony of the six witnesses be taken following the same procedure as the one set out in the Decision on Prosecutor's First Request under Article 56.[162]

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[156] Decision on Prosecutor's First Request under Article 56, para. 4.
[157] Decision on Prosecutor's First Request under Article 56, para. 4.
[158] Decision on Request for Leave to Appeal Decision under Article 56, paras 4, 9-13, p. 9.
[159] Notice of Intended Charges. *See also* Prosecutor's Response, para. 18.
[160] Prosecutor's Second Request under Article 56.
[161] Request to Supplement the Notice of Intended Charges, paras 2, 8-9, 11.
[162] Decision on Prosecutor's Second Request under Article 56, paras 10, 13, p. 10-11.

121. On 15 October 2015, the Single Judge granted the Prosecutor's Request to Supplement the Notice of Intended Charges, noting that "the factual basis and legal characterisation of the additional intended charges are very similar to the crimes and facts included in the Notice with respect to seven other women".[163]

122. In September and November 2015, the Single Judge, pursuant to article 56 of the Statute, heard witnesses P-0099, P-0101, P-0214, P-0226, P-0227, P-0235 and P-0236, in the presence of the Prosecutor and the Defence.[164]

123. On 10 August 2016, the Trial Chamber granted the Prosecutor's request to admit the transcripts and audio-visual recordings of the article 56 witnesses' testimony, as well as related items used during their examinations (hereinafter: "Article 56 Evidence"), pursuant to articles 56(4) and 69(4) of the Statute[165] and recognised the Article 56 Evidence as formally submitted.[166] The Trial Chamber noted, in relation to an argument raised by the Defence, that there is no requirement that measures under article 56 of the Statute be taken after the notification of the charges or disclosure of evidence.[167] The Trial Chamber also noted that before the testimony of the article 56 witnesses was taken, the Defence had received (i) the witnesses' prior statements, which provided notice of the nature and content of their prospective testimony, and (ii) information on the nature and scope of the relevant charges.[168]

124. In its closing brief, the Defence argued that it had not been informed of the charges for which the Article 56 Evidence was taken,[169] that the "dual role" of the Single Judge had "the appearances of impropriety",[170] and that the Single Judge had precluded the Defence from raising objections.[171]

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[163] Decision on the Prosecutor's Request to Supplement the Notice of Intended Charges, paras 9-10, p. 5.
[164] T-8; T-9; T-10; T-11; T-13; T-14; T-15; T-16; T-17; T-18.
[165] Request to Admit Article 56 Evidence.
[166] Decision on Article 56 Evidence, p. 9.
[167] Decision on Article 56 Evidence, para. 12.
[168] Decision on Article 56 Evidence, para. 13.
[169] Defence Closing Brief, para. 63.
[170] Defence Closing Brief, para. 64.
[171] Defence Closing Brief, para. 65.

125. In the Conviction Decision, the Trial Chamber addressed the Defence's challenges to the Article 56 Evidence. Regarding Mr Ongwen's right to be informed of the charges, the Trial Chamber held that:

> Article 56 of the Statute, dealing with 'unique investigative opportunity' and placed within Part 5 of the Statute, is not limited to certain procedural stages. In fact, evidence may be preserved under that provision even before the surrender or voluntary appearance of the person concerned. Accordingly, the Defence interpretation which seeks to require the submission of charges before action in relation to a unique investigative opportunity is taken is without merit.[172]

126. With respect to the argument of the "dual role" of the Single Judge, the Trial Chamber stated that the Defence failed to explain wherein the purported conflict of interest lies.[173] Finally, the Trial Chamber rejected the Defence's assertion that it was precluded from raising objections, noting that this assertion is based on a false interpretation of the Single Judge's statement.[174]

(b) The propriety of a judge's concurrent involvement in the taking of testimony under article 56 of the Statute and the conduct of confirmation proceedings

(i) Summary of the submissions

127. The Defence challenges the "dual role" of the Single Judge, who took testimony of witnesses pursuant to article 56 of the Statute and concurrently participated in the confirmation of charges proceedings as one of the judges of the Pre-Trial Chamber.[175] It questions the propriety of the Single Judge's participation in the proceedings committing Mr Ongwen to trial, while he actively participated in the collection of evidence for the purpose of that trial.[176] The Defence submits that this "dual role" created a "strong perception of a conflict of interest and lack of independence and neutrality",[177] and that this "significantly compromised" the integrity of the proceedings and violated Mr Ongwen's right to a fair trial.[178] The Defence argues that the Single Judge did not demonstrate "the utmost vigilance" to avoid unduly affecting

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[172] Conviction Decision, para. 64.
[173] Conviction Decision, para. 65 (footnote omitted).
[174] Conviction Decision, para. 66.
[175] Appeal Brief, paras 21, 38.
[176] Appeal Brief, para. 37.
[177] Appeal Brief, para. 30.
[178] Appeal Brief, para. 37.

the rights of Mr Ongwen.[179] Furthermore, it submits that the Pre-Trial Chamber did not provide a reasoned statement in relation to the appointment of one judge to oversee both proceedings.[180]

128. The Prosecutor argues that the Trial Chamber correctly rejected the Defence's arguments regarding the alleged conflict of interest on account of the "dual role" of the Single Judge and that the Statute expressly permits such a situation.[181] The Prosecutor submits that, as demonstrated by relevant domestic jurisdictions, a judge's role in overseeing the taking of article 56 testimony is not conflicted by serving on the pre-trial chamber that determines whether to confirm the charges on the basis of that evidence.[182]

129. Victims Group 1 argue that the Defence repeats its arguments presented at trial and fails to explain how the Trial Chamber erred in considering those arguments.[183] They aver that the Statute does not prevent the appointment of the same judge to conduct article 56 proceedings and preside over the confirmation of charges proceedings, and that such appointment does not *per se* create a conflict of interest.[184]

(ii) Determination by the Appeals Chamber

130. The Defence challenges the "dual role" of the Single Judge in taking the testimony of witnesses under article 56 of the Statute and concurrently conducting the confirmation of charges proceedings.[185]

131. The Appeals Chamber notes at the outset that the Defence previously raised these issues before the Trial Chamber, which ruled upon them.[186] Contrary to the requirements of substantiation,[187] the Defence does not identify any error in the Trial Chamber's findings regarding the Defence's challenge to the "dual role" of the Single

[179] Appeal Brief, para. 28.
[180] Appeal Brief, paras 30-31.
[181] Prosecutor's Response, paras 22-23.
[182] Prosecutor's Response, para. 23.
[183] Victims Group 1's Observations, paras 21-22.
[184] Victims Group 1's Observations, paras 28-30.
[185] Appeal Brief, para. 38.
[186] Conviction Decision, para. 65.
[187] *See* *Ntaganda* Appeal Judgment, para. 95.

Judge. Rather, it merely avers that the Trial Chamber "sidestepped [the] violation" of Mr Ongwen's rights and did not provide a reasoned statement.[188]

132. The Trial Chamber found the Defence's arguments to be without merit and that the Defence failed to explain where the purported conflict between the two roles of the Single Judge lay.[189] The Appeals Chamber finds no error in the Trial Chamber's approach, for the reasons that follow.

133. Article 56(1)(a) of the Statute provides for a procedure in relation to a unique investigative opportunity:

> Where the Prosecutor considers an investigation to present a unique opportunity to take testimony or a statement from a witness or to examine, collect or test evidence, which may not be available subsequently for the purposes of a trial, the Prosecutor shall so inform the Pre-Trial Chamber.

134. Article 56(1)(b) of the Statute sets out the pre-trial chamber's role in case a unique investigative opportunity arises:

> In that case, the Pre-Trial Chamber may, upon request of the Prosecutor, take such measures as may be necessary to ensure the efficiency and integrity of the proceedings and, in particular, to protect the rights of the defence.

135. Among the measures available to the pre-trial chamber and referred to in article 56(1)(b), article 56(2) of the Statute lists:

> (a) Making recommendations or orders regarding procedures to be followed;
>
> (b) Directing that a record be made of the proceedings; […]
>
> (d) Authorizing counsel for a person who has been arrested, or appeared before the Court in response to a summons, to participate, or where there has not yet been such an arrest or appearance or counsel has not been designated, appointing another counsel to attend and represent the interests of the defence;
>
> (e) Naming 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;
>
> (f) Taking such other action as may be necessary to collect or preserve evidence.

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[188] Appeal Brief, para. 30.
[189] Conviction Decision, para. 65.

136. As expressly stated in article 56(1)(b) of the Statute, the purpose of this provision is to ensure the efficiency and integrity of the proceedings and, in particular, to protect the rights of the defence. Article 56 of the Statute provides an avenue to collect or preserve testimony or evidence so that it may later be used at trial. Whether it will be ultimately relied upon, and how much weight it will be given, is for the trial chamber to decide. Pursuant to article 56(4) of the Statute, "[t]he admissibility of evidence preserved or collected for trial pursuant to this article, or the record thereof, shall be governed at trial by article 69, and given such weight as determined by the Trial Chamber".

137. The title of article 56 reads: "Role of the *Pre-Trial Chamber* in relation to a unique investigative opportunity".[190] Another provision that appears in the same part of the Statute as article 56,[191] is article 61(7), which indicates that the pre-trial chamber "shall, on the basis of the hearing, determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged". It is thus clear that, what the Defence refers to as "dual role", is expressly provided for by the Statute. Both article 56 proceedings and the confirmation of charges are statutory roles of the pre-trial chamber.

138. There is nothing in the applicable law to suggest that a judge of the pre-trial chamber who has participated in a unique investigative opportunity should be excluded from subsequent proceedings during the pre-trial phase. On the contrary, all these procedural steps are part of the same pre-trial phase, of which the same pre-trial chamber is in charge. This is notable, in particular when viewed in light of article 39(4) of the Statute, which expressly provides for the exclusion of a pre-trial judge in other circumstances.[192] The Defence fails to explain, as correctly noted by the Trial Chamber,[193] where the purported conflict arises.

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[190] Emphasis added.
[191] Part 5: "Investigation and prosecution".
[192] Article 39(4) of the Statute reads, in its relevant part: "Nothing in this article shall, however, preclude the temporary attachment of judges from the Trial Division to the Pre-Trial Division or vice versa, if the Presidency considers that the efficient management of the Court's workload so requires, provided that *under no circumstances shall a judge who has participated in the pre-trial phase of a case be eligible to sit on the Trial Chamber hearing that case*" (emphasis added).
[193] Conviction Decision, para. 65.

139. The Defence also takes issue with the Single Judge's "active participation" in the collection of evidence[194] and failure to demonstrate "the utmost vigilance" to avoid unduly affecting the rights of Mr Ongwen.[195] The Appeals Chamber finds these arguments unpersuasive. As discussed above, article 56 of the Statute expressly provides for judicial intervention in an investigation. Specifically, article 56(1)(b) and 56(2) of the Statute provide for the pre-trial chamber's power to participate in article 56 proceedings. For instance, article 56(2)(e) empowers the pre-trial chamber to name one of its members to observe and make orders regarding the questioning of persons. Pursuant to article 56(2)(f), the pre-trial chamber may take "such other action as may be necessary to collect or preserve evidence". Moreover, article 56(3)(a) of the Statute allows the pre-trial chamber to take measures under article 56(2) on its own initiative in case the Prosecutor has not sought such measures.

140. The Appeals Chamber is equally unpersuaded by the Defence's argument that the Single Judge ought to have exercised his powers under article 56 of the Statute with "the utmost vigilance".[196] The Defence does not explain why and how such vigilance must be exercised. Furthermore, in support of its argument, the Defence relies on the *Yekatom and Ngaïssona* Amendment Decision, which, however, is not relevant to the present case. That decision concerned the Prosecutor's request for an amendment to the charges, which was rejected, and a notice of intention to add further charges.[197] It is with respect to the latter that Pre-Trial Chamber II stressed the need to "exercise the utmost vigilance to avoid that the Prosecutor's statutory prerogatives are exercised in such a way as to unduly detrimentally affect the fundamental rights of the Defence".[198] However, this is irrelevant to the present issue of the Pre-Trial Chamber purportedly exercising the prerogatives of the Prosecutor in the context of a unique investigative opportunity.

141. The Appeals Chamber also finds no merit in the Defence's argument that the Pre-Trial Chamber did not provide a reasoned statement in relation to the appointment of one judge to oversee two sets of proceedings.[199] As discussed above, the Pre-Trial

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[194] Appeal Brief, para. 37.
[195] Appeal Brief, para. 28.
[196] Appeal Brief, para. 28.
[197] *Yekatom and Ngaïssona* Amendment Decision, paras 14-38.
[198] *Yekatom and Ngaïssona* Amendment Decision, para. 38.
[199] Appeal Brief, paras 30-31.

Chamber's power to oversee the taking of testimony under article 56 and the confirmation proceedings is expressly regulated by the Statute. The Defence has not shown why the Pre-Trial Chamber should have provided additional reasons for exercising its statutory powers, beyond those already set out in the Decision on Prosecutor's First Request under Article 56 and the Decision on Prosecutor's Second Request under Article 56.

(c) Alleged procedural irregularities of the proceedings under article 56 in this case

(i) Summary of the submissions

142. The Defence submits that it did not receive notice of the charges which were the subject of the unique investigative procedure.[200] It also challenges "a procedural bar to objections" in relation to the proceedings, imposed by the Single Judge.[201] Furthermore, the Defence argues that the involvement of the Single Judge went beyond the measures mandated by article 56(2)(e) of the Statute and included active participation in the collection of evidence for purposes of the confirmation of charges proceedings, "causing significant prejudice and compromising the integrity of the trial".[202]

143. The Prosecutor submits that the Trial Chamber correctly rejected the Defence's arguments regarding the alleged insufficient notice of the charges related to the article 56 proceedings and that the Defence was given ample notice.[203] Regarding the Single Judge's participation in the collection of evidence, the Prosecutor argues that the limited interventions of the Single Judge during the taking of the article 56 testimony did not amount to "active participation".[204] The Prosecutor contends that the Defence mischaracterises the Single Judge's pronouncements regarding the use of the Article 56 Evidence.[205] He submits that, contrary to the argument of the Defence, the Single Judge did not impose a procedural bar to objections, but merely stated an expectation that the parties would not raise any.[206]

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[200] Appeal Brief, paras 13-14, 16-18.
[201] Appeal Brief, paras 32-34.
[202] Appeal Brief, paras 38-42.
[203] Prosecutor's Response, paras 14, 16-18.
[204] Prosecutor's Response, para. 26.
[205] Prosecutor's Response, para. 28.
[206] Prosecutor's Response, para. 29.

144. Victims Group 1 submit that the Defence was provided with sufficient information necessary to safeguard Mr Ongwen's rights and that the Court's legal texts do not require that the Prosecutor give notice of the charges, which are the subject of the unique investigative procedure, to the suspect.[207] They argue that the statements of the Single Judge made during the taking of article 56 testimony, and referred to by the Defence, do not show bias.[208] Victims Group 1 submit that, contrary to the Defence's assertion, it was not prevented from making any specific submissions regarding the article 56 proceedings.[209]

(ii) Determination by the Appeals Chamber

145. The Appeals Chamber notes that the Defence incorporates by reference submissions made in another filing.[210] For the reasons set out earlier in this Judgment,[211] the Appeals Chamber will address only those arguments that are developed under the present ground of appeal.

146. The Defence submits that Mr Ongwen did not receive notice of the charges which were the subject of the unique investigative procedure and that his right to prepare his defence had been violated.[212] The Appeals Chamber is not persuaded by this argument. First, the Appeals Chamber notes that Mr Ongwen did receive ample notice as regards the evidence that the witnesses would provide prior to them giving testimony. The Single Judge granted the Prosecutor's two requests for the taking of testimony under article 56 of the Statute after ascertaining that the Prosecutor had provided sufficient information. Indeed, the Single Judge emphasised "the need to allow the Defence sufficient time to prepare in order to be able to meaningfully participate in the taking of the testimony and fully exercise its […] rights".[213] He acknowledged that the Prosecutor had disclosed the statements of the witnesses who were to testify under article 56 to the Defence.[214]

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[207] Victims Group 1's Observations, paras 26-27.
[208] Victims Group 1's Observations, paras 31-32.
[209] Victims Group 1's Observations, para. 33.
[210] Appeal Brief, para. 15.
[211] *See* paragraph 97 above. *See also* section V.D. (Substantiation of arguments) above.
[212] Appeal Brief, paras 13-14, 16-18.
[213] Decision on Prosecutor's First Request under Article 56, para. 13.
[214] Decision on Prosecutor's First Request under Article 56, para. 14; Decision on Prosecutor's Second Request under Article 56, para. 15.

147. Second, the Appeals Chamber notes that around the time the taking of testimony began, the Prosecutor filed the Notice of Intended Charges, containing references to most of the witnesses who were to give testimony under article 56 and detailing the related crimes which the Prosecutor intended to include in the Document Containing the Charges.[215] This notice related to the Prosecutor's prior information to the Pre-Trial Chamber about ongoing additional investigations into, *inter alia*, sexual and gender-based crimes[216] and a related order of the Single Judge for the Prosecutor to provide a formal notice of additional crimes.[217] Furthermore, the Appeals Chamber notes that when informing the Single Judge and the Defence of those investigations, the Prosecutor made it clear that sexual and gender-based crimes would be included in the charges.[218] Shortly after filing the Notice of Intended Charges, the Prosecutor filed a request to supplement that notice by including reference to another of those witnesses,[219] which was granted by the Single Judge.[220]

148. Moreover, if the Defence is to be understood to argue that no article 56 proceedings could have been conducted before it received a detailed notice of all charges against Mr Ongwen, the Appeals Chamber takes note of, and concurs with, the Trial Chamber's finding that under article 56 of the Statute, "evidence may be preserved […] even before the surrender or voluntary appearance of the person concerned".[221] The Appeals Chamber observes in this respect that article 56(2)(d) of the Statute specifically refers to the possibility of taking article 56 measures "where there has not yet been […] an arrest or appearance". It is thus clear that such measures may be taken before the Prosecutor has provided the person with the document containing the charges pursuant to article 61(3)(a) of the Statute. The Appeals Chamber also recalls that "the facts and circumstances described in the charges […] [are] delineated in the course of the pre-trial proceedings, starting with the warrant of arrest or the summons to appear".[222] Therefore, in cases such as the present one, where article 56 measures are taken after the warrant of arrest has been issued, but before the provision of the

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[215] Notice of Intended Charges.
[216] T-5, p. 18, lines 20-24, p. 23, lines 16-19.
[217] T-6, p. 10, lines 12-13.
[218] T-5, p. 23, lines 16-19.
[219] Request to Supplement the Notice of Intended Charges, paras 2, 8-9, 11.
[220] Decision on the Prosecutor's Request to Supplement the Notice of Intended Charges, p. 5.
[221] Conviction Decision, para. 64.
[222] *Ntaganda* Appeal Judgment, para. 325.

document containing the charges, notice to the suspect is included in the warrant of arrest and, if required, in any subsequent communication from the Prosecutor. The provision of the document containing the charges is certainly not a pre-condition for instituting article 56 proceedings.

149. The Defence further argues that the Single Judge imposed "a procedural bar to objections" in relation to the article 56 proceedings.[223] It also submits that the Trial Chamber rejected its arguments on this issue without providing a reasoned statement.[224]

150. As discussed above, the Trial Chamber considered the argument of the Defence that it was precluded from raising objections during the article 56 proceedings and rejected it, as, according to the Trial Chamber, the Defence relied on a false interpretation of the Single Judge's statement.[225] For the reasons that follow, the Appeals Chamber finds no error in this finding of the Trial Chamber.

151. The Defence's argument concerns the following statement made by the Single Judge at the beginning of the taking of testimony of one of the article 56 witnesses:

> 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 Trial Chamber in the course of any trial, I expect no preliminary procedural issues as to the nature, scope and purpose of this hearing.[226]

152. The Appeals Chamber fails to see how this statement of the Single Judge can be interpreted as a bar to objections. The statement merely expresses an *expectation* that the parties would not be likely to raise procedural issues, given that all such matters had been addressed before. The Trial Chamber therefore correctly found the Defence's interpretation of the Single Judge's words to be "false". The Trial Chamber also correctly noted that there was no indication that the Defence had actually been prevented from making specific submissions in relation to the article 56 proceedings.[227]

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[223] Appeal Brief, paras 32-34.
[224] Appeal Brief, para. 33.
[225] Conviction Decision, para. 66.
[226] T-8, p. 4, lines 5-8.
[227] Conviction Decision, para. 66, *referring to* specific submissions on this issue filed by the Defence.

153. The Defence further refers to interventions of the Single Judge during the taking of testimony under article 56 and argues that his participation went beyond "observing and making recommendations" mandated by article 56(2)(e) of the Statute.[228]

154. The Defence challenges the following interventions made by the Single Judge during the parties' questioning of witnesses:

a. during the testimony of P-0101, the Single Judge said: "Excuse me. Before the next question, I just want to raise a question I have. You were talking about … asked about 1994 and I think it's about ten years earlier";[229]

b. during the testimony of P-0214, the Single Judge said: "Yes. I just wanted to put the picture clear. […] The problem about the dates 2002 or 2004, because I think there is some discrepancy because if Pajule was in 2003 and it was insisted this morning that the witness was given to Ongwen in 2004, but it seems that it's 2002, so I would just ask the parties maybe to put some questions […] to the witness in order to clarify what happened. Otherwise I'll do it";[230]

c. during the testimony of witness P-0226, in response to an exchange between the parties on the question whether the witness, who stated that she was 12 years old at the relevant time, would not be criminally responsible for certain acts and the issue of self-incrimination would not arise,[231] the Single Judge said: "[…] [b]ut I think I said that it's quite evident that she was under … far under 18 years old at that time. […]";[232] and

d. during the testimony of witness P-0226, in the course of questioning of the witness on whether she had been beaten for "about two weeks" or "about one week", the Single Judge said to Defence counsel: "You may rest assured, counsel, that we do appreciate this. But I think […] all these things have been lived by a small girl, seven, eight, nine years old. Now about 15 years have passed. […] they must be read also a little bit we would say in Latin *cum grano salis*, with a little bit of salt. So […] it's not literally one week or two week. […]".[233]

155. The Appeals Chamber notes that the first two interventions were meant to clarify what appear to be obvious mistakes in dates. Furthermore, on one of these occasions the Single Judge asked the parties to explore the matter with the witness,[234] rather than

[228] Appeal Brief, paras 38-42.
[229] T-13, p. 29, lines 9-11.
[230] T-15, p. 42, lines 5-11.
[231] T-8, p. 59, line 17 to p. 60, line 22.
[232] T-8, p. 60, lines 23-25.
[233] T-9, p. 40, lines 5-10.
[234] T-15, p. 42, lines 5-11.

addressing the witness directly. In the intervention described under (c) above, the Single Judge merely addressed the parties on an issue that they discussed. Similarly, the intervention under (d) was directed at Defence counsel. In both (c) and (d), the Single Judge's intervention had no impact on the ongoing examination of the witnesses. Furthermore, none of the interventions of the Single Judge went beyond the scope of the measures set out in article 56(2) of the Statute. The Defence also fails to demonstrate how these interventions "greatly influenced the confirmation and trial proceedings".[235]

156. Accordingly, the Defence's argument on this point is rejected.

(d) The manner in which the Trial Chamber dealt with the Defence's objections to the submission of the evidence obtained under article 56 and its subsequent reliance on that evidence in the Conviction Decision

(i) Summary of the submissions

157. The Defence argues that the Trial Chamber failed to provide a reasoned statement on a number of objections regarding the evidence obtained pursuant to article 56 of the Statute.[236] It also submits that the Trial Chamber impermissibly relied on the evidence of article 56 witnesses to convict Mr Ongwen.[237]

158. The Prosecutor argues that the Trial Chamber provided adequate reasoning with respect to the status of the Article 56 Evidence.[238] Regarding the Trial Chamber's reliance on the Article 56 Evidence, the Prosecutor notes that the Defence raises the same arguments under grounds of appeal 6, 66, 67, 87, 89 and 90, and that they should be rejected for reasons set out in respect of those grounds.[239]

(ii) Determination by the Appeals Chamber

159. The Defence argues that the Trial Chamber failed to provide a reasoned statement on a number of objections[240] and on the "status of witnesses".[241] However, it is unclear

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[235] Appeal Brief, para. 42.
[236] Appeal Brief, paras 43-44.
[237] Appeal Brief, paras 45-49.
[238] Prosecutor's Response, para. 30.
[239] Prosecutor's Response, para. 31.
[240] The Defence refers to the following objections: "the irregular status of the evidence, the prejudice of admission, and failing to exclude the evidence pursuant to Article 69(7) of the Statute", and "the procedural violations by the non-compliance with Article 56(1)(a) and (2)(a) and (e) of the Statute by the Single Judge of the Pre-Trial Chamber" (Appeal Brief, para. 43).
[241] Appeal Brief, paras 43-44.

from the Appeal Brief what error the Defence alleges. Other than listing general subject-matters of objections which, it submits, the Trial Chamber failed to consider, the Defence does not specify what exactly those objections were and how the alleged failure to consider them prejudiced Mr Ongwen. Similarly, the Defence merely states that the Trial Chamber failed to provide a reasoned statement on the status of article 56 witnesses, without identifying any error in the Decision on Article 56 Evidence and the alleged resulting prejudice.

160. At any rate, the Appeals Chamber notes that in the Decision on Article 56 Evidence, the Trial Chamber duly considered a number of objections raised by the Defence, including its submissions that "there is no statutory avenue for the admission of the [Article 56 Evidence]",[242] as well as the Defence's challenges under article 69(7) of the Statute to the Single Judge's findings on the requirements of article 56(1)(a) and 56(2) and his authority to hear the article 56 witnesses' testimony.[243]

161. The Defence further submits that the Trial Chamber: (i) relied on the evidence of article 56 witnesses, which fell outside the temporal scope of the charges,[244] and (ii) relied on evidence of crimes as corroboration.[245] The Appeals Chamber, however, notes that the Defence fails to identify any error under this heading. The Appeals Chamber also recalls that the testimony of article 56 witnesses was taken in the presence of the Defence, who could question the witnesses,[246] and that transcripts of that testimony were prepared.

162. Furthermore, the Defence's submissions on this issue resemble arguments raised under other grounds of the appeal. In particular, the Trial Chamber's reliance on facts falling outside the period relevant to the charges is challenged under grounds of appeal 6, 87, 88 and 89. As these arguments are developed in a more detailed and clear manner under those grounds, the Appeals Chamber will not consider them under the present grounds of appeal.

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[242] Decision on Article 56 Evidence, para. 6.
[243] Decision on Article 56 Evidence, paras 8-10.
[244] Appeal Brief, para. 46.
[245] Appeal Brief, paras 47-49.
[246] Decision on Prosecutor's First Request under Article 56, para. 11.

(e) Overall conclusion

163. In view of the foregoing, the Appeals Chamber rejects grounds of appeal 1, 2 and 3.

3. Ground of appeal 4: Alleged errors regarding the legality of Mr Ongwen's plea of not guilty

164. Under this ground of appeal, the Defence contends that Mr Ongwen's fair trial rights were violated by the Trial Chamber's failure to ensure, pursuant to article 64(8)(a) of the Statute, that he understood the nature of the charges against him and proceeded to trial on an "illegal plea" of not guilty.[247]

165. The Defence asserts, *inter alia*, that: (i) the manner in which the charges were read out and the Trial Chamber's questioning of Mr Ongwen as to whether he understood the charges;[248] (ii) the lack of a full Acholi translation of the Confirmation Decision at the time of the plea;[249] and (iii) Mr Ongwen's mental disability prevented him from understanding the charges and resulted in the trial commencing on the basis of an "illegal plea".[250]

166. The Appeals Chamber will address these arguments in turn.

(a) Background

167. On 21 December 2015, the Prosecutor filed the Document Containing the Charges.[251] An Acholi translation was notified to Mr Ongwen on the same day.[252]

168. On 21 January 2016, during the confirmation of charges hearing, Mr Ongwen confirmed that he had read and understood the Acholi translation of the Document Containing the Charges.[253]

169. On 6 December 2016, at the commencement of the trial and in accordance with the Trial Chamber's directions,[254] the Court Officer read out the charges with

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[247] Appeal Brief, paras 50-76.
[248] Appeal Brief, paras 58-68.
[249] Appeal Brief, para. 59.
[250] Appeal Brief, paras 69-76.
[251] Document Containing the Charges.
[252] Acholi Translation of Document Containing the Charges.
[253] T-20, p. 6, lines 5-14.
[254] Directions on the Conduct of the Proceedings, para. 6.

simultaneous interpretation into Acholi.[255] Thereafter, the Presiding Judge questioned Mr Ongwen to ascertain whether he understood the charges, enquiring in particular, as to whether he recalled saying at the start of the confirmation of charges hearing that he had read and understood the Document Containing the Charges.[256]

170. After confirming that he had received the charges (*i.e.* the Document Containing the Charges) in Acholi and reiterating that he, Mr Ongwen, was not the LRA,[257] the Trial Chamber deliberated for approximately 15 minutes on the question of whether Mr Ongwen understood the nature of the charges and thereafter concluded that he had.[258] In particular, the Trial Chamber stated that

> Mr Ongwen's remarks that the LRA 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.[259]

171. Thereafter, the Presiding Judge proceeded to ascertain whether Mr Ongwen intended to admit guilt with respect to any of the charges.[260] Mr Ongwen responded that "[i]n the name of God, I deny all these charges in respect to the war in northern Uganda" and thereafter confirmed that he pleaded not guilty.[261]

172. Before proceeding to hear the opening statements of the parties and participants, the Presiding Judge enquired, pursuant to rule 134(2) of the Rules, whether the parties had any remaining objections or observations concerning the conduct of the proceedings that had arisen since the confirmation hearing.[262] In this regard, the Defence stated that it would raise issues relating to the specificity of the charges "as the occasion arises in the course of the trial".[263]

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[255] T-26, p. 8, line 23 to p. 16, line 10.
[256] T-26, p. 16, line 13 to p. 17, line 1.
[257] T-26, p. 17, lines 9-14 (Mr Ongwen: "Yes, I did receive the charges in Acholi, but I reiterate it is the LRA who abducted people in northern Uganda. The LRA killed people in northern Uganda. LRA committed atrocities in northern Uganda, and I'm one of the people against whom the LRA committed atrocities. But it's not me, [Mr] Ongwen, personally, who is the LRA").
[258] T-26, p. 17, lines 15-19, 23 to p. 20, line 2.
[259] T-26, p. 19, line 22 to p. 20, line 2.
[260] T-26, p. 20, line 25 to p. 21, line 1.
[261] T-26, p. 21, lines 2-6.
[262] T-26, p. 21, lines 13-16.
[263] T-26, p. 21, line 22 to p. 22, line 4.

(b) Alleged errors relating to the reading of the charges and the Trial Chamber's questioning of Mr Ongwen

(i) Summary of the submissions

173. First, the Defence argues that the charges were not read out in their entirety to Mr Ongwen.[264] It avers that while the crimes, the approximate dates and the places of their alleged commission were mentioned, the alleged modes of liability were not, resulting in Mr Ongwen having no information as to what his role in the alleged crimes was.[265] The Defence further argues that after hearing Mr Ongwen's statements, the Trial Chamber failed to "ask him if he understood the charges and the modes of liability or if any further reading was necessary, in contradiction [of] its own [Directions on the Conduct of Proceedings]".[266]

174. As to the questioning of Mr Ongwen by the Trial Chamber to ascertain whether he understood the charges, the Defence argues that the Trial Chamber erroneously relied on Mr Ongwen's understanding of the charges as enumerated in the Document Containing the Charges, which had been given to him in December 2015, instead of the Confirmation Decision which had been filed in March 2016, with certain modifications.[267] Furthermore, the Defence alleges that the Trial Chamber erred in finding that Mr Ongwen had understood the confirmed charges based on a statement of understanding that he had made in January 2016 when the charges enumerated in the Document Containing the Charges were not yet confirmed.[268] Moreover, the Defence argues that the Trial Chamber erroneously rejected its argument that Mr Ongwen did not understand the charges given his statement that he, Mr Ongwen, was not the LRA.[269] In its view, in light of Mr Ongwen's statement, his plea was not unequivocal and thus did not satisfy the legal criteria for a "not guilty" plea.[270]

175. The Prosecutor submits that there was no error in the manner in which the charges were read at trial.[271] First, the Prosecutor argues that "[i]t is misleading for Ongwen to

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[264] Appeal Brief, paras 58, 60.
[265] Appeal Brief, paras 58, 60.
[266] Appeal Brief, para. 61.
[267] Appeal Brief, paras 62-63.
[268] Appeal Brief, para. 65.
[269] Appeal Brief, para. 66.
[270] Appeal Brief, paras 51-54, 67-68.
[271] Prosecutor's Response, paras 36-39.

now claim that the [Trial] 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."[272] Second, the Prosecutor submits that Mr Ongwen was on notice of the alleged modes of liability for each crime long before the commencement of the trial, and that the Defence made filings, disclosures, and submissions, prior to the confirmation of charges hearing, relating to the alleged modes of liability, which it must have done on the basis of instructions from Mr Ongwen.[273]

176. Third, the Prosecutor submits that "Ongwen's argument that the [Trial] Chamber did not ask him if he understood the charges or modes of liability or whether a further reading was necessary is unnecessarily formalistic" and that it was apparent, at the start of the trial, that the Trial Chamber "sought to ascertain whether he understood the charges."[274] Fourth, the Prosecutor argues that the Defence's arguments that the Trial Chamber erred in relying on Mr Ongwen's understanding of the Document Containing the Charges as opposed to the Confirmation Decision and erroneously found that he understood the confirmed charges based on a statement of understanding he made in January 2016, are "similarly formalistic".[275] In his view, the Trial Chamber rightly found no material difference between the Document Containing the Charges and the confirmed charges in the Confirmation Decision, and as such the Defence's argument regarding such a difference is erroneous.[276]

177. Victims Group 1 observe that the Defence repeats its arguments from its closing brief about the illegality of Mr Ongwen's "not guilty" plea, and that the Trial Chamber addressed these arguments "exhaustively" in the Conviction Decision.[277] They submit that the Trial Chamber was correct in its assessment that Mr Ongwen was informed and understood the charges at the beginning of the trial, as he was provided with an Acholi version of the Document Containing the Charges prior to the confirmation hearing, and during that hearing he confirmed that he had received, read, and understood same.[278] Moreover, Victims Group 1 submit that "[t]he [Trial] Chamber correctly reasoned that

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[272] Prosecutor's Response, para. 36.
[273] Prosecutor's Response, para. 37.
[274] Prosecutor's Response, para. 38.
[275] Prosecutor's Response, para. 39.
[276] Prosecutor's Response, para. 39.
[277] Victims Group 1's Observations, para. 34.
[278] Victims Group 1's Observations, paras 36-39.

the words chosen by [Mr] Ongwen in response to the Presiding judge, made it clear that he fully understood the charges but was not willing to accept responsibility for the crimes he was accused of".[279]

(ii) Relevant parts of the Conviction Decision

178. The Trial Chamber rejected the Defence's argument that Mr Ongwen did not understand the nature of the charges against him at the time of his plea,[280] noting that "the standards for a not guilty plea are not equivalent to the standards required for an admission of guilt under Article 65 of the Statute" and that "[a] non-unequivocal 'not guilty' plea results simply in the proceeding with the trial".[281]

179. The Trial Chamber considered the Defence's argument, concerning Mr Ongwen's statement that he was not the LRA, to be "untenable", noting that "[t]he fact that an accused provides an answer which contains more than a simple 'yes' or 'no' […] does not mean that he has no clear understanding of the question put to him".[282] The Trial Chamber reiterated its previous findings that Mr Ongwen's remarks demonstrated an understanding of the confirmed charges as being brought against him, and that Mr Ongwen's remarks were rather a dispute as to his responsibility for the alleged acts.[283]

(iii) Determination by the Appeals Chamber

180. In claiming that the Trial Chamber erred in proceeding to trial on an "illegal plea", the Defence raises arguments concerning the modalities of the reading of the charges at the start of the trial and the manner in which Mr Ongwen was questioned by the Trial Chamber on whether he understood the charges.[284]

181. First, the Defence argues that at the commencement of the trial, the charges were not read out in their entirety, as the alleged modes of liability were excluded, resulting in Mr Ongwen having no information as to what his role in the alleged crimes was.[285]

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[279] Victims Group 1's Observations, para. 40.
[280] Conviction Decision, paras 73-82.
[281] Conviction Decision, para. 74.
[282] Conviction Decision, para. 78 (footnotes omitted).
[283] Conviction Decision, para. 78. *See also* T-26, p. 19, line 22 to p. 20, line 2.
[284] Appeal Brief, paras 58-68.
[285] Appeal Brief, paras 58, 60.

For the reasons that follow, the Appeals Chamber finds no merit in this argument. As pointed out by the Prosecutor, the Appeals Chamber notes that prior to the start of the trial, both the Defence and the Prosecutor made joint submissions before the Trial Chamber on the conduct of the proceedings.[286] On the specific issue concerning the reading of the charges, the parties agreed as follows:

> To promote the efficiency of proceedings, the Prosecution and Defence propose instead that the Chamber: (i) asks the accused to provide a certification before the start of trial that he has read and understands the nature of the charges against him; (ii) confirms with the accused at the start of the hearing that he waives his right to be read the charges; and (iii) summarises the charges against the accused for the public. The Chamber should also afford the accused an opportunity to make an admission of guilt or to plead not guilty.[287]

182. On 13 July 2016, the Trial Chamber issued the Directions on the Conduct of Proceedings, and decided as follows:

> As for reading the charges to the accused at the commencement of trial, the Presiding Judge considers that extracts of the confirmed charges are sufficient for this purpose. Accordingly, the Court Officer will read the numbered counts, minus the statutory provisions referenced, which are contained in the confirmation decision's operative part under the 'legal characterisation of the facts' sub-headings. No waiver or written certification that this is sufficient is required; the accused can confirm at the commencement of trial if he understands the charges or if any further reading is necessary.[288]

183. From the above, it is clear that the Defence, together with the Prosecutor, proposed a waiver of Mr Ongwen's right to have the charges read out and that they be summarised if read. A review of the trial record reveals that, at the time, the Defence did not object or seek leave to appeal the Trial Chamber's Directions on the Conduct of Proceedings concerning the reading of the charges.

184. However, on 8 January 2018, the Defence filed a motion requesting that the Chamber: (i) make findings on fair trial violations in respect to notice and translation; and (ii) order a temporary stay of proceedings until the violations are remedied.[289] Notably, in this request the Defence made no mention of the issue regarding the

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[286] Prosecutor's Response, para. 36.
[287] Joint Prosecution and Defence Submissions on the Conduct of Proceedings, para. 9.
[288] Directions on the Conduct of the Proceedings, para. 6.
[289] Defence Request for Findings on Fair Trial Violations, para. 35.

modalities of the reading of the charges but instead argued, *inter alia*, that the lack of a complete Acholi translation of the Confirmation Decision and the separate opinion of Judge Perrin de Brichambaut, at that stage, amounted to a violation of article 67 of the Statute.[290] On 24 January 2018, the Trial Chamber rejected the Defence Request for Findings of Fair Trial Violations on the basis that the relief sought was both untimely and unjustified.[291]

185. On 30 January 2018, the Defence sought leave to appeal the Decision on the Defence Request for Findings on Fair Trial Violations, on four issues, including the issues of "whether the reading of enumerated counts in a very abbreviated and incomplete form constitutes notice of the charges, for the purposes of Article 67(1)(a) of the Statute" and "[o]n what legal basis, if any, can the Chamber decide that seeking a waiver for a summary or limited reading of the charges from the Accused is not necessary? […]".[292]

186. On 12 February 2018, the Trial Chamber rejected the Defence's request for leave to appeal, noting that "[…] none of the four issues highlighted by the Defence arise from the Impugned Decision and, on that basis, fail to meet the requirements of Article 82(1)(d) of the Statute".[293] In addition, the Trial Chamber considered the request to constitute "a belated attempt by the Defence to address issues that arose prior to or during the commencement of trial".[294] Moreover, the Trial Chamber noted that the issues concerning the reading of the charges related to directions it gave in July 2016 in its Directions on the Conduct of the Proceedings for which the Defence did not seek leave to appeal at the time and thus "cannot do so now, over 1.5 years later".[295] Furthermore, the Trial Chamber noted that "no objections were raised regarding the 'abbreviated and incomplete' reading of the charges during or after the commencement of trial".[296]

187. The Appeals Chamber considers that in light of the Defence's initial proposal (to waive Mr Ongwen's right to have the charges read out and that they be summarised if

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[290] Defence Request for Findings on Fair Trial Violations, paras 1-4.
[291] Decision on the Defence Request for Findings on Fair Trial Violations, paras 16-22.
[292] Defence Request for Leave to Appeal Decision 1147, para. 2.
[293] Decision on the Defence Request for Leave to Appeal Decision 1147, para. 7.
[294] Decision on the Defence Request for Leave to Appeal Decision 1147, para. 7.
[295] Decision on the Defence Request for Leave to Appeal Decision 1147, para. 8.
[296] Decision on the Defence Request for Leave to Appeal Decision 1147, para. 8.

read) and its subsequent lack of any objection, prior to or during the commencement of the trial, to the Trial Chamber's directions on the reading of the charges, it was not unreasonable for the Trial Chamber to reject the Defence's attempt to litigate this issue almost one and a half years later. Moreover, the Appeals Chamber cannot discern why the Defence would propose a waiver of Mr Ongwen's right to have the charges read out at the commencement of the trial, if, as the Defence alleges, at that time, Mr Ongwen had "no information as to what his role in the alleged crimes was".[297]

188. In any event, the Appeals Chamber notes that Mr Ongwen was placed on notice, in advance of the commencement of the trial on 6 December 2016, as to the charges including the alleged mode of liability for each crime by virtue of the fact that he had received the Document Containing the Charges in Acholi by December 2015,[298] which was recited almost *verbatim* in the operative part of the Confirmation Decision.[299] Furthermore, as submitted by the Prosecutor, prior to the confirmation hearing the Defence made various submissions in relation to the charges, including in relation to the alleged modes of liability.[300] Given the above, the Appeals Chamber finds that the Trial Chamber did not violate Mr Ongwen's rights by its decision to abbreviate the charges to be read out in the way that it did. The argument is therefore rejected.

189. The Defence also argues that the Trial Chamber erred by failing to ask Mr Ongwen if he understood the charges or modes of liability or whether a further reading was necessary.[301] As noted above, the Trial Chamber questioned Mr Ongwen specifically on whether he understood the nature of the charges brought against him.[302] Following Mr Ongwen's responses, the Trial Chamber concluded that he did understand the charges and explained its reasons for its conclusion.[303] Importantly, the Appeals Chamber notes that, at that stage of the proceedings, neither Mr Ongwen nor the Defence requested a further reading of the charges, which, according to the

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[297] Appeal Brief, paras 58, 60.
[298] Acholi Translation of Document Containing the Charges.
[299] Decision on the Defence Request for Findings on Fair Trial Violations, para. 7. *See also* Confirmation Decision, pp. 71-104.
[300] *See* Defence Brief for Confirmation of Charges Hearing, paras 82-109, 112-127.
[301] Appeal Brief, para. 61.
[302] *See* paragraphs 169-170 above.
[303] T-26, p. 17, line 25 to p. 20, line 4.

Directions on the Conduct of the Proceedings, they would have been entitled to do.[304] Consequently, the argument is rejected.

190. Second, the Defence alleges that the Trial Chamber erroneously relied on Mr Ongwen's understanding of the Document Containing the Charges, not the Confirmation Decision,[305] and that it erroneously found that he understood the *confirmed* charges based on a statement he made in January 2016 when the charges were not yet confirmed.[306]

191. The Appeals Chamber notes that all 70 counts in the Document Containing the Charges were confirmed by the Pre-Trial Chamber in the Confirmation Decision and that "the operative part of the Confirmation Decision is an almost verbatim recitation of the charges as they appeared in the document containing the charges".[307] The limited modifications made by the Pre-Trial Chamber to the text of the charges as presented by the Prosecutor were specifically identified at paragraph 158 of the Confirmation Decision and consisted of the removal of one section and of a few words and the insertion of pseudonyms to refer to some witnesses whose identity was confidential *vis-à-vis* the public.[308] Thus, the difference between the Document Containing the Charges and the Confirmation Decision was inconsequential. Given these circumstances, the Appeals Chamber considers that if Mr Ongwen understood the charges as reflected in the Document Containing the Charges then it stands to reason that he would have understood the charges as set out in the Confirmation Decision. Consequently, the Appeals Chamber finds that it was not erroneous for the Trial Chamber to question Mr Ongwen's understanding of the charges based on the Document Containing the Charges instead of the Confirmation Decision.

192. In the same vein, the Appeals Chamber finds no merit in the argument that the Trial Chamber erred in finding that Mr Ongwen understood the *confirmed* charges based on "statements he made in January 2016", before the charges were confirmed.[309]

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[304] Directions on the Conduct of the Proceedings, para. 6. *See also* paragraph 182 above.
[305] Appeal Brief, paras 62-63. *See* T-26, p. 16, line 23 to p. 17, line 1.
[306] Appeal Brief, para. 65.
[307] Decision on the Defence Request for Findings on Fair Trial Violations, para. 7. *See also* Conviction Decision, para. 81.
[308] Conviction Decision, para. 158.
[309] Appeal Brief, para. 65.

The Appeals Chamber notes that at the start of the confirmation of charges hearing, on 21 January 2016, Mr Ongwen was asked by the Pre-Trial Chamber if he was aware of the charges against him and if he was notified of the charges in a language that he fully understands and speaks, meaning Acholi.[310] Mr Ongwen responded as follows:

> Thank you, your Honour. […] The reading out [of] these charges, whether they are true or not, is all going to be a waste of time. I've been handed out the document translated in Acholi, so I've read and understood it. Thank you.[311]

193. The Appeals Chamber notes that the document that Mr Ongwen was referring to was the Document Containing the Charges which he confirmed had been translated into Acholi and that he had read and understood.[312]

194. As all 70 counts in the Document Containing the Charges were subsequently confirmed in the Confirmation Decision, the Appeals Chamber finds that it was not unreasonable for the Trial Chamber to find that Mr Ongwen understood the *confirmed* charges based on a statement he made in January 2016 about his understanding of the charges that were reflected in the Document Containing the Charges. The argument is therefore rejected.

195. Third, the Defence contends that the Trial Chamber erroneously rejected its argument that Mr Ongwen did not understand the charges given his statement that he was not the LRA.[313] In the Defence's view, Mr Ongwen's plea was not unequivocal

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[310] T-20, p. 5, lines 8-25 to p. 6, lines 1-3 ("Presiding Judge: Now in accordance with Rule 122(1) of the Rules, I should now ask the court officer to read out the charges as presented by the Prosecutor. However, as there are 70 charges brought by the Prosecutor against [Mr] Ongwen, the Document Containing the Charges is long and amounts to almost 60 pages, reading it out now would take a significant amount of time, at least a couple of days I would say, I therefore ask if there is any objection from the parties to skip this procedural step, and in particular, I ask the Defence of [Mr] Ongwen and [Mr] Ongwen himself whether he waives his right to have the charges read out orally to him. I note in this respect that a translation into Acholi, the language Mr Ongwen has declared to fully understand and speak, of the Document Containing the Charges was filed in the record of the case – it is annex B to filing 375 – which in accordance with 19 Regulation 31(3) of the Regulations must have been notified to [Mr] Ongwen by way of personal service and therefore he should be perfectly aware of what he is accused of. So I would like to give the floor first to the Defence and then personally to [Mr] Ongwen asking them to respond to the question if they waive the right to have it read out integrally. Please, Defence of the suspect has the floor. Mr Odongo: Mr President, considering the amount of time this is likely to take and the fact that we have the full content of the charges, we have no objection to waiving the necessity to have it read out. Thank you".).

[311] T-20, p. 6, lines 9-14.

[312] T-20, p. 5, lines 8 to p. 6, lines 1-3.

[313] Appeal Brief, para. 66; T-26, p. 17, lines 2-6.

and therefore did not satisfy the legal criteria for a "not guilty" plea.[314] The Appeals Chamber notes that the Defence takes issue with the Trial Chamber's conclusion that "the standards for a not guilty plea are not equivalent to the standards required for an admission of guilt under Article 65 of the Statute" and argues that the Trial Chamber "fails to explain its reasons for this conclusion".[315] Furthermore, the Defence contends that the Trial Chamber's statement that "'[a] non-unequivocal 'not guilty' plea results simply in the proceeding with the trial', misses the point" and argues that it is illogical to have criteria for a guilty plea and none for a not guilty plea.[316]

196. The Appeals Chamber considers the Defence's arguments to be misplaced. The Appeals Chamber notes that by a plain reading of the relevant provisions, the legal criteria that must be established for an admission of guilt, as stipulated in article 65 of the Statute, are not identical to the criteria applicable to a plea of not guilty under article 64(8)(a) of the Statute. While article 65 of the Statute requires a chamber to ensure, *inter alia*, that an "accused understands the nature and consequences of the admission of guilt" and that the admission is made "voluntarily", article 64(8)(a) of the Statute requires a trial chamber to ensure that an accused "understands the nature of the charges" and is afforded an opportunity to enter a plea. In this sense, the Trial Chamber did not err in concluding that "the standards for a not guilty plea are not equivalent to the standards required for an admission of guilt under Article 65 of the Statute".[317]

197. However, the Appeals Chamber considers that while the legal criteria may differ between these two provisions, procedural fairness requires that when conducting proceedings pursuant to article 64(8)(a) and article 65 of the Statute, a trial chamber must ensure that there is no doubt as to whether an accused person understands the charges.

198. In the case at hand, the Appeals Chamber notes that at the commencement of the trial the Trial Chamber questioned Mr Ongwen to ascertain whether he understood the charges, enquiring in particular, as to whether he recalled saying at the start of the

[314] Appeal Brief, paras 52-54, 67-68.
[315] Appeal Brief, para. 54.
[316] Appeal Brief, para. 54.
[317] Conviction Decision, para. 74.

confirmation of charges hearing that he had read and understood the Document Containing the Charges.[318] Mr Ongwen responded as follows:

> 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 LRA but not me, because I'm not the LRA. The LRA is Joseph Kony who is the leader of the LRA.[319]

199. After confirming that he had received the charges (*i.e.* the Document Containing the Charges) in Acholi and reiterating that he, Mr Ongwen, was not the LRA,[320] the Trial Chamber deliberated for approximately 15 minutes on the question of whether Mr Ongwen understood the nature of the charges and thereafter concluded that he had.[321]

200. The Trial Chamber then proceeded to ascertain whether Mr Ongwen intended to admit guilt with respect to any of the charges.[322] Mr Ongwen responded that "[i]n the name of God, I deny all these charges in respect to the war in northern Uganda" and thereafter confirmed that he pleaded not guilty.[323]

201. The Appeals Chamber considers that even though Mr Ongwen's response to the enquiry as to whether he understood the charges appears to be unclear, the Trial Chamber nevertheless reasonably determined that Mr Ongwen's remarks represented "a dispute as to [his] responsibility for these alleged acts" and was not a sign that he did not understand the charges against him.[324] Furthermore, the Appeals Chamber finds that any discussion as to an accused's responsibility for the alleged charges is a matter to be dealt with during the trial and is not part of a determination under article 64(8)(a) of the Statute. In the Appeals Chamber's view, rather than showing an error in the Trial Chamber's conclusion, the Defence's argument amounts to mere disagreement with its conclusion and is therefore rejected.

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[318] T-26, p. 16, line 13 to p. 17, line 1.
[319] T-26, p. 17, lines 2-6.
[320] T-26, p. 17, lines 9-14.
[321] T-26, p. 17, lines 15-19, p. 17 line 23 to p. 20, line 2.
[322] T-26, p. 20, line 25 to p. 21, line 1.
[323] T-26, p. 21, lines 2-6.
[324] Conviction Decision, para. 78.

(c) Alleged error in not providing Mr Ongwen with a full translation of the Confirmation Decision at the time of the plea

(i) *Summary of the submissions*

202. The Defence argues that Mr Ongwen's rights under article 67(1)(a) and (f) of the Statute were violated since he was not provided with a full translation of the Confirmation Decision in Acholi or the Separate Opinion of Judge Perrin de Brichambaut at the time of his plea on 6 December 2016.[325] It further argues that as it only received a full translation of the Confirmation Decision approximately one year after the commencement of the trial, it was impossible for Mr Ongwen to have been informed, in a language that he speaks and understands, of the charges against him on the day that the Trial Chamber asked him to enter a plea.[326]

203. The Prosecutor submits that the Defence's claim "has no basis in the record".[327] The Prosecutor further submits that the Trial Chamber rightly found that Mr Ongwen had received the Document Containing the Charges by 21 December 2015 which Mr Ongwen confirmed that he had read and understood.[328] In addition, he submits that the Defence's claim that Mr Ongwen was prejudiced in his ability to understand the charges is further undermined by the fact that the Defence failed to raise any objections regarding the lack of a full Acholi translation of the Confirmation Decision either before or during the commencement of the trial when afforded opportunities to do so.[329]

204. Lastly, the Prosecutor submits that the Defence "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*'".[330]

(ii) Relevant parts of the Conviction Decision

205. In addressing this matter, the Trial Chamber stated in the Conviction Decision as follows:

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[325] Appeal Brief, para. 59.
[326] Appeal Brief, para. 59.
[327] Prosecutor's Response, para. 40.
[328] Prosecutor's Response, para. 40.
[329] Prosecutor's Response, para. 41.
[330] Prosecutor's Response, para. 41 (emphasis in original).

> Lastly, concerning translation of the decision on the confirmation of the charges, the Chamber recalls that, as previously stated in a decision on the matter, at the opening of the trial [Mr] Ongwen had available to him the full text of the charges in Acholi. The document containing the charges on which the Prosecutor requested that [Mr] Ongwen be brought to trial was translated into Acholi in its entirety. [Mr] Ongwen confirmed that he received this translation and understood the charges during the hearing of the confirmation of the charges. The decision on the confirmation of the charges confirmed all counts contained in this document and copied it verbatim into its decision, including as concerns the facts and circumstances described in the charges. Because of the clear separation between the text of the charges brought against [Mr] Ongwen and the other parts of the decision on the confirmation of charges containing the reasoning of the Pre-Trial Chamber, the lack of a full translation of the entire decision containing the charges at the opening of the trial was immaterial. In this regard, the Chamber observes that in accordance with Article 67(1)(a) of the Statute an accused has the right to be informed, in a language which he or she fully understands and speaks, of the 'nature, cause and content' of the charges. Finally, the Chamber recalls that at the opening of trial the numbered counts without references to the statutory provisions – which were contained in the operative part of the confirmation decision under the subheadings 'legal characterisation of facts' – were read out and, in that context, again made available to [Mr] Ongwen in Acholi by virtue of the interpretation in the courtroom.[331]

(iii) Determination by the Appeals Chamber

206. The Defence alleges a violation of Mr Ongwen's rights under article 67(1)(a) and (f) of the Statute on account of the fact that he was not provided with a full translation of the Confirmation Decision in Acholi and the Separate Opinion of Judge Perrin de Brichambaut at the time of his plea on 6 December 2016.[332] In the Defence's view, this made it "impossible" for Mr Ongwen to have been informed of the charges, in a language that he understands and speaks.[333]

207. The Appeals Chamber has previously held that "the decision on the confirmation of the charges defines the parameters of the charges at trial",[334] and constitutes the "authoritative statement of the charges".[335] This notwithstanding, the Appeals Chamber considers, that in circumstances where the operative part of a confirmation decision defines the acts that an accused person is alleged to have committed, and the legal characterisation given to such acts (including the mode of liability charged for each crime) and is provided to an accused in a language that he or she fully understands and

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[331] Conviction Decision, para. 81 (footnotes omitted).
[332] Appeal Brief, para. 59.
[333] Appeal Brief, para. 59.
[334] *Lubanga* Appeal Judgment, para. 124.
[335] *Bemba et al.* Appeal Judgment, para. 196.

speaks, a further translation of the reasoning underpinning a confirmation decision and any related separate or dissenting opinion, in a language that an accused fully understands and speaks, may not be essential to place an accused on notice of the charges in order to enter a plea pursuant to article 64(8)(a) of the Statute. That said, the Appeals Chamber underlines that such an assessment is necessarily one that will turn on the specific circumstances of each case.

208. In the case at hand, the Appeals Chamber notes that Mr Ongwen was placed on notice, in advance of the commencement of the trial on 6 December 2016, as to the charges by virtue of the fact that he had received the Document Containing the Charges in Acholi by December 2015, which was recited almost *verbatim* in the operative part of the Confirmation Decision.[336] The differences between the charges set out in the Document Containing the Charges and the Confirmation Decision were listed in paragraph 158 of the Confirmation Decision and determined to be inconsequential to Mr Ongwen's understanding of the charges at the time of entering a plea.[337] Furthermore, the Appeals Chamber notes that at the opening of the trial, the charges which were contained in the operative part of the Confirmation Decision, including the facts and circumstances described in the charges, were read out and simultaneously translated into Acholi, thus affording Mr Ongwen yet another opportunity to be informed of the charges in a language that he fully understands and speaks.[338]

209. While the reasoning of the Pre-Trial Chamber for its findings on each of the charges, and the related Separate Opinion of Judge Perrin de Brichambaut, form part of the Confirmation Decision, in the Appeals Chamber's view, a translation of these parts was not essential to place Mr Ongwen on notice of the charges in order to enter a plea.

210. Moreover, the Appeals Chamber notes that according to the Defence, prior to the commencement of the trial, Mr Ongwen had received approximately 64 pages of the 104 page Confirmation Decision, translated into Acholi.[339] In this regard, the Appeals Chamber notes that of the remaining 40 pages that he alleges were not translated, 33 pages (starting at page 71 of the Confirmation Decision) contain the operative part

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[336] Decision on the Defence Request for Findings on Fair Trial Violations, para. 7.
[337] *See* paragraph 191 above.
[338] *See* paragraph 169 above.
[339] Appeal Brief, para. 59.

of the Confirmation Decision, which, as noted above, were already available to Mr Ongwen in Acholi, by virtue of the fact that he had received the Document Containing the Charges in Acholi by December 2015. While it is unclear why Mr Ongwen was not provided with a translation of the remaining seven pages of the Confirmation Decision, the Appeals Chamber considers that, in these circumstances, Mr Ongwen's rights under article 67(1)(a) and (f) of the Statute were not violated.

211. As to the Defence's argument that Mr Ongwen was prejudiced by a lack of translation into Acholi of the Separate Opinion of Judge Perrin de Brichambaut at the time of the plea, the Appeals Chamber reiterates that a translation of this document into Acholi was not essential for Mr Ongwen to have entered a plea. Significantly, the Appeals Chamber notes that Judge Perrin de Brichambaut signed the disposition of the Confirmation Decision committing Mr Ongwen to trial on "the charges as confirmed".[340] Accordingly, this argument is rejected.

212. In view of the above, the Appeals Chamber considers that the right to be informed of the charges in a language that the accused understands and speaks, pursuant to article 67(1)(a) of the Statute read in conjunction with article 67(1)(f) of the Statute, was satisfied. Therefore, it was reasonable for the Trial Chamber to find that "the lack of a full translation of the entire decision containing the charges at the opening of the trial was immaterial".[341] Accordingly, the argument is rejected.

(d) Alleged error in ignoring Mr Ongwen's mental disability

(i) Summary of the submissions

213. The Defence alleges that the Trial Chamber erroneously ignored the effect of Mr Ongwen's mental condition on his ability to understand the charges against him by proceeding with the commencement of the trial and finding that it would determine for itself whether Mr Ongwen understood the nature of the charges.[342]

214. The Prosecutor argues that the Defence fails to identify any error in the Trial Chamber's reasoning.[343] The Prosecutor further submits that by the start of the trial, the

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[340] Confirmation Decision, p. 104.
[341] Conviction Decision, para. 81.
[342] Appeal Brief, paras 69-72.
[343] Prosecutor's Response, para. 43.

Defence "had produced no evidence or any 'concrete substantiation' to the Trial Chamber that Ongwen suffered from a 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".[344]

215. Victims Group 1 observe that the Defence, on appeal, merely repeats its arguments made before the Trial Chamber and "fails to explain how the medical condition of [Mr] Ongwen prevented him from standing trial, and limits itself to referring [to the] procedural history and the fact that the Chamber denied its request [to postpone the opening of the trial and to order a medical examination pursuant to rule 135 of the Rules].[345]

(ii) Relevant parts of the Conviction Decision

216. The Trial Chamber held that the Defence "misstates the facts" when it argued that "in light of the information before [the Chamber] about Mr Ongwen's disability, a postponement of the 6 December proceedings should have been taken".[346] The Trial Chamber found that "the only information available to the Chamber was a filing by the Defence, the day before the opening statement, stating, *inter alia,* that experts hired by the Defence made a finding pursuant to Article 64(8)(a) of the Statute and determined that [Mr] Ongwen did not understand the charges and that he was not fit to stand trial. No supporting material was provided, and in particular not any expert report."[347] In the Trial Chamber's view, "it did not ignore any information when making its determination pursuant to Article 64(8)(a) of the Statute that [Mr] Ongwen understood the charges" and "[a]ny reference by the Defence to reports by medical experts made after the decision is misplaced".[348]

(iii) Determination by the Appeals Chamber

217. The Appeals Chamber notes that, in essence, the Defence takes issue with the Trial Chamber's finding that it did not "ignore any information [concerning

[344] Prosecutor's Response, para. 44.
[345] Victims Group 1's Observations, paras 41-42.
[346] Conviction Decision, para. 79.
[347] Conviction Decision, para. 79.
[348] Conviction Decision, para. 80.

Mr Ongwen's mental health] when making its determination that [Mr Ongwen] understood the charges" at the commencement of the trial.[349]

218. On 5 December 2016, the Defence filed a request for a stay of the proceedings, based on "a preliminary report from its Experts, […] stating that [Mr Ongwen] does not understand the charges and was not aware of the wrongfulness of any actions during his time in the bush".[350] The Defence submits that its request "provided the information it had available at the time of the 5 December 2016 filing" which included information on Mr Ongwen's situation, dates of meetings between Mr Ongwen and Dr Dickens Akena and Professor Emilio Ovuga, mental health experts called by the Defence (hereinafter: "D-0041" and "D0042" respectively and collectively: "Defence Experts"), and the efforts of the Defence Experts to obtain material from the ICC-DC and to meet with the ICC-DC medical staff, which was refused on 24 June 2016.[351] The Defence further submits that it provided the Trial Chamber with the Defence experts' final report in the afternoon of 6 December 2016, after the commencement of the trial.[352]

219. The Appeals Chamber is not persuaded by the Defence's argument. It notes that, as argued by the Prosecutor, prior to the filing of its request on 5 December 2016, the Defence failed to inform the Trial Chamber of any issues related to Mr Ongwen's fitness to stand trial.[353] The Appeals Chamber further notes that the parties and participants were placed on notice by the Trial Chamber, as early as 30 May 2016, to file all motions that could affect the commencement of the trial and require resolution beforehand by 28 October 2016.[354] In addition, the Appeals Chamber observes that when the Defence eventually informed the Trial Chamber, on the eve of the start of the trial, it failed to substantiate its request for a stay of proceedings with any "supporting material" or any expert report.[355] In this context, the Appeals Chamber finds that the Trial Chamber reasonably rejected the Defence's request for a stay of proceedings and reasonably determined that it would assess for itself whether Mr Ongwen understood

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[349] Appeal Brief, para. 69, *referring to* Conviction Decision, paras 79-80.
[350] Appeal Brief, para. 70, *referring to* Defence Request of 5 December 2016 for a Stay of Proceedings, paras 1(4), 41.
[351] Appeal Brief, para. 72.
[352] Appeal Brief, para. 71.
[353] Prosecutor's Response, para. 44.
[354] Decision on Commencement Date of the Trial, para. 11, p. 7.
[355] Conviction Decision, para. 79.

the charges.[356] The Appeals Chamber considers further that the provision of the Defence Experts' report after the start of the trial does not assist the Defence in showing an error in the Trial Chamber's decision, pursuant to article 64(8)(a) of the Statute, that Mr Ongwen understood the charges at the time of entering his plea. The argument is therefore rejected.

(e) Overall conclusion

220. Having considered all the arguments raised under the fourth ground of appeal concerning alleged errors in the Trial Chamber's consideration of whether Mr Ongwen understood the charges at the time of his plea pursuant to article 64(8)(a) of the Statute, the Appeals Chamber rejects this ground of appeal.

4. Ground of appeal 5: Alleged error in proceeding to trial and in entering a conviction on the basis of a defective Confirmation Decision, in violation of the right to notice under article 67(1)(a) of the Statute

221. Under its ground of appeal 5, the Defence argues that Mr Ongwen's right to notice under article 67(1)(a) of the Statute was violated and requests a reversal of his convictions on this basis.[357]

(a) Summary of the submissions

222. The Defence submits that the Trial Chamber erred in conducting proceedings, resulting in convictions, on the basis of a defective Confirmation Decision issued by the Pre-Trial Chamber which failed to provide notice to the accused, thereby violating his right to be informed "promptly and in detail" of the charges under article 67(1)(a) of the Statute, as well as his right to present a defence under article 67(1)(e) of the Statute.[358] The alleged defects being that the Confirmation Decision failed to articulate: (i) the contextual and legal elements of war crimes and crimes against humanity;[359] (ii) the modes of liability set out in article 25(3)(a) of the Statute (in respect of commission in the sense of indirect perpetration and indirect co-perpetration),[360] and article 25(3)(f) of the Statute (in respect of attempt);[361] and (iii) failed to link the stated

[356] T-26, p. 4, line 15 to p. 7 line 18.
[357] Appeal Brief, para. 77.
[358] Appeal Brief, paras 77, 95.
[359] Appeal Brief, paras 97-100.
[360] Appeal Brief, paras 106-137.
[361] Appeal Brief, paras 102-105.

facts to the legal elements of the crimes,[362] thereby failing to provide a reasoned opinion.[363] Specifically, the Defence maintains that notice provided in respect of persecution, forced marriage, enslavement and conscription of child soldiers was defective,[364] and that the manner in which the proceedings under article 56 of the Statute were conducted violated the right to notice.[365]

223. The Defence further argues that: the conviction for indirect co-perpetration is *ultra vires* as indirect co-perpetration is not expressly enumerated in the Statute as a mode of liability and therefore, cannot be added through inherent judicial powers;[366] the Trial Chamber erroneously found that indirect co-perpetration is not a standalone mode of liability but a form of co-perpetration, underscoring the need for specificity on the modes of liability;[367] and the *mens rea* of indirect co-perpetration and indirect perpetration and the *actus reus* of indirect co-perpetration ("frustration of the crime") were not set out in the charges in the Confirmation Decision.[368] The Defence further submits that the *mens rea* for the crime of forced marriage as a form of other inhumane acts directly committed by Mr Ongwen and the factual allegations underpinning it has not been set out in the Confirmation Decision.[369] Finally, the Defence argues that the Trial Chamber erred in the Conviction Decision by dismissing *in limine* the Defence's challenges brought, on procedural grounds, against the charges in the Confirmation Decision,[370] which resulted in no findings being entered on the contested issues.[371] Consequently, the Defence seeks reversal of the convictions on these bases.[372]

224. The Prosecutor argues that the Defence's submissions incorporated into the appeal merely by reference should be dismissed *in limine*.[373] He further avers that the Defence fails to appreciate that only the *charges* confirmed by the Pre-Trial Chamber

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[362] Appeal Brief, para. 99.
[363] Appeal Brief, paras 170-173.
[364] Appeal Brief, paras 139-163.
[365] Appeal Brief, paras 87-92.
[366] Appeal Brief, para. 121; T-265, p. 38, lines 13-18.
[367] Appeal Brief, para. 122.
[368] Appeal Brief, paras 123-124; T-265, p. 42, lines 2-6, 15-19, p. 61, lines 6-20. *See also* T-265, p. 60, lines 22-24.
[369] *See* Appeal Brief, para. 148.
[370] Appeal Brief, paras 164-169.
[371] Appeal Brief, paras 165, 166, 169; T-263, p. 62, lines 13-21.
[372] Appeal Brief, paras 77, 95.
[373] Prosecutor's Response, para. 74.

as opposed to the *reasons* in support thereof are binding on the Trial Chamber.[374] He argues that "[t]he 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" and that "[r]ather, the Charges must set out the factual allegations underlying the elements of the crimes and modes of liability, and their legal characterisation".[375] The Prosecutor also submits that the charges gave notice of the relevant factual allegations, as supplemented by other documents providing additional detail.[376] He adds that the Pre-Trial Chamber provided adequate reasoning for its conclusions in the Confirmation Decision when read as a whole,[377] and the Defence received notice of the evidence relied upon through various procedural means.[378] Furthermore, the Prosecutor argues that indirect co-perpetration is a form of criminal responsibility compatible with the Statute and is recognised and applied in the Court's jurisprudence,[379] and that the Trial Chamber was correct to dismiss *in limine*, in the Conviction Decision, the undeveloped Defence challenges to the charges in the Confirmation Decision.[380]

225. Victims Group 1 submit that the Trial Chamber did not err in rejecting *in limine* the challenges brought against the charges during the trial.[381] Regarding the jurisdictional challenges, which, Victims Group 1 submit, were already addressed in the Confirmation Decision, they argue that the Defence fails to counter the Pre-Trial Chamber's reasoning that the crime of forced marriage falls under "other inhumane acts" under article 7(1)(k) of the Statute, and ignores "decisive majority interpretation of the Statute" in regard to indirect co-perpetration.[382] Victims Group 1 further aver that the Confirmation Decision was sufficiently specific and reasoned and that the Defence does not explain how the alleged defects affect the reliability of the Conviction Decision, or the right under article 67(1)(e) of the Statute to examine witnesses.[383]

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[374] Prosecutor's Response, paras 75-76.
[375] Prosecutor's Response, para. 80. *See also* paras 81-82, 84-85.
[376] Prosecutor's Response, paras 74, 82, 86-98.
[377] Prosecutor's Response, para. 78.
[378] Prosecutor's Response, para. 78.
[379] Prosecutor's Response, paras 74, 99-104; T-265, p. 46, lines 1-4, 9-18.
[380] Prosecutor's Response, paras 74, 108-111
[381] Victims Group 1's Observations, paras 45-47.
[382] Victims Group 1's Observations, para. 46.
[383] Victims Group 1's Observations, paras 48-49.

(b) Relevant parts of the Conviction Decision

226. After recalling its prior decisions and the Appeals Chamber's previous judgment on the matter, the Trial Chamber noted that "[t]he Defence does not provide any new argument going beyond its prior submissions".[384] It then held as follows:

> The Defence does not request a new resolution of its requests but submits that because of the allegations contained in these motions the accused "has been placed in a position of not knowing the specifics against which he must defend the alleged crimes and his alleged participation" which prejudiced the Defence's planning and "made the fair trial impossible". Since the Chamber ruled on these motions, the Defence's argument is, in essence, that the decisions of the Chamber violated the accused's right to a fair trial. When ruling on the various requests, the Chamber considered all these allegations and dismissed the arguments by the Defence. Since no new arguments are presented by the Defence, the Chamber finds that its prior decisions did not violate the accused's right to notice and right to prepare a defence. Accordingly, the Defence's allegations do not justify the exceptional remedy of a permanent stay of the proceedings.[385]

(c) Determination by the Appeals Chamber

(i) Preliminary issue

227. At the outset, the Appeals Chamber notes that the Defence requests leave to incorporate into the appeal the issues raised in the Defence's Motion on Defects in Confirmation Decision Regarding SGBC and that the Appeals Chamber decide thereon.[386] Since the arguments have not been substantiated on appeal, with the Defence seeking to incorporate previous filings into its submissions on appeal, they are dismissed. Furthermore, the Appeals Chamber has considered the Defence's submissions in relation to the lack of notice in the article 56 proceedings[387] in the context of the allegations of fair trial violations brought under grounds of appeal 1, 2 and 3 of the Appeal Brief.[388] Finally, the Appeals Chamber will consider arguments alleging that "forced marriage is jurisdictionally defective, because it is not in the Rome

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[384] Conviction Decision, para. 83.
[385] Conviction Decision, para. 84 (footnotes omitted).
[386] Appeal Brief, para, 79, *referring to* Motions on Defects in the Confirmation Decision Regarding SGBC.
[387] Appeal Brief, paras 87-92.
[388] Appeal Brief, paras 12-49.

Statute"[389] in the context of the arguments on forced marriage in grounds of appeal 90 and 66.[390]

228. The Appeals Chamber also notes the Defence's argument that the charges with respect to indirect co-perpetration were *ultra vires* "because it is not found within the statutory language of Article 25(3)(a) and the Chamber does not have the inherent power to add it to the Statute".[391] The Appeals Chamber recalls that the modes of liability confirmed by the Pre-Trial Chamber included the commission of particular crimes "jointly with another" person and "through another person" within the meaning of article 25(3)(a) of the Statute.[392] The Pre-Trial Chamber found their combination (in the sense of commission of crimes both "jointly with" another and "through" another) to be equivalent to "indirect co-perpetration".[393] Since the argument of the Defence is not concerned with the question of notice but rather with the legality of Mr Ongwen's conviction as an indirect co-perpetrator, these arguments will be addressed in the section of this judgment dealing with the Defence's legal challenges to the mode of liability of indirect co-perpetration.[394]

229. Apart from the above, the Appeals Chamber notes that the Defence's argument is that it is legally incorrect[395] for the Trial Chamber to determine that its prior decisions[396] "did not violate the accused's right to notice and right to prepare a defence".[397] In its view, "procedural arguments should not be permitted to trump the

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[389] Appeal Brief, paras 147-149.
[390] Appeal Brief, para. 975.
[391] Appeal Brief, para. 121.
[392] Confirmation Decision, Charges, para. 9.
[393] Confirmation Decision, paras 38-39.
[394] *See* section VI.D.1(c)(i) (Indirect perpetration and indirect co-perpetration – legal framework and relevant considerations) below.
[395] Appeal Brief, para. 93.
[396] In the Conviction Decision, the Trial Chamber recalled that it had previously dismissed *in limine* the Defence's challenges of inadequate notice of, and jurisdictional challenges to, the charges in the Confirmation Decision (*see* Decision on Defence Motions Alleging Defects in the Confirmation Decision) for reasons relating to untimeliness under rule 134(2) of the Rules. The Appeals Chamber's Judgment thereupon confirmed that decision (*Ongwen* OA4 Judgment). Furthermore, in the Conviction Decision, the Trial Chamber also dismissed *in limine* the Defence's challenges to the same issues that were raised in the Defence Closing Brief, Conviction Decision, paras 37-41.
[397] Conviction Decision, para. 84.

'interests of justice', especially in a prosecution of a single defendant for 70 charges and eight modes of liability".[398]

230. The Appeals Chamber is mindful of its previous finding that the Trial Chamber did not violate article 67(1)(a) and (b) of the Statute in its decisions dismissing *in limine* the Defence's challenges to the charges. However, the Appeals Chamber also recalls that it held that the Defence was entitled to advance the arguments presented in the Defects Series before the Appeals Chamber should a conviction be entered and an appeal lodged against it.[399] Indeed, the Appeals Chamber considers that in order to properly consider whether the Trial Chamber violated the fair trial rights of the accused, it needs to analyse the underlying substantive arguments made under this ground of appeal.

231. For the reasons that follow, the Appeals Chamber finds that Mr Ongwen received sufficient notice and therefore, he was not prejudiced by the Trial Chamber's dismissal *in limine* of its repeated challenges to the charges in the Confirmation Decision raised in its closing brief (thereby entering no findings on the merits of alleged violations of notice or the jurisdictional defect).[400]

(ii) Applicable law

232. Article 67(1)(a) of the Statute governs the scope of the notice to be provided in the charges confirmed against the accused in accordance with article 61 of the Statute. It stipulates:

> In the determination of any charge, the accused shall be entitled […] to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks.

233. The Appeals Chamber has found it "axiomatic" that an accused is informed promptly and in detail of the nature, cause and content of a charge in accordance with article 67(1)(a) of the Statute.[401] While the "nature" of the charges has been defined as

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[398] Appeal Brief, para. 165. *See also* paras 164, 166-169.
[399] *Ongwen* OA4 Judgment, paras 158, 160.
[400] Appeal Brief, paras 164-169, *referring to* Conviction Decision, paras 40-41.
[401] *Bemba* Appeal Judgment, para. 186.

the legal characterisation of the acts in question, the "cause" of the charges has been defined as the acts the person is alleged to have committed.[402]

234. Significantly, the Appeals Chamber has noted the "strong link" between the right of the accused to such notice of the charges pursuant to article 67(1)(a) and the right of the accused to prepare a defence, stipulated in article 67(1)(b) of the Statute.[403] It has stated that notice should be given in a timely manner, "before the start of the trial hearings".[404]

235. As to the requisite level of specificity in the provision of such notice, the Appeals Chamber has stated that the accused person must receive "sufficiently detailed notice of the charges",[405] and that what constitutes sufficient detail "turn[s] on the particular circumstances of the case, taking into account the nature of the charges and the ability of the accused to prepare a meaningful defence".[406]

236. As to the content of the charges, regulation 52(c) of the Regulations[407] requires that the document containing the charges, filed pursuant to article 61(3)(a) of the Statute, include "a legal characterisation of the facts to accord both with the crimes under articles 6, 7 or 8 and the precise form of participation under articles 25 and 28". In this regard, the Appeals Chamber has previously stated that regulation 52(c) "requires clear identification of both the relevant sub-provision in articles 25 and 28 of the Statute and the applicable mode or modes under that sub-provision (for example, 'jointly with another […] person' under article 25(3)(a) of the Statute)".[408]

237. The Appeals Chamber recalls that the level of detail required to satisfy the notice requirement in article 67(1)(a) of the Statute "varies depending on the particular

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[402] *Yekatom and Ngaïssona* OA2 Judgment, para. 38.
[403] *Lubanga* Appeal Judgment, para. 129. *See also* para. 118.
[404] *Lubanga* Appeal Judgment, para. 129; *Ntaganda* Appeal Judgment, para. 322.
[405] *Ntaganda* Appeal Judgment, para. 322. *See also Lubanga* Appeal Judgment, para. 123.
[406] *Yekatom and Ngaïssona* OA2 Judgment, para. 44. *See also* paras 38-39.
[407] Regulation 52 of the Regulations, entitled "Document containing the charges", provides: "The document containing the charges referred to in article 61 shall include: (a) The full name of the person and any other relevant identifying information; (b) A statement of the facts, including the time and place of the alleged crimes, which provides a sufficient legal and factual basis to bring the person or persons to trial, including relevant facts for the exercise of jurisdiction by the Court; (c) A legal characterisation of the facts to accord both with the crimes under articles 6, 7 or 8 and the precise form of participation under articles 25 and 28".
[408] *Yekatom and Ngaïssona* OA2 Judgment, para. 36.

circumstances of each case",[409] including the specific mode of liability charged. In this case, Mr Ongwen was alleged to have committed crimes directly, through another person and jointly through another person pursuant to article 25(3)(a) of the Statute.[410] In relation to his individual criminal responsibility as an indirect perpetrator and as an indirect co-perpetrator, the charges alleged that Mr Ongwen retained control over the crimes through the use of an organised power apparatus (the LRA).[411] Therefore, the level of detail required to satisfy the notice requirement will need to be considered in light of the features of these modes of liability which are elaborated in the section of this judgment dealing with the Defence's challenges to Mr Ongwen's individual criminal responsibility as an indirect perpetrator and as an indirect co-perpetrator.[412]

(iii) Alleged failure to provide notice of the legal elements of the crimes and modes of liability in the Confirmation Decision

238. The Defence contends that sufficient notice of the legal characterisation of the facts includes all of the legal elements of the crimes and of the particular modes of responsibility. In particular, the Defence argues that the elements of the crimes against humanity of persecution, and enslavement should have been set out in the charges.[413]

239. In light of the clear wording of regulation 52(c) of the Regulations as previously interpreted by the Appeals Chamber,[414] for the purpose of notice, it is sufficient for the accused to be informed of the specific provisions that codify the crimes with which he or she is charged and there is no need to set out, for example, the specific elements of the crimes charged as stipulated in the Elements of Crimes.

240. Accordingly, the Defence's argument on this point is rejected.

241. With regard to the legal elements of the particular modes of responsibility, the Appeals Chamber has previously rejected the argument that in order to comply with an accused's right to a fair trial, regulation 52(c) "must be read expansively so as to also

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[409] *Yekatom and Ngaïssona* OA2 Judgment, para. 38.
[410] Confirmation Decision, Charges, pp. 76-77, 80-81, 84-85, 88-89, 97-99, 101-102, 103-104.
[411] Confirmation Decision, Charges, para. 13.
[412] *See* section VI.D.1(c)(i) (Indirect perpetration and indirect co-perpetration – legal framework and relevant considerations) below.
[413] Appeal Brief, paras 141-142, 145, 151-153.
[414] *See* section VI.B.4(c)(ii) (Applicable law) above.

mandate that the charges include notice of the legal elements of individual criminal responsibility".[415] Whereas "detail about the role of an accused in the charges" *is* preferred and some cases "may require going beyond the language of the particular forms of responsibility enumerated in the Statute", the Appeals Chamber has found that "procedural fairness does not necessarily require that the legal elements of the modes of criminal responsibility be listed in the charges".[416] As recounted above, "for the purposes of sufficient notice, the charges must set out the exact sub-provision applicable in article 25 of the Statute and the specific form of participation within that sub-provision".[417] This was done in the instant case in the Confirmation Decision. Indeed, reference is made to the specific forms of commission under article 25(3)(a) (commission in the form of direct perpetration, indirect co-perpetration or indirect perpetration,[418] as defined in the Confirmation Decision),[419] as well as to article 25(3)(f) (attempt) of the Statute.

242. Thus, the Defence's argument that the legal elements of the modes of liability should have been set out in the Confirmation Decision is without merit. Accordingly, it is also rejected.

(iv) Alleged failure to provide notice of the mens rea

243. The Appeals Chamber now addresses the Defence's arguments that the Confirmation Decision failed to identify the "full or complete" *mens rea* (*i.e.* the legal elements of the *mens rea*) for liability under article 25(3)(a) of the Statute as direct perpetrator, indirect perpetrator and indirect co-perpetrator and failed to provide factual support therefor.[420] In particular, the Defence argues that, for co-perpetration, the accused must be aware that he or she is making an essential contribution to the crime, but that this was not established in the Confirmation Decision,[421] and that the *mens rea*

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[415] *Yekatom and Ngaïssona* OA2 Judgment, paras 36, 44. *See also* paragraph 37 of that judgment, noting the submission on appeal that "in addition to the charging document submitted by the Prosecutor, [the] right to notice of the charges compels a pre-trial chamber to spell out the legal elements of the confirmed modes of liability in its decision confirming the charges".
[416] *Yekatom and Ngaïssona* OA2 Judgment, paras 44, 46. *See also* paras 49-51.
[417] *Yekatom and Ngaïssona* OA2 Judgment, para. 43.
[418] Confirmation Decision, Charges, pp. 76-77, 80-81, 84-85, 88-89, 97-99, 101-102, 103-104. The Defence's challenges to commission in the form of indirect co-perpetration are addressed below.
[419] Confirmation Decision, paras 38-41.
[420] Appeal Brief, paras 108, 112-117, 123-124; T-265, p. 42, lines 2-6, 15-19.
[421] Appeal Brief, para. 108; T-265, p. 42, lines 2-6, 15-19, p. 61, lines 6-20.

for indirect co-perpetration requires an awareness that if a person's essential task is not undertaken it will frustrate the crime, which was also not established in the Confirmation Decision.[422] In relation to the latter argument, given that under this ground of appeal, the Defence is alleging a lack of sufficient notice, its challenges about the purported absence of findings in the Conviction Decision or the alleged insufficient evidentiary support therefor will not be addressed here.

244. In the instant case, the Pre-Trial Chamber set out in the section on the material facts of each relevant count in the charges concerning indirect co-perpetration, that Mr Ongwen was aware of the factual circumstances that enabled him to jointly exercise control over the crime.[423] By way of example, in respect of the Pajule IDP camp, the Pre-Trial Chamber stated:

> The Pajule co-perpetrators implemented the Pajule common plan through the hierarchical apparatus of the LRA deployed for the Pajule attack, which they jointly controlled. [Mr] 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.[424]

245. The same was done in relation to Mr Ongwen's individual criminal responsibility as an indirect perpetrator for the crimes committed in the course of the attacks on Lukodi and Abok IDP camps.[425] For instance, in respect of the Lukodi IDP camp, the Pre-Trial Chamber stated:

> 42. As the commander of the Lukodi attack, [Mr] Ongwen exerted control over the crimes through the LRA fighters who carried out the attack. The attackers included members of the Sinia and Gilva brigades. These fighters complied with [Mr] Ongwen's orders in carrying out the material elements of the charged crimes. [Mr] Ongwen committed the crimes through the hierarchical apparatus of the LRA by planning the attack, selecting fighters and appointing leaders for the attack, instructing the troops prior to the attack, and ordering and deploying troops to commit crimes in Lukodi. [Mr] Ongwen was aware of the fundamental features

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[422] Appeal Brief, paras 123-124.
[423] Confirmation Decision, Charges, paras 15-16 (counts 1-10, Pajule IDP camp), paras 27-28 (counts 11-23, Odek IDP camp), paras 119-120 (counts 61-68, indirect sexual and gender-based crimes), para. 126 (counts 69-70, conscription and use of children under the age of 15 in hostilities).
[424] Confirmation Decision, Charges, para. 16.
[425] Confirmation Decision, Charges, paras 41-44 (counts 24-36, Lukodi IDP camp), paras 53-57 (counts 37-49, Abok IDP camp).

> of the LRA and the factual circumstances which allowed him to exert control over the charged crimes.
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> […]
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> 44. When engaging in the above conduct, [Mr] Ongwen had the requisite intent and knowledge under articles 25, 28 and 30, and under the elements of the crimes listed below.[426]

246. Furthermore, and contrary to the Defence's assertion,[427] the Pre-Trial Chamber did ground its "conclusory statements" as to Mr Ongwen's *mens rea* in the charges – in relation to his conduct and bringing about the objective elements of certain crimes, and in its statement of facts on the modes of liability and the material facts regarding the structure and functioning of the LRA and Mr Ongwen's position within it.[428] Indeed, in the Confirmation Decision, the Pre-Trial Chamber noted in the section titled "statements of facts regarding common elements of modes of liability" that these statements "are common to multiple categories of charges in this document" and indicated that the "statements of material facts and circumstances and legal characterisations in each category of charges should be read in conjunction with this section".[429]

247. In the above-mentioned section, after describing the nature of the LRA "as an organised and hierarchical apparatus of power", the Pre-Trial Chamber stated, *inter alia*, that Mr Ongwen "was aware of the fundamental circumstances of the LRA, including the Sinia brigade".[430] It also noted the different commanding positions held by Mr Ongwen and that he had "effective command and control, or authority and control, over his subordinates" during the time period relevant to the charges.[431] It found in that regard that

> He mobilised his authority and power in the LRA, including the Sinia brigade, to secure compliance with his orders and cause his subordinates to carry out the conduct described in this document. This allowed him to exert control over the crimes charged as well as to prevent or repress any conduct by his subordinates of which he disapproved. His subordinates complied with his orders. He had the

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[426] Confirmation Decision, Charges, paras 42, 44.
[427] Appeal Brief, paras 115-117.
[428] Confirmation Decision, Charges, paras 10-13.
[429] Confirmation Decision, Charges, para. 9.
[430] Confirmation Decision, Charges, para. 11.
[431] Confirmation Decision, Charges, para. 12.

> power, *inter alia*, to issue or give orders; to ensure compliance with the orders issued; to order forces or units under his command, whether under his immediate command or at a lower level, to engage in hostilities; to discipline any subordinate; and the authority to send forces to the site of hostilities and to withdraw them at any time.[432]

248. In addition, for the purpose of notice, consideration may be given to the Pre-Trial Chamber's factual narrative on the "conclusions as concerns the nature and structure of the LRA and [Mr] Ongwen's status in the organisation at the time relevant for the charges".[433] In this regard, the Pre-Trial Chamber found, based on the evidence, that

> 58. As concerns [Mr] Ongwen, the evidence demonstrates that at all times relevant to the charges, he was a commander in position to direct the conduct of the significant operational force subordinate to him. In August 2002, he is reported to have been the commander of Oka battalion. In September 2003, he progressed to the position of second in command of the Sinia brigade, and in March 2004 he became the brigade's commander. It is also notable that the evidence indicates that [Mr] Ongwen's performance as commander was valued highly by Joseph Kony, and it is indeed telling that his appointments to more powerful command positions and his rise in rank followed and were associated with his operational performance, which included the direction of attacks against civilians as discussed below.
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> 59. As commander, [Mr] Ongwen was aware of the powers he held, and he took sustained action to assert his commanding position, including by the maintenance of a ruthless disciplinary system, abduction of children to replenish his forces, and the distribution of female abductees to his subordinates as so-called "wives".[434]

249. As a result, the Appeals Chamber finds that Mr Ongwen received sufficient notice of the factual allegations underpinning the *mens rea* element of indirect co-perpetration and indirect perpetration. In this regard, the Appeals Chamber recalls its holding in the *Ntaganda* Appeal Judgment that despite the "varying jurisprudence as to whether the accused's awareness of the factual circumstances that allow him or her to exert control over the crime is an additional subjective element or whether such is encompassed in the mental elements prescribed in article 30 of the Statute", "for indirect co-perpetration, the 'knowledge' component of *mens rea* includes an awareness on the part of the co-perpetrator of the factual circumstances that enabled him or her, together with other co-perpetrators, to jointly exercise control over the crime".[435] The same

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[432] Confirmation Decision, Charges, para. 13.
[433] Confirmation Decision, paras 54-59.
[434] Confirmation Decision, paras 58-59.
[435] *Ntaganda* Appeal Judgment, para. 1045.

conclusion applies to indirect perpetration in the sense that the knowledge component includes an awareness of the factual circumstances that enabled the person to exercise control over the crime.

250. Finally, in relation to the *mens rea* for the crime of forced marriage as a form of other inhumane acts directly committed by Mr Ongwen,[436] the Appeals Chamber notes that the Confirmation Decision identifies the requisite *mens rea* as well as the relevant factual allegations underpinning Mr Ongwen's knowledge and intent in relation to P-0099,[437] P-0101,[438] P-0214,[439] P-0226[440] and P-0227.[441] By way of example, in relation to P-0099, the charges section in the Confirmation Decision states as follows:

> 69. After her abduction [P-0099], in coercive circumstances, became [Mr] Ongwen's forced exclusive conjugal partner – his forced wife. As [Mr] Ongwen's forced wife, she had to maintain an exclusive sexual relationship with him, have sexual intercourse with him on demand, bear children, perform domestic chores and otherwise do what [Mr] Ongwen instructed her to do. Her forced marriage to [Mr] Ongwen was an inhumane act that inflicted great suffering or serious injury to her body or to her mental or physical health of a character similar to other crimes against humanity charged in this document. [Mr] Ongwen was aware of the factual circumstances that established the character of the inhumane act.
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> 70. [Mr] Ongwen exercised any or all of the powers attaching to the right of ownership over [P-0099] for the entire period of her forced marriage to him, including between 1 July 2002 and September 2002. He deprived her of her liberty by placing her under military guard, imposing conditions that made it impossible for her to escape and exacted forced labour, reducing her to a servile status. When [Mr] Ongwen was not present, he ensured [P-0099] continued to be confined. [P-0099] was forced to carry out different tasks in [Mr] Ongwen's household such as cooking, working in the garden and doing the laundry. If she failed to perform these tasks, she was punished.
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> 71. [Mr] Ongwen meant to engage in the conduct described above and meant to cause the consequences or was aware that they would occur in the ordinary course of events.[442]

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[436] *See* Appeal Brief, para. 148.
[437] Confirmation Decision, Charges, paras 69-71.
[438] Confirmation Decision, Charges, paras 75-80.
[439] Confirmation Decision, Charges, paras 84-89.
[440] Confirmation Decision, Charges, paras 93-98.
[441] Confirmation Decision, Charges, paras 102-106.
[442] Confirmation Decision, Charges, paras 69-71.

251. Consequently, the Appeals Chamber finds that Mr Ongwen received sufficient notice of the factual allegations underpinning the *mens rea* element of direct perpetration.

252. Accordingly, the Defence's arguments are rejected.

(v) Alleged failure to provide notice of the means by which Mr Ongwen could have frustrated the crimes

253. Regarding the argument that the Defence was not provided with notice of the means by which Mr Ongwen could have frustrated the crimes charged in the Confirmation Decision as an indirect co-perpetrator,[443] the Appeals Chamber concurs with the Prosecutor's submission that, as a matter of law, there is no separate requirement to give notice of the means by which the crimes could have been frustrated.[444] The question is whether the accused had control over the crime, by virtue of his or her essential contribution to it *and the resulting power* to frustrate its commission, even if that essential contribution was not made at the execution stage.[445] To determine whether contributions are essential and sufficient to confer upon a person the power to control the crimes and to frustrate their commission, a normative assessment of the person's role in the implementation of the common plan is required.[446]

254. In the case at hand, in relation to the charges concerning indirect co-perpetration, namely crimes committed in the course of the attacks on Pajule and Odek IDP camps, sexual and gender-based crimes and the conscription and use of children under the age of 15 in hostilities, the charges provided Mr Ongwen with sufficient notice as to the

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[443] Appeal Brief, paras 123-124, 666-668.
[444] Prosecutor's Response, para. 427; T-265, p. 64, lines 9-19.
[445] *Lubanga* Appeal Judgment, para. 473. *See also Bemba et al.* Appeal Judgment, para 820; *Ntaganda* Appeal Judgment, para. 1060.
[446] *Lubanga* Appeal Judgment, para. 473; *Bemba et al.* Appeal Judgment, para. 810; *Ntaganda* Appeal Judgment, para 1060. In the *Ntaganda* Appeal Judgment, the Appeals Chamber's assessment of whether the trial chamber had erred in concluding that there had been an essential contribution to the crimes within the framework of the common plan demonstrates this, finding that "the Trial Chamber was entitled to assess Mr Ntaganda's role [in the two military operations] comprehensively with a view to determining whether, as a whole, his contributions to the implementation of the common plan amounted to an essential contribution *with the resulting power to frustrate the commission of the crimes*, *Ntaganda* Appeal Judgment, para. 1064 (emphasis in original and footnote omitted; emphasis added). *See also* para. 1067: "the Trial Chamber assessed [the appellant's] contribution to the implementation of the common plan as a whole, to determine whether it amounted to an essential contribution with the resulting power to frustrate the commission of the crimes" (emphasis added and footnote omitted).

manner in which he had control over the crimes.[447] For example, in relation to the crimes committed in the course of the attack on Odek IDP camp, paragraph 29 of the charges states as follows:

> [Mr] Ongwen contributed to the implementation of the Odek common plan and to the commission of the crimes charged in relation to Odek by
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> - planning the attack;
> - briefing and instructing the troops prior to the attack;
> - ordering fighters under his command to commit crimes in Odek;
> - deploying troops to Odek;
> - commanding and coordinating the Odek attack on the ground;
> - failing, while being a military commander or person effectively acting as a military commander, to take necessary and reasonable measures within his power to prevent or repress the commission of the crimes charged in relation to Odek or failing to submit the matter to the competent authorities for investigation and prosecution. [Mr] Ongwen knew or, owing to the circumstances at the time, should have known that the LRA fighters were committing or were about to commit these crimes.[448]

255. As a result, the Appeals Chamber finds that Mr Ongwen received sufficient notice as to the factual allegations underpinning his alleged control over the crimes, by virtue of his essential contribution to it and the resulting power to frustrate its commission.

256. Accordingly, the Defence's arguments are rejected.

(vi) Alleged failure to provide notice of factual allegations

257. The Appeals Chamber turns now to the Defence's argument that it did not have sufficient notice of the factual allegations. The Defence submits that the statement of facts regarding the contextual elements of war crimes and crimes against humanity and the legal elements of persecution, enslavement and conscription of children for use in hostilities in the Confirmation Decision was vague and was not linked to the elements in article 7(1) and article 8(1) of the Statute.[449]

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[447] Confirmation Decision, Charges, paras 17 (Pajule IDP camp), 29 (Odek IDP camp), 123 (indirect sexual and gender-based crimes), 129 (conscription and use of children under the age of 15 in hostilities).
[448] Confirmation Decision, Charges, para. 29.
[449] Appeal Brief, paras 98-99, 140-163.

258. With respect to the level of detail required in the charges as to the statement of facts, the Appeals Chamber has emphasised that in the confirmation process, the facts – referring to "the factual allegations which support each of the legal elements of the crime charged" – "must be identified with sufficient clarity and detail, meeting the standard in article 67 (1) (a) of the Statute".[450] The statement of facts must provide a "sufficient legal and factual basis to bring the person or persons to trial".[451]

259. As previously held by the Appeals Chamber, what constitutes sufficient notice depends on the particular circumstances of the case and 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, cause and content of the charges,[452] nor does it require the use of any specific terminology aside from the language of the Statute.[453] In this vein, the Appeals Chamber has previously rejected arguments of an accused challenging the manner in which the material facts were organised in the confirmation decision. In particular it rejected the argument that the trial chamber had "erred in 'finding that the factual allegations need not be explicitly tied to the legal findings"'[454] and that the factual allegations in the confirmation decision were "not linked to the confirmed mode of responsibility".[455]

260. As to whether the Confirmation Decision sets out the facts with sufficient detail in this case, the Appeals Chamber is not called upon and has thus not considered, whether sufficient notice was given of all the material facts. Rather, it considered the narrower issue of the linkage between the mode of liability and the facts. In order to consider whether the statement of facts in the confirmation decision provided adequate notice, such a decision may be looked at as a whole (in addition to the operative part) and in light of any references to the document containing the charges reflected therein. Whilst "the decision on the confirmation of the charges defines the parameters of the charges at trial",[456] constituting the "authoritative statement of the charges",[457] this does

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[450] *Lubanga* Appeal Judgment, para. 121, *referring to* *Lubanga* OA15 / OA16 Judgment, fn. 163.
[451] Regulation 52 of the Regulations.
[452] *Yekatom and Ngaïssona* OA2 Judgment, para. 54.
[453] *Yekatom and Ngaïssona* OA2 Judgment, paras 58, 60.
[454] Yekatom and Ngaïssona OA2 Judgment, para. 25 (citing the appeal brief in that case).
[455] *Yekatom and Ngaïssona* OA2 Judgment, para. 52 (citing the appeal brief in that case).
[456] *Lubanga* Appeal Judgment, para. 124.
[457] *Bemba et al.* Appeal Judgment, para. 196.

not necessarily 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".[458] In the instant case, it is noted that the statement of facts, as set out in the Document Containing the Charges,[459] was complemented by the Prosecutor's Pre-Confirmation Brief,[460] providing details on the facts and setting out the supporting evidence.[461]

261. The Appeals Chamber finds that the factual allegations supporting the contextual elements of crimes against humanity and war crimes were set out in the charges. Reference is made to acts having been committed as part of a widespread or systematic attack directed against a civilian population, and it is stated that Mr Ongwen "knew that his conduct was part of this widespread or systematic attack against the civilian population pursuant to, or in furtherance of the organisational policy".[462] In particular, the charges refer to the following factual allegations:

> 2. The LRA carried out a widespread or systematic attack directed against the civilian population of northern Uganda, from at least 1 July 2002 to 31 December 2005.
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> 3. From at least 1 July 2002 to 31 December 2005, the overall objective of the LRA was to overthrow the government of Uganda through armed rebellion. In order to achieve this objective and to sustain its activities, the LRA adopted a number of policies that were implemented throughout the organisation. The LRA adopted a policy of launching attacks on civilians, including those living in protected [IDP camps] and abducting civilians; male abductees to be conscripted and used as soldiers and female abductees to serve primarily as domestic servants, sex slaves and forced exclusive conjugal partners.
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> 4. The 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 of northern Uganda.[463]

262. As regards Mr Ongwen's knowledge, the Confirmation Decision stated as follows:

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[458] *Lubanga* Appeal Judgment, para. 124.
[459] Document Containing the Charges.
[460] Pre-Confirmation Brief.
[461] Pre-Confirmation Brief.
[462] Confirmation Decision, Charges, paras 2-4, 9-13.
[463] Confirmation Decision, Charges, paras 2-4.

> As a long-term member of the LRA who held a number of command positions, and due to his participation in numerous LRA operations, [Mr] Ongwen knew that his conduct was part of this widespread or systematic attack against the civilian population pursuant to, or in furtherance of the organisational policy.[464]

263. The Confirmation Decision also referred to the existence of an armed conflict not of an international character, the LRA as an organised armed group and the crimes taking place in the context of, and associated with, a non-international armed conflict.[465] Furthermore, it stated that "due to his participation in numerous LRA operations", Mr Ongwen "was aware of the factual circumstances that established the existence of th[e] non-international armed conflict".[466]

264. The Pre-Confirmation Brief provided further factual details for the contextual elements.[467] For instance, in relation to the contextual elements of war crimes, the Prosecutor alleged, *inter alia*, that "[t]he non-international armed conflict in northern Uganda from at least 1 July 2002 to 31 December 2005 was between the LRA on one side and the UPDF together with associated local armed forces raised for the purpose of resisting LRA attacks on the other".[468] The Prosecutor further explained that "[t]he UPDF was Uganda's national military" and "[t]he LRA was well-structured, well-armed, and possessed the required […] degree of organisation that enabled it to carry out protracted armed violence".[469] In relation to the contextual elements of crimes against humanity, the Prosecutor alleged, *inter alia*, that "the civilian population of northern Uganda was targeted in sufficient number and in such a manner that it is clear it was the primary target of the attack".[470] The Prosecutor added alleged that "the evidence set out in the section on persecution […] shows that the LRA launched attacks with the particular purpose of punishing the civilian population for their failure to support the LRA and for their purported support of the government" and that "[t]his buttresses the existence of an organisational policy".[471]

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[464] Confirmation Decision, Charges, para. 4
[465] Confirmation Decision, Charges, paras 5-8, 9-13.
[466] Confirmation Decision, Charges, paras 5-8, 9-13.
[467] Pre-Confirmation Brief, paras 23-37, 38-58.
[468] Pre-Confirmation Brief, para. 25.
[469] Pre-Confirmation Brief, paras 26-27.
[470] Pre-Confirmation Brief, para. 40.
[471] Pre-Confirmation Brief, para. 41.

265. Whilst the Defence argues that the "elements of the crimes alleged to be under persecution" are not set out in the Confirmation Decision,[472] they are discernible as being those committed in the course of the attacks on the four IDP camps.[473] For instance, the Appeals Chamber notes that the factual allegations constituting the acts or crimes in connection with persecution as per article 7(1)(h) of the Statute, in relation to the attack on the Odek IDP camp, are described as attacks against the civilian population, murder, attempted murder, torture, other inhumane acts, cruel treatment, enslavement, outrages against personal dignity and pillaging committed by the attackers at, or near the Odek IDP camp in the specific circumstances described in the Confirmation Decision.[474] The attacks on the other three IDP camps of Abok, Pajule and Lukodi equally set out the factual allegations constituting the acts or crimes in connection with persecution as per article 7(1)(h) of the Statute.[475]

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[472] Appeal Brief, paras 141-146.
[473] Confirmation Decision, Charges, paras 25, 39, 52, 65.
[474] Confirmation Decision, Charges, paras 39, 72 ("Many civilians were shot by the LRA attackers: at least 61 died as a result of their injuries, but there is also evidence that some survived the shooting. A number of witnesses, among them Witnesses P-252, P-268, P-269, P-274 and P-275, state to have seen many dead civilians lying scattered around the camp. In addition, the evidence includes references to instances of grave physical abuse, such as beating with sticks and guns or kicking. In one instance, a female LRA attacker raped Witness P-270, a civilian resident of the camp, with a comb and a stick used for cooking, while the victim's husband was forced to watch. The attackers forced Witness P-252 to kill an abducted man, and later to inspect decomposing bodies, including that of his father, to ensure that no one was alive. The LRA also abducted people, and forced them to carry loot and wounded LRA attackers away from the camp. Witness P-245 estimated that 35 civilians were abducted. If the abductees walked too slowly, they were beaten. In order to increase their carrying capacity and walking speed, mothers were forced to abandon their children on the side of the road, as observed by Witnesses P-268 and P-275. Some abductees were released after several days, while others, including Witness P-252, remained in captivity for up to over a year. Witnesses P-218 and P-274 provide partial lists of people who were killed, injured or abducted during the attack. The LRA attackers (including [Mr] Ongwen personally, as reported by Witness P-54) also pillaged food and personal items from the trading centre and from civilian homes").
[475] Confirmation Decision, Charges, paras 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 [Mr] 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"), 52 ("The attackers severely deprived, contrary to international law, the residents of Lukodi 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. [Mr] Ongwen targeted this group of civilian residents based on political grounds, as he perceived them to be affiliated with and/or supporting the Ugandan government. This conduct was committed in connection with the crimes of attacks against the civilian population, murder, attempted murder, torture, other inhumane acts, cruel treatment, enslavement, destruction of property and pillaging committed by the attackers at or near Lukodi"), 65 ("The attackers severely deprived, contrary to

266. Furthermore, the Pre-Confirmation Brief provided further information about the attacks on all four IDP camps. It discussed the crime of persecution separately in a stand-alone section, rather than in the specific sections for each IDP camp attack,[476] and summarised the evidence of the underlying crimes.[477] In particular, it stated that the underlying conduct of the persecution of the civilian population on political grounds at Pajule, Odek, Lukodi and Abok IDP camps consisted of "[t]he charged crimes of attacking civilians, murder, attempted murder, torture/other inhumane acts/cruel treatment, enslavement, pillaging, destruction of property and outrages [up]on personal dignity".[478]

267. Contrary to the Defence' s contention that the Confirmation Decision does not set out the factual support for the *mens rea* and contextual elements with regard to enslavement as a crime against humanity, or tie witness testimony to each element,[479] the Appeals Chamber finds that the Confirmation Decision clearly identifies the factual allegations supporting the *mens rea*.[480] Indeed, the Confirmation Decision refers to Mr Ongwen's knowledge by stating that "his conduct was part of this widespread or systematic attack against the civilian population pursuant to, or in furtherance of the organisational policy".[481] It also refers to the contextual elements with regard to

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international law, the residents of Abok 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. [Mr] Ongwen targeted this group of civilian residents based on political grounds, as he perceived them to be affiliated with and/or supporting the Ugandan government. This conduct was committed in connection with the crimes of attacks against a civilian population, murder, attempted murder, torture, other inhumane acts, cruel treatment, enslavement, destruction of property and pillaging committed by the attackers at or near Abok").

[476] Pre-Confirmation Brief, paras 111-147.

[477] Pre-Confirmation Brief, paras 157-183 (Pajule IDP Camp), 235-268 (Odek IDP Camp), 318-342 (Lukodi IDP Camp), 383-407 (Abok IDP Camp).

[478] Pre-Confirmation Brief, para. 127 (footnotes omitted).

[479] Appeal Brief, paras 152-154.

[480] Confirmation Decision, Charges, paras 2-4.

[481] Confirmation Decision, Charges, paras 2- 4 ("The LRA carried out a widespread or systematic attack directed against the civilian population of northern Uganda, from at least 1 July 2002 to 31 December 2005. From at least 1 July 2002 to 31 December 2005, the overall objective of the LRA was to overthrow the government of Uganda through armed rebellion. In order to achieve this objective and to sustain its activities, the LRA adopted a number of policies that were implemented throughout the organisation. The LRA adopted a policy of launching attacks on civilians, including those living in protected [IDP camps] and abducting civilians; male abductees to be conscripted and used as soldiers and female abductees to serve primarily as domestic servants, sex slaves and forced exclusive conjugal partners. The 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 of northern Uganda. As a long-term member of the LRA who held a number of command positions, and due to his participation in numerous LRA

enslavement as a crime against humanity ("the 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 of northern Uganda").[482] Regard may also be had to the Pre-Confirmation Brief which sets out the Prosecutor's evidence concerning the existence of a widespread and systematic attack for the crimes against humanity charged.[483]

268. Regarding the conscription and enlistment of children for the use in hostilities as a war crime, the Defence asserts that the Confirmation Decision does not identify: the factual allegations underlying the plan of the LRA leadership and Mr Ongwen's contributions to the common plan; the identity of "senior commanders" and their role in the common plan; and the allegations concerning Mr Ongwen's awareness of the factual circumstances that established the existence of an armed conflict.[484] However, the 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 and Mr Ongwen's contributions to the common plan are set out at paragraphs 126 and 129 of the charges section of the Confirmation Decision:

> 126. Between at least 1 July 2002 and 31 December 2005 [Mr] Ongwen, Joseph Kony, and the Sinia brigade leadership ("child soldiers coperpetrators") 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"). […]
>
> 129. [Mr] Ongwen contributed to the realization of the common plan by
>
> - leading by example, by personally using children under 15 as escorts who participated in hostilities alongside him;
> - ordering his subordinates to abduct children to replenish the ranks of his troops, who proceeded to abduct and conscript children under 15 into Sinia brigade as a result of his orders;
> - planning, coordinating, ordering and deploying troops for military attacks and attacks against the civilian population in which children under 15 actively participated;

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operations, [Mr] Ongwen knew that his conduct was part of this widespread or systematic attack against the civilian population pursuant to, or in furtherance of the organisational policy".).
[482] Confirmation Decision, Charges, para. 4.
[483] Pre-Confirmation Brief, paras 38-58.
[484] Appeal Brief, paras 158-160; T-265, p. 40, lines 13-15.

- having operational control over the implementation of the child soldiers common plan in the units he commanded;
- supervising and taking part in military training of children and
- failing, while being a military commander or person effectively acting as a military commander, to take necessary and reasonable measures within his power to prevent or repress the commission of the charged crimes or failing to submit the matter to the competent authorities for investigation and prosecution. [Mr] Ongwen knew or, owing to the circumstances at the time, should have known that the LRA fighters were committing or were about to commit the crimes of conscription and use of child soldiers. [Mr] Ongwen had effective command and control, or authority and control, over LRA fighters that committed these crimes.[485]

269. Further notice was provided by the particulars given in the Pre-Confirmation Brief as to the factual allegations and evidence in support thereof.[486] By way of example, it was alleged that

> [Mr] Ongwen regularly ordered his troops to abduct. By way of example: [Mr] Ongwen organised an abduction mission to Acet, in which P-0233 took part. Its objective, among others, was to abduct boys between 13 and 15 years of age. Boys in that age range were abducted from Acet and conscripted into the Sinia brigade. During the briefing prior to the attack on Odek IDP camp on or about 29 April 2004, [Mr] Ongwen instructed his fighters that if they find "good boys or girls" they should return with them. As explained by P-0205 who was present at the briefing, this instruction meant those capable of being soldiers, with 12 being the preferred starting age. Boys under 15 were subsequently abducted in the Odek attack and conscripted into Sinia brigade, including P-0252 who was 11 years old at the time and P-0275 who was nine years old. Ongwen reported abducting eight boys from Odek in an intercepted radio communication on 30 April 2004.[487]

270. As noted above,[488] the factual allegations supporting Mr Ongwen's awareness of the circumstances that established the existence of an armed conflict are equally set out in the Confirmation Decision and the Pre-Confirmation Brief.[489]

271. The Defence also argues that "there is no indication as to who the other 'senior commanders' are, or what "the alleged roles of these unnamed persons [were]".[490] The

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[485] Confirmation Decision, Charges, p. 103, paras 126, 129.
[486] Pre-Confirmation Brief, paras 624-627.
[487] Pre-Confirmation Brief, para. 627 (footnotes omitted).
[488] *See* paragraphs 261-264 above.
[489] Confirmation Decision, Charges, pp. 71-73, paras 2-13; Pre-Confirmation Brief, paras 36-37.
[490] Appeal Brief, para. 158.

Prosecutor submits that "the charges need not list all the co-perpetrators or identify them all by name" and that features, such as group membership or role in the commission of the crimes, may be used.[491]

272. As to what extent the co-perpetrators and their respective roles need to be identified, the Appeals Chamber held in the *Lubanga* Appeal Judgment that to ensure the preparation of an effective defence, "where an accused is not alleged to have directly carried out the incriminated conduct and is charged for crimes committed on the basis of a common plan", the following detailed information must be provided to the accused:

> (i) his or her alleged conduct that gives rise to criminal responsibility, including the contours of the common plan and its implementation as well as the accused's contribution (ii) the related mental element; and (iii) *the identities of any alleged co-perpetrators*. With respect to the underlying criminal acts and the victims thereof, the Appeals Chamber considers that the Prosecutor must provide details as to the date and location of the underlying acts and identify the alleged victims to the greatest degree of specificity possible in the circumstances.[492]

273. The Appeals Chamber concluded that the "underlying criminal acts form an integral part of the charges against the accused, and sufficiently detailed information must be provided in order for the accused person to effectively defend him or herself against them".[493]

274. The Appeals Chamber considers that in order to satisfy the notice requirement set out in article 67(1)(a) of the Statute, in certain circumstances there may be no need to identify each member of the common plan by name.[494] Indeed, this may be the case in circumstances such as the present where the accused person was charged as an indirect

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[491] Prosecutor's Response, para. 96.
[492] *Lubanga* Appeal Judgment, para. 123 (emphasis added).
[493] *Lubanga* Appeal Judgment, para. 123.
[494] *See*, under a different legal framework and under the doctrine of joint criminal enterprise, *Brđanin* Appeal Judgment, para. 430 ("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)"); *Krajišnik* Appeal Judgment, para. 156 ("While a Trial Chamber must identify the plurality of persons belonging to the JCE, it is not necessary to identify by name each of the persons involved. Depending on the circumstances of the case, it can be sufficient to refer to categories or groups of persons"). *See also Đorđević* Appeal Judgment, para. 141 ("the common purpose can be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise. It is therefore not required, as a matter of law, that a trial chamber make a separate finding on the individual actions and the intent of each member of a joint criminal enterprise to establish that a plurality of persons acted together in implementing the common purpose. The Appeals Chamber therefore finds that the Trial Chamber was not required to examine the individual actions or scrutinise the intent of each member of the [joint criminal enterprise]." (Footnotes omitted)).

co-perpetrator who was alleged to have retained control over the commission of crimes through the use of an organised power apparatus (the LRA).

275. As explained above,[495] the level of detail required to satisfy the notice requirement in article 67(1)(a) of the Statute needs to be assessed in light of the particular circumstances of the case, including the specific mode or modes of liability charged. Therefore, in cases of indirect co-perpetration, where the control over the crimes is retained through the use of an organised power apparatus, the particular features of this mode of liability – as fully set out below when addressing the Defence's challenge to Mr Ongwen's individual criminal responsibility as an indirect perpetrator and as an indirect co-perpetrator –[496] need to be considered when addressing an alleged violation of the right to notice under article 67(1)(a) of the Statute. Indeed, in cases such as this one, where it is alleged that Mr Ongwen and the other indirect co-perpetrators retained control over the crimes through the use of the LRA, a more generic identification of the other indirect co-perpetrators may suffice to comply with the notice requirement.[497]

276. In this case, the indirect co-perpetrators were identified as "[Mr] Ongwen, Joseph Kony, and the Sinia brigade leadership".[498]

277. The Appeals Chamber notes that the charged crimes in this case are alleged to have occurred in Northern Uganda from at least 1 July 2002 to 31 December 2005 in the context of operations of an organised armed group: the LRA.[499] The Confirmation Decision identifies the Sinia brigade "as one of the four LRA brigades" that "consisted of a brigade headquarters and a number of battalions and companies".[500] Given the geographic and temporal parameters of the charges as well as the identification of the LRA as the organisation that engaged in an armed conflict not of an international character and carried out a widespread or systematic attack against the civilian

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[495] *See* section VI.B.4(c)(ii) (Applicable law) above.
[496] *See* section VI.D.1(c)(i) (Indirect perpetration and indirect co-perpetration – legal framework and relevant considerations) below.
[497] *See* footnote 494 above.
[498] Confirmation Decision, Charges, p. 102, para. 126. *See also* para. 143, *referring to* "senior commanders" of the LRA leadership.
[499] Confirmation Decision, Charges, paras 2-3, 5-6.
[500] Confirmation Decision, Charges, para. 10.

population of Northern Uganda,[501] it was sufficiently clear that the individual criminal acts committed as part of the LRA's operations were attributable to the military leaders of that group. Therefore, in these specific circumstances, it was sufficient for the Trial Chamber to identify the others as "the Sinia brigade leadership".

278. The Appeals Chamber thus concludes that Mr Ongwen received sufficient notice, in accordance with article 67(1)(a) of the Statute, as to the identities of the indirect co-perpetrators.

279. In light of the foregoing, the Defence's argument that the Pre-Trial Chamber failed to provide notice of factual allegations[502] is rejected.

(d) Overall conclusion

280. Having considered all the arguments raised under ground of appeal 5, the Appeals Chamber rejects this ground of appeal.

5. Ground of appeal 6: Alleged error in violating the right to notice by expanding the material, temporal and geographic scope of the charges and prejudicially relying on uncharged acts

281. Under ground of appeal 6, the Defence argues that Mr Ongwen's right to notice was violated[503] given: (i) the "[p]rejudicial and inconsistent notice of the geographic and temporal scope of the case in the [Confirmation Decision]";[504] and (ii) that the Trial Chamber "prejudicially expand[ed] the temporal and geographic scope of the charges and rel[ied] on uncharged allegations".[505] The Defence therefore requests that the Appeals Chamber invalidate the Conviction Decision.[506]

(a) Summary of the submissions

282. The Defence argues that the Trial Chamber erred in law and procedure, violating the Defence's right to notice by "a) expanding the material, temporal and geographic scope of the charges beyond the parameters of the charged crimes, and b) relying on evidence of acts not charged" to convict or to support the conviction of Mr Ongwen or

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[501] Confirmation Decision, Charges, paras 2, 5.
[502] Appeal Brief, paras 170-173.
[503] Appeal Brief, p. 38, paras 174-175.
[504] Appeal Brief, p. 39.
[505] Appeal Brief, pp. 40-42, paras 182-196.
[506] Appeal Brief, para. 197.

to reject the grounds for excluding his criminal responsibility under article 31(1)(a) and (d) of the Statute.[507] The Defence submits that the Confirmation Decision was inconsistent in its definition of the temporal and geographic scope of the case[508] and that the Trial Chamber impermissibly and prejudicially used "evidence of acts not charged and evidence falling out[side] of the temporal and geographic scope of the case" for "context, circumstances, inferences, imputations, modes of liability and conscription and use of child soldiers", in violation of article 74(2) of the Statute.[509]

283. The Prosecutor argues that the Defence's submissions incorporated into the appeal by reference should be dismissed *in limine*[510] and that each conviction fell within the scope of the charges,[511] which were divided into three main categories.[512] The Prosecutor contends that the Defence's arguments as to inconsistency in the Confirmation Decision should be dismissed for lack of substantiation, or found to be incorrect.[513] Further, the Prosecutor maintains that the Trial Chamber was entitled to "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 hostilities".[514] He submits that only the charges as defined by the Pre-Trial Chamber, as opposed to evidence relied upon, its factual analyses and narratives, are binding on the Trial Chamber.[515]

284. Victims Group 1 argue that the Defence fails to substantiate its allegations that the Pre-Trial Chamber expanded the scope of the charges and erroneously relied on

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[507] Appeal Brief, p. 38, Section D, para. 176. *See also* para. 182.
[508] Appeal Brief, paras 175, 178-181.
[509] Appeal Brief, para. 188. *See also* paras 182-187, 191-192.
[510] Prosecutor's Response, para. 112.
[511] Prosecutor's Response, para. 116.
[512] Prosecutor's Response, paras 83, 113, *referring to* Conviction Decision, para. 33 ("(i) charges of crimes committed during the attacks on four IDP camps, (ii) charges of sexual and gender-based violence directly perpetrated by Mr Ongwen against seven women in his household between 1 July 2002 and 31 December 2005 and (iii) charges – systemic in nature – of indirect sexual and gender-based violence against women and girls and the conscription and use of children under the age of 15 in hostilities in Northern Uganda between 1 July 2002 and 31 December 2005".).
[513] Prosecutor's Response, para. 113.
[514] Prosecutor's Response, para. 116.
[515] Prosecutor's Response, para. 117.

evidence of uncharged acts.[516] In respect of the latter, they further contend that the Defence fails to cite any support therefor, and that jurisprudence from the Court and the *ad hoc* tribunals demonstrates that "evidence relating to facts outside of temporal and/or geographical scope of the charges is not as such inadmissible".[517] Victims Group 1 submit that there are no inconsistencies in the operative part of the Confirmation Decision.[518] In addition, Victims Group 1 argue that there is a difference between the charges (understood as facts and circumstances and their legal characterisation) and the evidence presented to support those charges, and further, that the charges cannot be expanded by evidence.[519]

(b) Relevant parts of the Conviction Decision

285. The Trial Chamber stated that "pursuant to Article 74(2) of the Statute, it has ensured that its findings of fact do not exceed the facts and circumstances described in the charges against [Mr] Ongwen as confirmed by the Pre-Trial Chamber".[520] In the context of assessing the evidence of sexual and gender-based crimes, the Trial Chamber considered evidence of facts falling outside the scope of the charges that "may be of relevance, as circumstantial evidence, to establish facts and circumstances described in the charges";[521] "may […] be necessary to contextualise and fully articulate the facts of the charges";[522] or may "support the existence of a pattern of sexual violence".[523] Evidence of a fact which occurred outside the temporal scope of the charges was considered relevant and indicative of Mr Ongwen's intent and knowledge with respect to the presence of children in the LRA soldier ranks, and was taken into account by the Trial Chamber in its analysis of Mr Ongwen's knowledge of the age of the abductees.[524]

(c) Determination by the Appeals Chamber

286. At the outset, the Appeals Chamber notes that although the Defence raises ground of appeal 6 as an issue of notice under article 67(1)(a) of the Statute, its arguments are

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[516] Victims Group 1's Observations, para. 50.
[517] Victims Group 1's Observations, para. 57. *See also* para. 58.
[518] Victims Group 1's Observations, para. 51.
[519] Victims Group 1's Observations, para. 54.
[520] Conviction Decision, para. 122.
[521] Conviction Decision, para. 2009.
[522] Conviction Decision, para. 2009.
[523] Conviction Decision, para. 2070.
[524] Conviction Decision, para. 2404. *See also* paras 2405-2411.

in fact concerned with the scope rather than with the notice of the charges. In this regard, the Appeals Chamber recalls the clear distinction between these two issues.[525]

287. In the following sections, the Appeals Chamber will address: (i) the alleged inconsistencies in the Confirmation Decision regarding the temporal and geographic scope of the case; and (ii) the alleged erroneous reliance on evidence of facts falling outside the temporal and geographic scope of the charges.

(i) Alleged inconsistency in the temporal and geographic scope in the Confirmation Decision

288. The first issue the Defence raises under ground of appeal 6 is whether the Confirmation Decision was inconsistent in defining the temporal and, particularly, the geographic scope of the case (the argument in respect of the latter being that the Pre-Trial Chamber referred to acts allegedly committed on the territory of Sudan as opposed to Northern Uganda).

289. The Defence points to the following statements of the Pre-Trial Chamber to show the alleged inconsistencies in the Confirmation Decision: (i) at paragraph 4, stating that "the government of Uganda referred to the Prosecutor of the Court the 'situation concerning the Lord's Resistance Army'" and that the Prosecutor extended the investigation to the entire situation in Northern Uganda, "regardless of who committed the crimes";[526] (ii) at paragraph 105, stating that "the Prosecutor has only charged crimes within the time period between 1 July 2002 and 31 December 2005";[527] (iii) at paragraphs 67 and 73 of the charges, stating that the conduct in question (sexual and gender-based crimes directly perpetrated by Mr Ongwen) "took place in northern Uganda and Sudan prior to 1 July 2002 and continued uninterrupted in northern Uganda after 1 July 2002";[528] (iv) at paragraph 82 of the charges, stating that "[a]ll conduct

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[525] *Ntaganda* Appeal Judgment, para. 322 ("The Appeals Chamber notes at the outset that the present ground of appeal concerns the level of detail required in the formulation and confirmation of charges allowing for a meaningful application of article 74(2) of the Statute. It does not concern the question whether Mr Ntaganda was informed of the charges in detail and sufficiently in advance. Regarding that latter question, the Appeals Chamber recalls that, pursuant to article 67(1)(a) of the Statute, the person must receive timely and sufficiently detailed notice of the charges.") (Footnotes omitted). *See also* *Bemba* Appeal Judgment, para. 98; *Bemba* Dissenting Opinion to Appeal Judgment, paras 20, 28.
[526] Appeal Brief, para. 179. *See also* para. 189 in which the Defence also refers to paragraph 2 of the Confirmation Decision, *referring to* crimes committed on the territory of the Uganda (jurisdiction *ratione loci*) between 1 July 2002 and 31 December 2005 (jurisdiction *ratione temporis*).
[527] Appeal Brief, para. 189.
[528] Appeal Brief, para. 180.

described below [sexual and gender-based crimes directly perpetrated by Mr Ongwen] from at least September 2002 to 31 December 2005 took place in northern Uganda and occasionally in Sudan";[529] and (v) at paragraph 136, stating that "in line with the charges, the factual analysis of the Chamber is confined to [the practice of the 'LRA abduction of women for the purpose of turning them into forced so-called "wives" of LRA fighters'] as it occurred within the Sinia brigade between 1 July 2002 and 31 December 2005".[530]

290. For the reasons that follow, the Appeals Chamber sees no contradiction in the temporal and geographic scope delineated in the aforementioned paragraphs of the Confirmation Decision. The Defence's references to the Pre-Trial Chamber's findings on the scope of the case in the Confirmation Decision are taken from disparate sections of that decision, serving varying purposes such as background information and factual narrative; with no apparent incongruity in the charged counts.

291. The Appeals Chamber notes that, in the instant case, the Prosecutor charged, and charges were confirmed in relation to, acts committed on the territory of Northern Uganda between 1 July 2002 and 31 December 2005.[531] The Appeals Chamber further notes that the charges fall into three broad categories: (i) the attacks on four IDP camps; (ii) sexual and gender-based crimes allegedly directly perpetrated by Mr Ongwen against seven women in his household; and (iii) indirect sexual and gender-based crimes against women and girls and the conscription and use of children under the age of 15 in hostilities.[532]

292. With respect to the attacks on the four IDP Camps, these all fell within the period between 1 July 2002 to 31 December 2005 and transpired on the territory of Northern Uganda; with the attack on Pajule IDP Camp taking place on or about 10 October 2003 (counts 1-10),[533] the attack on Odek IDP Camp taking place on or about 29 April 2004 (counts 11-23),[534] the attack on Lukodi IDP Camp taking place on or about 19 May

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[529] Appeal Brief, para. 180.
[530] Appeal Brief, para. 181.
[531] *See* Document Containing the Charges; Confirmation Decision, paras 2, 105; Conviction Decision, para. 32.
[532] *See* footnote 512 above.
[533] Confirmation Decision, Charges, Section 4, counts 1-10.
[534] Confirmation Decision, Charges, Section 5, counts 11-23.

2004 (counts 24-36),[535] and the attack on Abok IDP Camp taking place on or about 8 June 2004 (counts 37-49).[536]

293. With respect to the sexual and gender-based crimes allegedly directly perpetrated by Mr Ongwen (counts 50-60), in setting out the material facts surrounding three of the seven women concerned (P-0099, P-0101 and P-0214), the Pre-Trial Chamber described conduct which occurred both within the parameters of the case in terms of jurisdiction *ratione loci* and jurisdiction *ratione temporis* and outside those parameters (referring to acts which took place in Sudan before 1 July 2002).[537] However, the Pre-Trial Chamber made clear that regardless of whether the crimes charged with respect to three of the seven women took place outside of Northern Uganda, they *also* took place within Northern Uganda in the relevant period.[538] Concerning the crimes committed against the other four women (P-0226, P-0227, P-0235 and P-0236), the material facts indicated that they were committed at various times in the period between 1 July 2002 to 31 December 2005 on the territory of Northern Uganda.[539]

294. Regarding the charges for sexual and gender-based crimes that Mr Ongwen allegedly committed indirectly (counts 61 to 68), the Pre-Trial Chamber made clear that it was only concerned with the abduction of women in Northern Uganda with the purpose of turning them into forced wives in the period between 1 July 2002 and 31 December 2005.[540] Likewise, the Pre-Trial Chamber confirmed the charges concerning the conscription and use of child soldiers (counts 69 and 70) in the period between 1 July 2002 and 31 December 2005 in Northern Uganda.[541]

295. In light of the above, the argument that the Pre-Trial Chamber was inconsistent in its definition of the temporal and geographic scope of the case is rejected.

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[535] Confirmation Decision, Charges, Section 6, counts 24-36.
[536] Confirmation Decision, Charges, Section 7, counts 37-49 .
[537] Confirmation Decision, Charges, Section 8, paras 67 (P-0099), 73 (P-0101), 82 (P-0214).
[538] Confirmation Decision, Charges, Section 8, paras 67 (P-0099), 73 (P-0101), 82 (P-0214).
[539] Confirmation Decision, Charges, Section 8, paras 91 (P-0226), 100 (P-0227), 108 (P-0235), 114 (P-0236).
[540] Confirmation Decision, Charges, Section 9, para. 119, counts 61-68. *See also* Confirmation Decision, paras 136-137.
[541] Confirmation Decision, Charges, Section 10, paras 126-127, counts 69-70. *See also* Confirmation Decision, para. 141.

(ii) Alleged erroneous reliance on evidence of facts falling outside the scope of the charges

296. The second issue the Defence raises under this ground of appeal concerns the manner in which the Trial Chamber used evidence of facts falling outside the scope of the charges in the Conviction Decision. Whilst the Trial Chamber stated that its findings did not exceed the facts and circumstances described in the charges,[542] this is contested.

297. Article 74(2) of the Statute stipulates that

> The decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges. The Court may base its decision only on evidence submitted and discussed before it at the trial.

298. This provision makes clear that the decision on conviction or acquittal cannot exceed the facts and circumstances described in the charges and any amendments thereto. Indeed, "[p]ursuant to this provision, 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".[543] Furthermore, as previously held, article 74(2) enshrines the principle of congruence "[i]n ensuring that the final decision of the court reflects the facts for which the accused was brought to trial".[544]

299. The Appeals Chamber finds it important to highlight the distinction between the facts and circumstances described in the charges and the evidence "submitted and discussed" during the trial proceedings. As previously held by the Appeals Chamber, the "facts" in article 74(2) of the Statute "must be distinguished from the evidence put forward by the Prosecutor […] to support a charge".[545]

300. Pursuant to article 74(2), a decision on conviction or acquittal can only be based on evidence submitted and discussed at trial. In the context of addressing an argument by the defence team of Mr Jean-Pierre Bemba Gombo concerning the possibility of relying on uncharged criminal acts to prove the facts and circumstances described in the charges, the minority of the Appeals Chamber in the *Bemba* Case held that "[w]here specific criminal acts are alleged to support a more broadly described charge, [a

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[542] Conviction Decision, para. 122.
[543] *Ntaganda* Appeal Judgment, para. 324.
[544] *Bemba* Dissenting Opinion to Appeal Judgment, para. 25.
[545] *Lubanga* OA15 / OA16 Judgment, para. 90, fn. 163.

chamber] must consider these acts in so far as it may serve its enquiry into whether there is sufficient evidence to establish […] that the person committed the crimes charged", noting that "[i]n such a case, allegations of such criminal acts are primarily vehicles to prove a broader allegation".[546] The Appeals Chamber finds this holding of relevance insofar as it clearly draws a distinction between the facts described in the charges and facts that could serve as evidentiary vehicles to prove the charges.

301. However, the Appeals Chamber finds that while a conviction is limited to the facts and circumstances described in the charges, evidence (including evidence of facts falling outside the temporal or geographic scope of the charges) may, depending on the way the charges have been formulated in a given case, be used in the trial chamber's enquiry of whether there is sufficient basis to establish beyond reasonable doubt that the person committed the crimes charged.[547]

302. Specifically in relation to the issue of evidence of facts outside the scope of the charges, the Appeals Chamber recalls that in the *Bemba* Appeal Judgment, it found that criminal acts falling outside the scope of the charges could be taken into account for the finding regarding the contextual elements of crimes against humanity, "which operate […] at a higher level of abstraction".[548] In other cases before this Court, it has been held that evidence of events which occurred outside the scope of the charges: may "assist in establishing the background and context of the events that fall within the timeframe of the charges";[549] "enable the Chamber to contextualise other pieces of evidence presented on the responsibility of the accused";[550] "help establish the existence of the common plan before and throughout the period of the charges";[551] and/or "provide[…] information about the measures that were at the disposal of the accused to punish crimes and the power he had to repress their commission".[552]

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[546] *Bemba* Dissenting Opinion to Appeal Judgment, para. 34.
[547] *See also* *Bemba* Dissenting Opinion to Appeal Judgment, paras 34-35.
[548] *Bemba* Appeal Judgment, para. 117. *See also* para. 116.
[549] *Lubanga* Conviction Decision, para. 1022. *See also* *Ntaganda* Decision on Admissibility of Evidence, para. 30 ("[t]he temporal scope of the charges is clearly delineated in section H of the DCC. 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, but do not form part of the charges as such.")
[550] *Bemba* Decision on Admission of Materials, para. 51.
[551] *Lubanga* Conviction Decision, para. 1352.
[552] *Bemba* Decision on Admission of Materials, para. 61.

303. The Appeals Chamber also notes that in the *Ntaganda* Case regarding a decision on the admission of documentary evidence, Trial Chamber VI held that when certain evidence "contains information falling outside the scope of the charges, this does not, in itself, preclude its admission" but a chamber needs to evaluate "whether such information is sufficiently linked to the charges or may assist the Chamber in the determination of material issues".[553]

304. Furthermore, the Appeals Chamber notes the interpretation adopted by the ICTR Appeals Chamber in the case of the *Prosecutor v. Ferdinand Nahimana et al.* that a chamber is not precluded from admitting evidence of events outside the temporal scope of a case "if the Chamber deems such evidence relevant and of probative value and there is no compelling reason to exclude it".[554] By way of example, the ICTR Appeals Chamber noted that evidence of this type can be admitted and relied upon when it is "aimed at: [c]larifying a given context; [e]stablishing by inference the elements (in particular, criminal intent) of criminal conduct occurring [during the period relevant to the charges]; [d]emonstrating a deliberate pattern of conduct".[555] In a different case, an ICTR Trial Chamber, in a decision on the admissibility of a proposed witness testimony, noted "the three possible avenues" by which evidence of events that occurred outside the temporal scope of the charged crimes may be considered *relevant*: (i) evidence relevant to an offence continuing into [the period relevant to the charges]; (ii) context or background; or (iii) similar fact evidence.[556]

305. As a result, evidence of facts falling outside the scope of the charges has been admitted and has been relied upon before international courts. Nonetheless, the Appeals Chamber is of the view that the question of whether trial chambers may rely on evidence of facts falling outside the temporal or geographic scope of the charges can only be answered, in particular, by reference to the specific evidence and the purpose for which it is sought to be used. A trial chamber is required to carefully consider the link between the evidence and the specific fact and/or circumstance described in the charges. Furthermore, in accordance with article 69(4) of the Statute and rule 63(2) of the Rules,

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[553] *Ntaganda* Decision on Documentary Evidence, para. 11.
[554] *Nahimana et al.* Appeal Judgment, para. 315.
[555] *Nahimana et al.* Appeal Judgment, para. 315, *referring to* rule 93 of the Rules. *See also* *Nahimana et al.* Trial Judgment, para. 103.
[556] *Bagosora* Decision on Admissibility, paras 8-14.

due regard must be given to the relevance and probative value of the evidence in question, and whether the probative value of the evidence is outweighed by its prejudicial effect. Potential relevant considerations in this regard may be the time elapsed between the evidence of facts outside the scope of the charges and the facts and circumstances described in the charges as well as the specific fact or circumstance that this evidence seeks to establish (*e.g.* whether it is used to establish a contextual element or a specific element of the underlying crimes).

306. The Appeals Chamber will now determine whether the Conviction Decision expanded the geographic scope of the charges, in light of the Defence's submission that the Trial Chamber "based its evidential findings on armed activities which occurred in the territory of Sudan" despite its determination that the conflict in Northern Uganda was an internal armed conflict.[557] In this context, the Defence points to the Trial Chamber's finding of "evidence that the LRA obtained supplies and training in Sudan"[558] and to the finding that "[i]n addition to weapons, a number of witnesses stated that the Government of Sudan provided food and medicine to the LRA".[559]

307. Notwithstanding these references, the Appeals Chamber observes that Mr Ongwen was not convicted of crimes committed in Sudan. Rather, reference to the LRA obtaining supplies and training in Sudan was made to address the Defence's argument that "the armed conflict between the LRA and the Ugandan government and associated forces should be considered international".[560] In this regard, the Trial Chamber found that there was "no indication, at least as concerns the relevant period, that the Government of Sudan in any way intervened in the conduct of LRA operations in Northern Uganda," which would have rendered the armed conflict in question international.[561]

308. Similarly, the evidence of weapons, food and medicine being provided to the LRA by the Government of Sudan was relied upon to support the Trial Chamber's factual finding that:

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[557] Appeal Brief, para. 183, fn. 180, *referring to* Conviction Decision, paras 1154-1155.
[558] Appeal Brief, para. 183, fn. 180, *referring to* Conviction Decision, para. 1154.
[559] Appeal Brief, para. 183, *referring to* Conviction Decision, fn. 1661.
[560] Conviction Decision, para. 1154.
[561] Conviction Decision, para. 1154. *See also* paras 2811-2812.

> The LRA had at its disposal weapons and ammunition for use in military operations. It regularly seized weapons from the UPDF during combat. It also obtained weapons and other supplies from Sudan. The LRA supplied itself with food, medicines and other items of use by looting from civilians in Northern Uganda, in particular from IDP camps. The LRA relied on high-frequency radio as the principal mode of communication between units in various locations in Northern Uganda and Sudan.[562]

309. The above finding was made under the Trial Chamber's finding of fact concerning the "LRA as an organisation in 2002-2005", a finding clearly relevant to the charges. Nothing indicates that the Trial Chamber "based its evidentiary findings on armed activities which occurred in the territory of Sudan".[563] As such, the Appeals Chamber rejects the Defence's argument.

310. Further challenges to specific instances where the Trial Chamber relied on evidence of facts falling outside the scope of the charges will be addressed in the determination of the relevant grounds of appeal.[564]

(d) Overall conclusion

311. Having considered all the arguments raised under ground of appeal 6, the Appeals Chamber rejects this ground of appeal.

6. Grounds of appeal 7, 8, 10 (in part), 25 and 45: Alleged errors regarding legal standards and application of the burden of proof

312. Under these grounds of appeal, the Defence argues that the Trial Chamber: (i) erroneously applied a standard of "ample evidence" to its assessment of the evidence instead of the "beyond reasonable doubt" standard;[565] (ii) erroneously applied the burden and standard of proof for grounds excluding Mr Ongwen's criminal liability;[566] and (iii) erroneously admitted P-0447's rebuttal report in circumstances where the legal standards for a rebuttal case were not met.[567]

313. These arguments will be addressed in turn.

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[562] Conviction Decision, p. 309.
[563] Appeal Brief, para. 183.
[564] *See* section VI.E.1(a) below (Alleged error in the Trial Chamber's reliance on evidence of facts outside the scope of the charges) and paragraphs 1092-1094 below.
[565] Appeal Brief, paras 199-207.
[566] Appeal Brief, paras 208-219.
[567] Appeal Brief, paras 220-226.

(a) Application of the "beyond reasonable doubt" standard

(i) Summary of the submissions

314. The Defence argues that the Trial Chamber's "[failure] to articulate whether or not an evidentiary finding or a conclusion is reached based on proof beyond a reasonable doubt" amounts to a legal error as it cannot be discerned whether the Trial Chamber properly applied the legal standard to the evidence.[568] With reference to certain paragraphs of the Conviction Decision, the Defence submits that the Trial Chamber impermissibly applied a standard of "ample evidence" instead of the "beyond reasonable doubt" standard which it argues "generates legal confusion".[569] In its view, a correct application of the beyond reasonable doubt standard of proof would have resulted in an explicit indication as to "when and how the standard was used in the [Conviction Decision]".[570]

315. The Prosecutor submits that the Trial Chamber correctly articulated and applied the standard of proof and entered findings "'beyond reasonable doubt' with respect to the facts essential to [Mr Ongwen's] conviction".[571] In his view, the Trial 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".[572] The Prosecutor further submits that the Defence reads the Trial Chamber's references to "ample evidence" out of context as these references "did not refer to an applicable standard but rather to the *quantity* of reliable evidence underpinning the Chamber's findings […]".[573] The Prosecutor submits that the Defence's arguments must be dismissed.[574]

316. Victims Group 1 observe that the Defence's assumption that the Trial Chamber was expected to articulate "with regard to each piece of evidence and each evidentiary finding or conclusion whether it was reached based on proof beyond reasonable doubt is erroneous and unfounded".[575] In addition, they aver that the Trial Chamber's use of

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[568] Appeal Brief, para. 201.
[569] Appeal Brief, paras 202-207.
[570] Appeal Brief, para. 207.
[571] Prosecutor's Response, paras 151-156.
[572] Prosecutor's Response, para. 152, *referring to* *Bemba et al.* Appeal Judgment, para. 868 citing *Lubanga* Appeal Judgment, para. 22.
[573] Prosecutor's Response, para. 154.
[574] Prosecutor's Response, para. 154.
[575] Victims Group 1's Observations, para. 65.

the phrase "ample evidence" was not used, as suggested by the Defence, to replace the burden of proof standard.[576]

317. Victims Group 2 observe that the Defence's "simple statement" that it could not discern whether the Trial Chamber applied the relevant standard to the evidence is insufficient.[577] In their view, the Defence fails to identify with any specificity the "findings or rulings" in the Conviction Decision that are challenged nor does it present cogent arguments explaining the alleged error and how the Trial Chamber erred.[578] Furthermore, Victims Group 2 submit that contrary to the Defence's allegation, the Trial Chamber's reference to "ample evidence" was not "a legal surrogate for the standard of proof beyond a reasonable doubt".[579] They observe that the examples provided by the Defence to demonstrate the alleged error misrepresent the findings of the Chamber.[580]

(ii) Determination by the Appeals Chamber

318. The Defence argues that the Trial Chamber misapplied the standard of "beyond reasonable doubt" throughout the Conviction Decision on the basis that the Trial Chamber failed to make explicit mention of when and how the standard was used.[581]

319. At the outset, the Appeals Chamber notes that article 66(3) of the Statute clearly stipulates that "[i]n order to convict an accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt". In the case at hand, the Appeals Chamber notes that the Trial Chamber began its assessment by first setting out its factual findings, in relation to the facts and circumstances that formed the basis for its decision under article 74 of the Statute.[582] The Trial Chamber explained that

> In this section, the Chamber sets out the material facts and circumstances of this case *as they have been established to the requisite threshold* upon its assessment of the evidence submitted and discussed before it at trial. They are the facts and

[576] Victims Group 1's Observations, para. 65.
[577] Victims Group 2's Observations, para. 46.
[578] Victims Group 2's Observations, para. 46.
[579] Victims Group 2's Observations, para. 47.
[580] Victims Group 2's Observations, para. 47.
[581] Appeal Brief, para. 207.
[582] Conviction Decision, paras 121-225.

> circumstances which form the basis for the Chamber's decision under Article 74 of the Statute.[583]

320. The Trial Chamber then proceeded to articulate the burden and standard of proof stating that the onus is on the Prosecutor to prove the guilt of the accused and that pursuant to article 66(3) of the Statute, in order to convict the accused, the Trial Chamber must be convinced of the guilt of the accused beyond reasonable doubt.[584] The Trial Chamber explained that the standard of "beyond reasonable doubt is to be applied to any facts indispensable for entering a conviction, namely those constituting the elements of the crimes or modes of liability charged"[585] and that for this determination it is required to carry out "a holistic evaluation and weighing of all the evidence taken together in relation to the facts at issue".[586] Having set out these principles, the Trial Chamber described its general approach to the evaluation of different types of evidence, and its assessment of the credibility of individual witnesses and the reliability of their evidence, based on its evaluation of the evidence as a whole.[587] It went on to provide a detailed analysis of the evidence underpinning its factual findings that it had identified earlier in the Conviction Decision[588] and explained its assessment with respect to the grounds excluding criminal responsibility.[589] Finally, the Trial Chamber set out its legal findings in relation to the charges brought against Mr Ongwen.[590]

321. The Appeals Chamber notes, that in exercising its fact-finding function, the Trial Chamber correctly articulated the burden and standard of proof as described above, and therefore it must be assumed that it proceeded on the basis of a correct understanding of these concepts.[591] Furthermore, the Appeals Chamber recalls that it has previously held that the "beyond reasonable doubt" standard is to be applied to the facts that are

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[583] Conviction Decision, para. 121 (emphasis added).
[584] Conviction Decision, paras 226-227.
[585] Conviction Decision, para. 227.
[586] Conviction Decision, para. 227.
[587] Conviction Decision, paras 232-850. At paragraph 261 of the Conviction Decision, the Trial Chamber emphasised that its assessments of the witnesses and their evidence was 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 present judgment".
[588] Conviction Decision, paras 851-2447.
[589] Conviction Decision, paras 2448-2672.
[590] Conviction Decision, paras 2673-3115.
[591] *See also* *Ntaganda* Appeal Judgment, para. 594.

indispensable for entering a conviction, namely, those constituting the elements of the crimes or modes of liability charged.[592] It follows that not each and every fact in the Conviction Decision must be proved beyond reasonable doubt.[593] For this reason, the Appeals Chamber has held that a "clear distinction must be made between facts constituting the elements of the crime and mode of liability […] and any other set of facts introduced by the different types of evidence […]".[594]

322. As the Defence fails to show any error in the Trial Chamber's application of the requisite standard of proof, its arguments on this point are rejected.

323. In addition, the Defence argues that the Trial Chamber applied a standard of "ample evidence" instead of "proof beyond a reasonable doubt" when assessing the evidence.[595] For the reasons that follow, the Appeals Chamber finds no merit in this argument.

324. In support of its argument, the Defence points to various paragraphs of the Conviction Decision that purport to demonstrate that the Trial Chamber adopted a standard of "ample evidence".[596] By way of example, the Appeals Chamber notes the following paragraphs of the Conviction Decision referenced by the Defence:

i. With respect to D-0133 and his evidence on the phenomenon of escape from the LRA the Trial Chamber stated: "*[l]astly, the Chamber finds Pollar Awich's statement that 'there are no cases where children escaped […] voluntary' incredible considering the* ***ample evidence*** *received to the contrary*";[597]

ii. As to D-0121's evidence that the civilians who were abducted and later rescued and returned by Captain Engola were not from Abok and were abducted on a day other than the day of the attack, the Trial Chamber stated: "*[g]iven the* ***ample evidence*** *showing that the abductees rescued*

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[592] *Ntaganda* Appeal Judgment, para. 37; *Bemba et al.* Appeal Judgment, para. 96, *Ngudjolo* Appeal Judgment, paras 123-125; *Lubanga* Appeal Judgment, para. 22.
[593] *D. Milošević* Appeal Judgment, para. 20. *See also* *Bemba et al.* Appeal Judgment, para. 868, *Lubanga* Appeal Judgment, para. 22.
[594] *Bemba et al.* Appeal Judgment, para. 868.
[595] Appeal Brief, paras 202-207. In paragraph 204 of the Appeal Brief the Defence referred to paragraph 447 of the Conviction Decision in relation to the Trial Chamber's impeachment of the credibility of P-0250. As paragraph 447 of the Conviction Decision does not relate to P-0250 the Appeals Chamber will not consider this aspect of the Defence's argument.
[596] Appeal Brief, paras 203-206, *referring to* Conviction Decision, paras 542, 612, 1464, 1484, 1845, 1497, 1746 and fn. 4970.
[597] Appeal Brief, para. 203, *referring to* Conviction Decision, para. 612 (emphasis added).

by Captain Engola and the government soldiers had been abducted from Abok [on] the day of the attack, the Chamber finds the witness's account unreliable";[598]

iii. As to P-0314's testimony, that he was told that LRA fighters did not loot a lot of food from Odek camp, the Trial Chamber stated: "*[t]hus, given the* ***ample evidence*** *that indicated that LRA fighters looted widely in Odek IDP camp, the Chamber does not rely on this aspect of P-0314's testimony*";[599]

325. The Appeals Chamber observes that the statements of the Trial Chamber in the paragraphs of the Conviction Decision referenced by the Defence, were made in the context of the Trial Chamber exercising its fact-finding function of evaluating the credibility and/or reliability of the evidence and entering factual findings based on its holistic assessment of the evidence before it. As argued by the Prosecutor, the Appeals Chamber finds that the references to "ample evidence", when understood in their proper context, are indicative of the quantity of reliable evidence underpinning the relevant finding of the Trial Chamber rather than the application of an incorrect legal standard. Accordingly, there is no basis to conclude from the paragraphs referred to by the Defence, that the Trial Chamber equated "'ample' [evidence] with proof beyond a reasonable doubt" and thus applied the wrong standard of proof.[600] The argument is therefore rejected.

(b) The burden and standard of proof for grounds excluding criminal responsibility

(i) Summary of the submissions

326. The Defence alleges that the Trial Chamber failed to apply the "beyond reasonable doubt" standard to Mr Ongwen's grounds for excluding criminal responsibility, and that this error had a material impact on the Conviction Decision since all of Mr Ongwen's convictions emanated from the Trial Chamber's rejection of the grounds excluding criminal responsibility.[601]

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[598] Appeal Brief, para. 204, *referring to* Conviction Decision, para. 542 (emphasis added).
[599] Appeal Brief, para. 204, *referring to* Conviction Decision, para. 1464 (emphasis added).
[600] *See* Appeal Brief, para. 203.
[601] Appeal Brief, paras 208, 213-215. The Appeals Chamber notes that at paragraph 208 of the Appeal Brief the Defence seeks to incorporate, by reference to the Defence's Closing Brief, arguments made therein relating to the application of the reasonable doubt standard to the grounds excluding criminal responsibility. As found above, the Appeals Chamber will address only those arguments that are

327. The Defence submits that in the absence of any provision in the Statute regulating the burden and standard of proof applicable to grounds excluding criminal responsibility, the Trial Chamber: (i) erred by failing to articulate what the applicable standard would be for grounds excluding criminal responsibility prior to the Defence presenting its evidence;[602] and (ii) erred by failing to indicate whether the Prosecutor met his or her burden with respect to the elements of the mental disease or defect and duress defences under article 31 of the Statute.[603]

328. Furthermore, the Defence submits that the Trial Chamber's failure to apply the "beyond reasonable doubt" standard to the grounds excluding criminal responsibility "implicitly led to the impermissible shifting of the onus onto the Defence, in violation of Article 67(1)(i) as well as Article 66(2) of the Statute".[604] The Defence alleges that the Prosecutor bears the burden to disprove each element of a ground excluding criminal responsibility beyond reasonable doubt and the Defence has no evidentiary burden.[605] The Defence argues that by stating that the Defence had every opportunity to present its evidence or legal submissions on the law, the Trial Chamber effectively shifted the Prosecutor's evidentiary burden onto the Defence.[606]

329. The Prosecutor submits that the Defence misunderstands the issue and contends that

> Although the Prosecution does not have the burden to "disprove" the "elements" of the grounds excluding an accused's criminal responsibility under article 31, 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 [Mr] 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

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developed in the present ground of appeal. *See* paragraph 97 above. *See also* section V.D. above (Substantiation of arguments).

[602] T-263, p. 43, lines 2-7 ("Now my next point is that the Defence of Mr Ongwen – Mr Ongwen was prejudiced because before he presented his affirmative defence of mental disease or defect, the Trial Chamber did not articulate what its standard would be for affirmative defence. The Defence was put in a position where it would have to guess what the standard would be and this affected the fair trial right of Mr Ongwen under 67 – Article 67(1)(e), his right to present a defence."); Appeal Brief, para. 210.

[603] Appeal Brief, para. 212.

[604] Appeal Brief, para. 216.

[605] Appeal Brief, paras 210, 218.

[606] Appeal Brief, para. 219.

> liability 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 [Mr] Ongwen. Indeed, the Chamber did not consider that there was a (reasonable) possibility on the evidence that, at the time material to the charges, [Mr] Ongwen suffered [from] a mental disease or defect, or acted under duress, in order to conclude that there was a ground to exclude his criminal responsibility.[607]

330. The Prosecutor further submits that "his burden is different from the Defence's 'evidential' burden to raise, and substantiate grounds under article 31 [of the Statute]".[608] In his view, the Defence's obligation to substantiate allegations that an accused is not criminally responsible 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".[609] The Prosecutor concludes that the Defence "does not demonstrate an error in the Chamber's application of the standard of proof with regard to the application of article 31".[610]

331. Victims Group 1 submit that the Defence fails to provide any reasons for its view on the Prosecutor's burden of proof nor for how the Trial Chamber shifted the burden of proof to the Defence.[611] They observe that nothing in the legal framework of the Court supports the Defence's submission that the Prosecutor must disprove grounds excluding criminal responsibility beyond reasonable doubt.[612]

332. Victims Group 2 submit that the Trial Chamber's findings on the grounds excluding criminal responsibility are "perfectly in line with [its] pronouncement on the burden of proof under article 66(2) and (3) of the Statute" and that the Trial Chamber did not shift the evidentiary burden to the Defence.[613]

333. The PILPG submit that the lack of a specific provision in the Statute stipulating the burden and standard of proof with respect to article 31 of the Statute is not a lacuna and that the drafters of the Statute intended the burden to be on the Prosecutor, to establish the guilt of the accused beyond reasonable doubt, even when grounds for

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[607] Prosecutor's Response, para. 157 (footnotes omitted).
[608] Prosecutor's Response, para. 158.
[609] Prosecutor's Response, para. 158.
[610] Prosecutor's Response, para. 160.
[611] Victims Group 1's Observations, para. 67.
[612] Victims Group 1's Observations, para. 68.
[613] Victims Group 2's Observations, para. 53.

excluding criminal responsibility are asserted.[614] In their view, by virtue of articles 66 and 67(1)(i) of the Statute and rule 79(1)(b) of the Rules, and based on the drafting history of the Statute, the Defence does not have the burden to prove the grounds for excluding criminal responsibility.[615] Rather, under their proposed "evidentiary production approach", the Defence would be required to make a "prima facie showing" that a ground excluding criminal responsibility exists. At that point, should the Trial Chamber determine that a particular article 31 claim meets the initial evidentiary threshold, the Prosecutor would then be required "to establish that the claim does not raise a reasonable doubt".[616]

334. Dr Paul Behrens submits that the Prosecutor "always has the burden to prove the guilt of the accused" whilst "the accused always has the burden of proof where elements concerning innocence is concerned".[617] In his view, although the Statute places the burden of proof regarding guilt on the Prosecutor, proving the existence of an alibi or mistake of fact is on the defence.[618] This view, he submits, is compatible with article 66(2) of the Statute in that the burden of proof for a ground excluding criminal responsibility, like the burden of proof for any other aspects pertaining to innocence, rests with the Defence, but is, in light of article 66(3), limited to establishing reasonable doubt.[619]

(ii) Relevant parts of the Conviction Decision

335. Regarding the burden and standard of proof for grounds excluding criminal responsibility, the Trial Chamber found as follows:

> The Chamber notes that there is no specific provision in the Statute regulating the burden and standard of proof with respect to grounds excluding criminal responsibility. However, this is not a lacuna in the Statute. 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

[614] Observations of PILPG, para. 3; T-263, p. 80, lines 13-18.
[615] Observations of PILPG, paras 7-22; T-263, p. 80, lines 1-7.
[616] Observations of PILPG, paras 28-29; T-263, p. 82, line 23 to p. 83, line 1.
[617] Observations of Dr Behrens, paras 2-3; T-263, p. 88, lines 23-25.
[618] Observations of Dr Behrens, para. 2.
[619] Observations of Dr Behrens, paras 3-4.

> 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.[620]

(iii) Determination by the Appeals Chamber

336. The Defence submits that the Trial Chamber misapplied the burden and standard of proof applicable to grounds excluding criminal responsibility under article 31 of the Statute. In the Defence's view, a correct application of the burden and standard of proof in relation to grounds excluding criminal responsibility, would have required the Prosecutor to bear the burden to disprove each element of these grounds beyond reasonable doubt.[621] In this regard, the Defence contends that the Trial Chamber erred when it failed to indicate whether the Prosecutor had met his burden.[622]

337. The Appeals Chamber considers that the Defence's arguments, which concern the scope of the Prosecutor's burden of proof when grounds excluding criminal responsibility are raised at trial, are misplaced. As explained by the Trial Chamber, in the absence of a specific provision in the Statute regulating the burden and standard of proof with respect to grounds excluding criminal responsibility, the general provisions of article 66 of the Statute apply.[623] This means that in all circumstances, including when a ground for excluding criminal responsibility is raised, the onus is on the Prosecutor to prove the guilt of the accused (article 66(2) of the Statute) and in order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt (article 66(3) of the Statute).[624]

338. As discussed above, this burden and standard of proof entails that the facts indispensable for entering a conviction, namely, those constituting the elements of the crime or crimes charged (such as the mental or subjective elements) and the mode or modes of liability alleged against the accused must be established beyond reasonable doubt by the Prosecutor.[625] Generally, the Prosecutor does not bear the burden *per se* to "disprove each element" of a ground excluding an accused's criminal responsibility. However, he or she must establish the guilt of the accused beyond reasonable doubt,

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[620] Conviction Decision, para. 231. *See also* para. 2455.
[621] Appeal Brief, paras 210-211.
[622] Appeal Brief, para. 212.
[623] Conviction Decision, para. 231.
[624] Conviction Decision, paras 231, 2455, 2588.
[625] *See* paragraph 320 above.

even when a ground for excluding criminal responsibility is raised. In doing so, the Prosecutor may address and rebut the Defence's allegations and evidence adduced in support of the alleged ground for excluding criminal responsibility. As a result, the Trial Chamber did not err by failing to indicate whether the Prosecutor "had met [his] burden in respect to the elements of the mental health and duress defences […]" as alleged by the Defence.[626] Indeed, the Appeals Chamber notes that the Trial Chamber found that the Prosecutor had established the elements of the crimes, including the mental element, and modes of liability beyond reasonable doubt and that the grounds for excluding criminal responsibility did not apply to Mr Ongwen.[627]

339. The Defence further argues that by misapplying the burden and standard of proof the Trial Chamber impermissibly shifted the onus onto the Defence in violation of articles 67(1)(i) and 66(2) of the Statute.[628] The Defence claims that, when raising grounds excluding an accused's criminal responsibility, it "has no evidentiary burden" as the "burden never shifts away from the Prosecutor".[629] In the Defence's view, the Trial Chamber shifted this burden when it stated that the Defence "had every opportunity to present its evidence or legal submissions on any point of law".[630]

340. The Appeals Chamber notes that the Defence's arguments misapprehend the difference between the Prosecutor's burden to establish the guilt of the accused beyond reasonable doubt and the Defence's responsibility to present evidence to establish the grounds it alleges exclude an accused's criminal responsibility. It is evident in this regard that, when raising grounds purporting to exclude an accused's criminal responsibility, it is not enough to merely give notice of such an intention. The Defence must also present evidence to substantiate its allegations. This is supported by rule 79(1)(b) of the Rules which requires the Defence to notify the Prosecutor of its intent to raise a ground for excluding criminal responsibility and to "*specify the names of witnesses and any other evidence upon which the accused intends to rely to establish the ground*".[631] This so-called "evidentiary burden" on the part of the Defence does not

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[626] Appeal Brief, para. 212.
[627] Conviction Decision, paras 2448-2580, 2668-2670.
[628] Appeal Brief, para. 216.
[629] Appeal Brief, para. 218.
[630] Appeal Brief, para. 219, *referring to* Conviction Decision, para. 90.
[631] Emphasis added. The Appeals Chamber considers that rule 79(1)(b) of the Rules gives effect to the adversarial principle (*contradictorio*) which allows each of the parties to contest the statement of facts

equate to a shift in the burden of proof as the Prosecutor is not absolved of his or her burden to establish the elements of the crimes (including the mental element) and the modes of liability beyond reasonable doubt.[632] The Trial Chamber must then decide whether a ground for excluding an accused's criminal responsibility exists, on the basis of all the evidence adduced by the parties and participants.

341. The Defence further submits that the Trial Chamber shifted the Prosecutor's evidentiary burden with respect to the grounds for excluding criminal responsibility by suggesting that the Defence had opportunities to call witnesses and did so.[633] The Appeals Chamber is not persuaded by this argument.

342. In the Conviction Decision, the Trial Chamber stated that

> 90. It further needs to be noted that the Defence had every opportunity to present its evidence or legal submissions on any point of law. It submitted expert reports and called experts in relation to Article 31(1)(a) of the Statute and it systematically explored matters related to Article 31(1)(d) of the Statute with witnesses who appeared before the court. In this context, the Chamber also recalls that it previously encouraged the Defence "to put forward all the evidence it has in support of the grounds for excluding criminal responsibility it has raised".
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> 91. As concerns Article 31(1)(a) of the Statute, the Chamber has specifically taken care that both parties had the opportunity to elicit all necessary evidence: it allowed the Prosecution to present evidence in rebuttal after the Defence had questioned D-0041 and D-0042. It also determined *proprio motu*, after taking "into account the principles of a fair trial and the rights of the accused pursuant to Article 67 of the Statute", that the Defence was allowed to present evidence in rejoinder of the rebuttal evidence – an opportunity which the Defence availed itself of.[634]

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and the legal grounds brought against them and underscores the principle of "equality of arms" before the Court. In particular, the drafting history of rule 79, reveals that while some delegations "expressed resistance to imposing any reciprocal disclosure obligations on the defence" the prevailing view was that "in light of the nature of cases falling within the Court's jurisdiction and the principle of 'equality of arms' before the Court, reciprocal disclosure was appropriate". As a result, limited disclosure obligations by the Defence, with respect to grounds excluding criminal responsibility under article 31(1) of the Statute, was imposed to ensure that the Prosecutor was "forewarned" and had "sufficient time to investigate such matters" and to avoid "lengthy adjournments". *See* H Brady, "Disclosure of Evidence" in R.S Lee (ed.) *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, 2001), pp. 414-415.

[632] Appeal Brief, paras 217-219.

[633] Appeal Brief, para. 219.

[634] Conviction Decision, paras 90-91 (footnotes omitted). *See also* Decision on the burden and standard of proof applicable to article 31 of the Statute, para. 15.

343. The Appeals Chamber considers that in discussing the manner and extent to which the Defence presented its evidence relating to article 31 of the Statute, the Trial Chamber did not, as suggested by the Defence, shift the burden of proof. The Appeals Chamber recalls that before the Trial Chamber, the Defence itself acknowledged that it was under an "evidential obligation" to raise the grounds for excluding criminal responsibility under article 31(1)(a) and (d) of the Statute.[635] Subsequently, the Defence submitted evidence of, *inter alia*, "five expert reports and the expert testimonies in its case and on rejoinder".[636] As stated above, the presentation of evidence in substantiation of grounds excluding criminal responsibility does not equate to a shift in the burden of proof.[637] Rather, as with other arguments that the Defence decides to raise at trial, it must substantiate them in order to raise reasonable doubt as to an accused's criminal responsibility.[638] The Appeals Chamber finds that the Defence fails to show that the Trial Chamber shifted the burden of proof when it stated that the Defence had opportunities to call witnesses and did so. The argument is thus rejected.

344. Lastly, the Defence argues that the Trial Chamber erred by failing to articulate what the applicable standard would be for grounds excluding criminal responsibility prior to the Defence presenting its evidence.[639] The Appeals Chamber notes in this regard that the Defence was placed on notice, prior to the presentation of its evidence on grounds excluding criminal responsibility, as to what the applicable burden and standard of proof would be. The Trial Chamber specifically stated in its Decision on the burden and standard of proof applicable to article 31 of the Statute, that

> 13. In respect of the merits, the Chamber notes that Article 66 of the Statute provides that, *inter alia*, the Chamber must be convinced of the guilt of the accused beyond reasonable doubt, and the onus is on the Prosecution to prove the guilt of the accused. The Appeals Chamber has established that this standard of proof entails that 'the elements of the crime and the mode of liability alleged against the accused, as well as the facts which are "indispensable for entering a conviction" must be established beyond reasonable doubt' by the Prosecution.

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[635] Defence Request for a Ruling on the Burden and Standard of Proof, para. 2.
[636] Defence Closing Brief, para. 533.
[637] *See* paragraph 340 above.
[638] *Ntaganda* Appeal Judgment, para. 586, the Appeals Chamber stated that "if the Prosecutor presents evidence meeting the 'beyond reasonable doubt' standard of proof, the accused may be convicted if he or she does not present evidence capable of raising reasonable doubt regarding the Prosecutor's case".
[639] T-263, p. 43, lines 2-7; Appeal Brief, para. 210.

> 14. The Chamber is also mindful of the protection provided for in Article 67(1)(i) of the Statute. […] However, the Chamber underscores that an accused must never be required to affirmatively disprove the elements of a charged crime or a mode of liability, as it is the Prosecution's burden to establish the guilt of the accused pursuant to Article 66 of the Statute.[640]

345. To the extent that the Defence argues that the Trial Chamber erred in failing to set out its legal interpretation of the burden and standard of proof prior to the presentation of evidence relating to article 31 of the Statute, the Appeals Chamber notes that in addressing this argument of the Defence, the Trial Chamber stated that

> With regard to the presentation of evidence, the Defence explains further that "it cannot fully address all issues which may be necessary for the Trial Chamber's Article 74 judgment if it does not know the standard which will be applied". This is not true, since the Defence can fully address all issues, but it will only know the Chamber's legal interpretation on these matters at a later point. The Defence has a right to the former pursuant to article 67(1) of the Statute, but it has no right to receive a full legal interpretation by the Chambers on the law at a specific point in the proceedings.[641]

346. The Appeals Chamber finds no error in the Trial Chamber's determination. It recalls that, as a matter of law, there is no rule in the Court's legal framework requiring a trial chamber to pronounce on its interpretation of the law at a specific point during the proceedings. Moreover, the Appeals Chamber notes that in its Decision on the burden and standard of proof applicable to article 31 of the Statute, the Trial Chamber explained that in the context of article 31 of the Statute, the Prosecutor had the burden to prove the guilt of the accused and that the Defence was not required to affirmatively disprove the elements of a charged crime or a mode of liability.[642] It further noted that the Defence had previously maintained that it was under an evidential obligation to raise the grounds for excluding criminal responsibility under article 31(1)(a) and (d) of the Statute.[643] Moreover, the Trial Chamber noted that the Defence "has had and will continue to have every opportunity [during the presentation of its case] to present evidence on all the elements of the relevant Article 31 grounds".[644] Subsequently, the Trial Chamber found that even though its full legal interpretation of the burden and

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[640] Decision on the burden and standard of proof applicable to article 31 of the Statute, paras 13-14. *See also* Conviction Decision, para. 86.
[641] Conviction Decision, para. 88 (footnotes omitted).
[642] Decision on the burden and standard of proof applicable to article 31 of the Statute, paras 13-14.
[643] Decision on the burden and standard of proof applicable to article 31 of the Statute, para 15.
[644] Decision on the burden and standard of proof applicable to article 31 of the Statute, para 15.

standard of proof applicable to article 31(1)(a) and (d) of the Statute was not available, at that point in the proceedings, the Defence was not prevented from fully presenting and addressing all its arguments and evidence relating to those issues.[645] The Appeals Chamber finds the Trial Chamber's approach in this respect to be reasonable. The Defence's argument fails to demonstrate any error in the Trial Chamber's determination. The argument is thus rejected.

(c) Errors relating to the admission of Professor Weierstall-Pust's rebuttal evidence and report

(i) Background

347. Between March and April 2018, the Trial Chamber heard testimony from Professor Weierstall-Pust (hereinafter: "P-0447") and other experts called by the Prosecutor on mental health issues.[646] On 13 April 2018, the Prosecutor completed the presentation of his evidence.[647]

348. In June 2018, the Defence's mental health experts, D-0041 and D-0042[648] provided their second psychiatric report which contained, *inter alia*, new diagnoses pertaining to Mr Ongwen's mental health.[649]

349. On 18 September 2018, the Defence gave its opening statement and on 1 October 2018 it called its first witness.[650]

350. On 17 September 2019, in anticipation of the Defence Experts' testimony, the Prosecutor indicated that in light of the content of the Defence Experts' Second Report:

> It is almost inevitable that the Prosecution […] will ask for permission to call evidence in rebuttal because expert witnesses who gave evidence during the prosecution case did not have the opportunity to address this new material. Such rebuttal evidence is likely to be in the shape of a further report and brief testimony from Professor Weierstall.[651]

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[645] Conviction Decision, paras 90-91.
[646] Conviction Decision, paras 2470, 2479, 2486. *See also* Prosecutor's Response, para. 163.
[647] Conviction Decision, para. 19.
[648] *See* paragraph 218 above.
[649] Defence Experts' Second Report, UGA-D26-0015-0948. *See also* Conviction Decision, para. 2522.
[650] Conviction Decision, para. 22.
[651] Prosecutor's Request for Order to Defence to Specify Date for Testimony, para. 5.

351. On 1 October 2019, the Trial Chamber decided, *inter alia*, to allow evidence in rebuttal from the Prosecutor, should she wish to introduce any, in relation to the Defence Experts' Second Report and the expected testimony of the Defence Experts.[652] In the same vein, the Trial Chamber allowed the Defence to present evidence in rejoinder to the rebuttal evidence should it wish to do so.[653]

352. Between 18 and 22 November 2019, the Defence Experts testified before the Trial Chamber.[654] Between 25 and 26 November 2019, following the submission of his Rebuttal Report on the Defence Experts' Second Report and the related testimony of the Defence Experts,[655] P-0047 testified before the Trial Chamber.[656] In rejoinder, the Defence submitted a report prepared by D-0042 and between 28 and 29 November 2019, the witness testified again.[657]

(ii) *Summary of the submissions*

353. The Defence argues that the Trial Chamber erred when it permitted a prosecution rebuttal case and admitted P-0447's report "without any showing that the legal standards for a rebuttal case were met".[658] In addition, the Defence contends that the Rebuttal Report was repetitive of prior testimony given by P-0447 on, *inter alia*, dissociative and depressive disorders, and by P-0446's testimony on malingering and "faking it".[659] Moreover, the Defence argues that its admission "was inconsistent with the Chamber's previous holding that [the] scope of rebuttal evidence can only concern points and facts not previously addressed by Prosecution witnesses".[660]

354. The Defence submits that the Rebuttal Report and P-0047's testimony were key for the Trial Chamber's rejection of the grounds excluding criminal responsibility.[661] In particular, the Defence argues that the Rebuttal Report was relied on extensively by the Trial Chamber to support the factors it identified as "indicators of unreliability"

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[652] Decision on Rebuttal Evidence, para. 16.
[653] Decision on Rebuttal Evidence, para. 17.
[654] D-0041: T-248, T-249; D-0042: T-250, T-251.
[655] Rebuttal Report, UGA-OTP-0287-0072.
[656] P-0047: T-252, T-253.
[657] Rejoinder Report, UGA-D26-0015-1574 ; D-0042: T-254, T-255.
[658] Appeal Brief, para. 223.
[659] Appeal Brief, para. 221.
[660] Appeal Brief, para. 221.
[661] Appeal Brief, para. 225.

when it rejected the Defence Experts' diagnoses of Mr Ongwen's mental disorders.[662] The Defence submits that were it not for the rebuttal evidence it would have been "less likely" for the Trial Chamber to reject the grounds excluding criminal responsibility.[663]

355. The Prosecutor submits that the Trial Chamber did consider the legal requirements for rebuttal evidence before allowing it.[664] In addition, the Prosecutor submits that the Rebuttal Report was not repetitive of P-0447's evidence given during the prosecution case.[665] He argues that "[t]he fact that P-0447 *in response to new opinions* refers to a diagnosis he had previously made did not make his evidence repetitive".[666] Lastly, the Prosecutor argues that "even if, *arguendo*, P-0447's evidence was repetitive", the Defence fails to demonstrate what prejudice, if any, it suffered.[667]

356. Victims Group 1 observe that "the Court's legal texts do not explicitly regulate rebuttal evidence".[668] They submit, however, that, as noted by the Trial Chamber, it is in principle possible to hear rebuttal evidence under the Statute system and that a chamber has wide discretion in this regard.[669] Furthermore, they submit that the Trial Chamber "extensively explained its reasons for granting P-0447's rebuttal evidence" which demonstrates that Mr Ongwen's fair trial rights were not violated.[670]

357. Victims Group 2 observe that the Trial Chamber issued a decision "specifically addressing the possibility for the Prosecution to present rebuttal evidence and developing a set of strict rules for its admission".[671] Therefore, they consider the Defence's argument in this regard to be "demonstrably incorrect".[672]

(iii) Determination by the Appeals Chamber

358. The Appeals Chamber notes that during the trial, at the stage of the presentation of evidence by the Defence, and more specifically, in the context of considering the

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[662] Appeal Brief, para. 225.
[663] Appeal Brief, para. 226.
[664] Prosecutor's Response, para. 162.
[665] Prosecutor's Response, para. 163.
[666] Prosecutor's Response, para. 163.
[667] Prosecutor's Response, para. 164.
[668] Victims Group 1's Observations, para. 76.
[669] Victims Group 1's Observations, para. 76.
[670] Victims Group 1's Observations, para. 76.
[671] Victims Group 2's Observations, para. 55.
[672] Victims Group 2's Observations, para. 57.

manner in which the Defence Experts would testify, the Trial Chamber permitted rebuttal and rejoinder evidence to be presented by the parties should they wish to do so, in connection with the anticipated testimony of the Defence Experts and the Defence Experts' Second Report.[673]

359. The Defence raises three arguments in this regard. First, it argues that the Trial Chamber erred by permitting rebuttal and rejoinder evidence to be presented in the absence of any formal request by the Prosecutor.[674] Second, it contends that the Trial Chamber erred in law by not articulating or applying any legal standard to the rebuttal evidence of P-0447 or his Rebuttal Report.[675] Third, the Defence maintains that the Prosecutor's rebuttal evidence was repetitive of previous prosecution evidence and thus inconsistent with the Trial Chamber's holding that it would not allow any repetition of evidence.[676] These arguments will be considered in turn.

360. With respect to the first argument, the Defence appears to argue that by permitting rebuttal and rejoinder evidence to be presented in the absence of any formal request by the Prosecutor, the Trial Chamber erred in the exercise of its discretion since the decision deprived the Defence of proper notice of the criteria for rebuttal evidence.[677] For the reasons that follow, the Appeals Chamber finds no merit in this argument. The Appeals Chamber notes that prior to taking its decision, the Trial Chamber had before it submissions from the Prosecutor that she was likely to request permission to present rebuttal evidence, since the content of the Defence Experts' Second Report raised new diagnoses concerning Mr Ongwen's mental health which the mental health experts called by the Prosecutor had not had an opportunity to address.[678] The Prosecutor also indicated, at that time, how she intended to proceed with the proposed rebuttal

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[673] Decision on Rebuttal Evidence, paras 12-17.
[674] Appeal Brief, para. 223.
[675] Appeal Brief, paras 220-223.
[676] Appeal Brief, paras 221-224.
[677] Appeal Brief, para. 223. *See also* T-251, p. 84, lines 4-11 ("Ms Lyons: Okay. And also for the record that – I'm not trying to re-litigate it but want to make it very clear – that it's still the position of the Defence that for proper notice in terms of a rebuttal case, in this situation rebuttal evidence from the Prosecution, there is a necessity for a written motion that goes through the criteria, some of which you have addressed in your decision. But for proper notice, so that we can fully understand and inform our client, we need to have a proper motion. We're here, we're doing it now because we've been ordered. No problem. But I want to register that objection again, which we've litigated and we lost, but [...]").
[678] Decision on Rebuttal Evidence, para. 3, *referring to* Prosecutor's Request for Order to Defence to Specify Date for Testimony, paras 6-7.

evidence.[679] The Trial Chamber explained that, under regulation 43 of the Regulations, it had an obligation to ensure that the questioning of witnesses and the presentation of evidence was fair and effective; to avoid delays and to ensure that the use of time was effective.[680] In particular, it stated that

> The Chamber must not postpone a discussion on these matters until the termination of the testimony of Defence Expert Witnesses particularly since the significance of the evidence is already foreseeable in light of the expert reports. Bearing in mind the advanced stage of the proceedings, such a late discussion could lead to significant delays and go against the expeditiousness of the proceedings, which is both of interests to the Prosecution and the Defence. A determination on the matter now will give all parties and participants sufficient time and foreseeability to prepare for an eventual testimony in rebuttal or rejoinder.[681]

361. As noted above, the Trial Chamber was already aware of the importance of the information contained in the Defence Experts' Second Report which it described as "foreseeable". Since the Prosecutor had already expressed her intention to call rebuttal evidence in connection with the testimony of D-0041 and D-0042, and, considering that at that stage of the proceedings, the Trial Chamber was deciding on the manner in which these witnesses would testify, the Appeals Chamber finds that it was not unreasonable for the Trial Chamber to have also dealt with the issue of the presentation of rebuttal and rejoinder evidence in that context. The Trial Chamber had an obligation under regulation 43 of the Regulations to ensure that the questioning of witnesses and the presentation of evidence was fair and effective and to ensure the effective use of time. As noted by the Prosecutor, "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".[682] Consequently, the Appeals Chamber finds

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[679] Decision on Rebuttal Evidence, para. 3, *referring to* Prosecutor's Request for Order to Defence to Specify Date for Testimony, paras 6-7. The Appeals Chamber notes that the Defence had an opportunity to respond specifically to the Prosecutor's indication regarding rebuttal evidence. *See* Defence's Reply to Prosecutor's Response re Mode of D-41 and D-42's Testimony, para. 4, fn. 6. In its response, the Defence objected to the Prosecutor's submission regarding the need for rebuttal evidence. It explained that it would be "premature and potentially prejudicial" for it to express an opinion as, at that stage without an opportunity to consult its experts, it did not agree with the Prosecutor's characterisation that the Defence Experts' Second Report contained new diagnoses concerning Mr Ongwen's mental health.
[680] Decision on Rebuttal Evidence, para. 13.
[681] Decision on Rebuttal Evidence, para. 13.
[682] Prosecutor's Response, para. 161.

that the Defence fails to demonstrate any error in the exercise of the Trial Chamber's discretion in this regard.

362. Turning to the second argument that the Trial Chamber erred in law by not articulating or applying any "legal standard" to the rebuttal evidence of P-0447 or his Rebuttal Report, the Defence refers to three "legal standards" which it argues were not satisfied for the admission of the rebuttal evidence. According to these standards, for a request of this nature to be successful a party must demonstrate

- that an issue of significance has arisen *ex improviso*;
- that the proposed evidence in rebuttal satisfies the admissibility criteria; and
- that this step will not undermine the Accused's rights, in particular under Article 67 of the Rome Statute.[683]

363. The Appeals Chamber notes that these three criteria, rather than legal standards, were first espoused by Trial Chamber I in the *Lubanga* Case following its analysis of the circumstances under which both the *ad hoc* Tribunals and Trial Chamber II in the *Katanga* Case considered the admission of rebuttal evidence.[684] Trial Chamber I concluded as follows:

> 42. The *ad hoc* tribunals have considered the admission of rebuttal evidence on a number of occasions. Both the ICTY and the ICTR have decided that the Chamber has a wide discretion to limit or preclude the presentation of rebuttal evidence in order to ensure that the trial proceeds expeditiously, and to avoid unfairness and unnecessary delays. The tribunals have determined that the proposed rebuttal evidence must relate to a significant issue that arises directly out of defence evidence that has been introduced, which could not reasonably have been anticipated. However, the prosecution cannot call rebuttal evidence merely because its case has been contradicted by other evidence or in order to reinforce other evidence that has already been called. Indeed, the tribunals have determined that the prosecution is under a duty to adduce all the evidence necessary to prove the guilt of the accused and thereafter it should close its case. This Chamber broadly agrees with the general approach as set out above in the various Decisions of Trial Chamber II and the *ad hoc* tribunals.

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[683] Appeal Brief, para. 221, fn. 208. The Defence refers to legal standards for the admission of rebuttal evidence that are cited in an earlier, unrelated request of the Prosecutor, for the presentation of rebuttal evidence. *See* Prosecutor's Request re Rebuttal Evidence, para. 4.
[684] *Lubanga* Decision on Rebuttal Evidence, paras 36-44.

> 43. In summary, calling rebuttal evidence is likely to be an exceptional event, and certainly in the context of this application, it will be necessary for the prosecution to demonstrate, first, that an issue of significance has arisen *ex improviso*, second, that the evidence on rebuttal satisfies the admissibility criteria; and, third, this step will not undermine the accused's rights, in particular under Article 67 of the Statute.[685]

364. The Appeals Chamber notes that these criteria have since provided guidance to other trial chambers in their adjudication of applications to adduce rebuttal evidence.[686] The Appeals Chamber concurs with the general import and applicability of these criteria. It further notes that each application for rebuttal evidence must be assessed on a case-by-case basis. A decision in this respect requires the exercise of a trial chamber's discretion within the context of its overarching obligation to ensure that the rights of an accused are upheld.

365. In the case at hand, the Appeals Chamber finds that the Trial Chamber appropriately applied these criteria when it considered the presentation of the rebuttal evidence in question. It found 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 the Defence Experts' expected testimony, which were not foreseeable to the Prosecutor. It also found that the need for rebuttal evidence was not caused by any negligence or fault on the part of the Prosecutor and emphasised that it would only allow it for points and facts not previously addressed by the Prosecutor's expert witness, noting that it had "a wide discretion to limit or preclude rebuttal evidence".[687] In addition, the Trial Chamber specifically referred to the rights of the accused under article 67 of the Statute and authorised rejoinder evidence in response to any potential rebuttal evidence that the Prosecutor may call.[688]

366. With respect to the third argument concerning the repetitive nature of P-0477's evidence and the Rebuttal Report, the Defence contends that the Rebuttal Report was

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[685] *Lubanga* Decision on Rebuttal Evidence, paras 42-43 *referring, inter alia, to Limaj et al.* Decision on Rebuttal Evidence, para. 6; *Blagojević and Jokić* Decision on Rebuttal Evidence, para. 6; *Galić* Decision on Rebuttal Evidence, para. 4; *Ntagerura et al.* Decision on Rebuttal Evidence, para. 31; *Semanza* Decision on Rebuttal Evidence, paras 8-9.
[686] *Ntaganda* Decision on Rebuttal Evidence, para. 20; *Bemba* Decision on Additional Evidence, paras 24-25; *Lubanga* Decision on Rebuttal Evidence, paras 42-43.
[687] Decision on Rebuttal Evidence, para. 16.
[688] Decision on Rebuttal Evidence, para. 17.

repetitive of the prior testimony of P-0447 on dissociative disorders and major depressive disorders and evidence of P-0446 on malingering and "faking it" that was tended during the prosecution case.[689] Moreover, it argues that the Rebuttal Report contained 48 references to severe depressive illness, post-traumatic stress disorder (hereinafter: "PTSD") whilst in P-0447's initial testimony there were 52 such references.[690] In essence, the Defence submits that the presentation of the rebuttal evidence was repetitive to such an extent that it allowed the Prosecutor "two bites of the apple".[691]

367. The Appeals Chamber notes that prior to P-0477's rebuttal testimony, the Trial Chamber addressed, by way of oral decision, the arguments of the Defence concerning, *inter alia*, the repetitiveness of the rebuttal evidence. The Trial Chamber stated as follows:

> The Chamber issues an oral decision on the objections of the Defence on the report presented by the rebuttal expert, Professor Weierstall. The Chamber said in paragraph 16 of [Decision on Rebuttal Evidence] that, and I quote, "[t]he rebuttal evidence appears to be necessary in light of the content of the second report and expected expert testimonies." What was clearly meant by this is that any issues touched upon in the second Defence expert report and the live testimony of Defence experts 41 and 42 could have been part of a report prepared by Professor Weierstall. This is clearly the case with the report of Professor Weierstall who discusses the testimonies of D-41 and D-42 and makes references to the second report and the supplementary report which is in line with the [Decision on Rebuttal Evidence] and consistent with *bona fide* character of rebuttal evidence. This also becomes evident from the title of Professor Weierstall's second report, an issue addressed by the Defence, I quote, "Expert opinion on the second psychiatric report and its related testimonies". Further, with regard to the fair trial rights of the accused, the Chamber again affirms the Defence's right to call a rejoinder witness expert. During this testimony, the Defence will have the right to fully address the entire content of the second report of Professor Weierstall. For these reasons, the Chamber rejects the objections of the Defence.[692]

368. The Appeals Chamber observes that in rejecting the Defence's arguments, the Trial Chamber explained that any issues discussed in the Defence Experts' Second Report including the testimony of D-0041 and D-0042 could be discussed by P-0477 in

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[689] Appeal Brief, para. 221.
[690] Appeal Brief, para. 224, fn. 215.
[691] Appeal Brief, para. 222.
[692] P-0047: T-252, p. 7, line 16, to p. 8, line 10.

his rebuttal evidence. In this regard, the Appeals Chamber further observes that dissociative disorders and major depressive disorders, including the issue of malingering, were discussed in considerable detail in the Defence Experts' Second Report.[693] Given the nature of rebuttal evidence, the Appeals Chamber considers that it was reasonably foreseeable that the Rebuttal Report would also discuss those mental disorders. In the Appeals Chamber's view, this does not equate to repetition in the sense argued by the Defence. As correctly pointed out by the Prosecutor, "[t]he fact that P-0477 *in response to new opinions* refers to a diagnosis he had previously made did not make his evidence repetitive".[694] Likewise, the number of references to PTSD in P-0477's initial testimony and the Rebuttal Report is no indication of repetition *per se*. If anything, it demonstrates that PTSD was an important issue that was addressed extensively in both P-0477's initial testimony and the Defence Experts' Second Report. The Appeals Chamber finds that in allowing P-0447 to give evidence in rebuttal, the Trial Chamber did not give the Prosecutor "a second bite of the apple" or a second opportunity to address the same arguments to the disadvantage of the Defence. Indeed, the Appeals Chamber notes that the Defence had the opportunity to present evidence in rejoinder.[695] The Defence exercised this right by submitting a Rejoinder Report prepared by D-0042 followed by the further testimony of this witness.[696] The Defence's argument is therefore rejected. In light of this, the Appeals Chamber finds that the Defence fails to show any error in the Trial Chamber's decision to allow the presentation of rebuttal and rejoinder evidence.

369. Finally, the Appeals Chamber notes the Defence's argument that, were it not for the rebuttal evidence, the Trial Chamber would not have rejected the ground excluding Mr Ongwen's criminal liability under article 31(1)(a) of the Statute.[697] The Appeals Chamber finds this argument to be speculative and lacking in merit. Furthermore, the argument ignores the other evidence on the record which the Trial Chamber relied on when it rejected the ground for excluding criminal liability under article 31(1)(a) of the Statute.[698]

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[693] Defence Experts' Second Report, pp. 4-5, 17-21, 22.
[694] Prosecutor's Response, para. 163.
[695] Decision on Rebuttal Evidence, para. 17.
[696] *See* Rejoinder Report, UGA-D26-0015-1574; T-254, T-255.
[697] Appeal Brief, para. 226.
[698] *See* Conviction Decision, para. 2580.

(d) Overall conclusion

370. Having considered all the arguments raised under grounds of appeal 7-8, 10 (in part), 25 and 45 concerning alleged errors in the Trial Chamber's application of the burden and standard of proof and legal standards relating to rebuttal evidence, the Appeals Chamber rejects these grounds of appeal.

7. Grounds of appeal 9 and 10 (in part): Alleged error concerning rulings on documentary evidence

371. Under grounds of appeal 9 and 10 (in part), the Defence challenges the Trial Chamber's alleged failure to make evidentiary rulings in respect of the report of PCV-1, the rebuttal report of P-0447 and the evidence of P-0078.

(a) Summary of the submissions

372. The Defence submits that the Trial Chamber's discussion of evidentiary matters with respect to the report of PCV-1, the rebuttal report of P-0447 and the evidence of P-0078 was insufficient.[699] The Defence states that it "has no idea what assessment the Chamber ultimately made of this evidence".[700]

373. The Prosecutor argues that the Trial Chamber would have made the same finding with respect to the report of PCV-1 regardless of the evidentiary procedure adopted.[701] He submits that the Defence suffered no prejudice in this respect, as the Trial Chamber did not rely on PCV-1's evidence.[702] The Prosecutor contends that other aspects of grounds 9 and 10 should be dismissed *in limine*, as they merely refer to arguments made in other filings, instead of being developed in the Appeal Brief.[703]

374. Victims Group 1 argue that the Defence does not point to any specific errors, that the Trial Chamber extensively explained its reasons for the rulings on the above-mentioned evidence and that these rulings did not violate any of Mr Ongwen's rights.[704]

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[699] Appeal Brief, paras 227-233.
[700] Appeal Brief, para. 233.
[701] Prosecutor's Response, para. 133.
[702] Prosecutor's Response, para. 134.
[703] Prosecutor's Response, paras 7-8, 136.
[704] Victims Group 1's Observations, paras 69-80.

Victims Group 2 submit that, contrary to the Defence's assertion, the Trial Chamber did conduct a detailed assessment of the report of PCV-1.[705]

(b) Determination by the Appeals Chamber

375. As a preliminary matter, the Appeals Chamber notes that the Defence has incorporated, by reference, arguments and pleadings made in other documents.[706] For reasons set out earlier in this judgment, the Appeals Chamber will disregard these arguments and pleadings.

376. Furthermore, it is noted that the Trial Chamber addressed the Defence's challenges to the above-mentioned evidence of PCV-1, P-0447 and P-0078 in the Conviction Decision.[707] However, rather than engaging with the Trial Chamber's findings in this regard, the Defence makes reference to submissions which were made before the Trial Chamber rendered the Conviction Decision. For these reasons, the Appeals Chamber will disregard these arguments.

377. The only arguments under the ninth and tenth grounds of appeal that are, at least to some extent, developed in the Appeal Brief, concern the report of PCV-1.[708] The Defence argues that it was prejudiced by the Trial Chamber's rejection of the Defence's motion to exclude portions of that report, despite the report's reference to the term "sex slave", which, in the Defence's view, is "a legal conclusion" and thus "inadmissible" in an expert report.[709] The Defence also submits that the Trial Chamber erred by failing to indicate in the Conviction Decision what assessment it made with respect to that report.[710] The Appeals Chamber notes, however, that the Trial Chamber ruled on the Defence's motion and gave reasons for its ruling during the trial.[711] It specifically assured the Defence that it would "fully […] assess […]" references to "terms with a legal connotation" and "make its own legal conclusions".[712] The Defence's argument that it "has no idea"[713] how the Trial Chamber assessed PCV-1's evidence thus has no

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[705] Victims Group 2's Observations, para. 63.
[706] Appeal Brief, para. 227.
[707] Conviction Decision, paras 99-102.
[708] Appeal Brief, paras 228-232.
[709] Appeal Brief, para. 230.
[710] Appeal Brief, para. 233.
[711] T-175, p. 11, lines 16-21, p. 12, lines 4-20.
[712] T-175, p. 12, lines 16-20.
[713] Appeal Brief, para. 233.

merit. Furthermore, the Defence does not explain how it was prejudiced in relation to the report of PCV-1, especially in light of the fact that the Trial Chamber did not rely on this report for any part of its analysis.[714]

(c) Overall conclusion

378. The Appeals Chamber therefore rejects grounds of appeal 9 and 10 (in part).

8. Ground of appeal 11: Alleged error by failing to provide translations and interpretation, in violation of article 67(1)(f) of the Statute

379. Under ground of appeal 11, the Defence challenges the Trial Chamber's alleged failure to provide Mr Ongwen with translations into Acholi of several documents.

(a) Summary of the submissions

380. The Defence argues that the Trial Chamber erred in law and procedure by failing to provide Mr Ongwen with translations of several documents into Acholi, in violation of his fair trial right under article 67(1)(f) of the Statute.[715] In particular, the Defence submits that Mr Ongwen did not receive an Acholi translation of: (i) the Prosecutor's application for the arrest warrant; (ii) the Confirmation Decision at the time of his plea; (iii) article 56 witness statements and witness statements during trial; and (iv) the Conviction Decision.[716] The Defence argues that the lack of timely translation of these documents "amounted to the violation of [Mr Ongwen's] fair trial rights" and "exacerbated the notice violation, and both – individually and together – resulted in a miscarriage of justice which materially affected the decision".[717]

381. The Prosecutor submits that the Defence's argument should be rejected, referring to its submissions in response to ground of appeal 4 and arguing that Mr Ongwen received Acholi translations of "those documents that were necessary to meet the requirements of fairness".[718] He submits that the Defence's arguments "broadly repeat" its general objections regarding the lack of Acholi translations made throughout the proceedings, and that the Pre-Trial Chamber and Trial Chamber ruled upon all of its

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[714] Conviction Decision, para. 600 ("The Chamber notes [PCV-1's] evidence, but also observes that it does not directly underlie any part of the Chamber's analysis as to whether the facts alleged in the charges are established".).
[715] Appeal Brief, paras 234-238.
[716] Appeal Brief, paras 234, 236.
[717] Appeal Brief, para. 238.
[718] Prosecutor's Response, paras 45-46.

objections, "appropriately balanc[ing] [Mr] Ongwen's right to translated material […] with the need to preserve the expeditiousness of the proceedings".[719]

382. Victims Group 1 also refer to their submissions concerning ground of appeal 4 and further submit that the right to translation under article 67(1)(f) of the Statute is not absolute.[720] They maintain that "[Mr Ongwen] was provided with Acholi translation of documents that allowed him to understand the nature, cause and content of the charges", and that therefore this ground of appeal should be dismissed.[721]

383. Victims Group 2 submit that during the pre-trial and trial proceedings Mr Ongwen: (i) was provided with full Acholi translations of the core documents; (ii) followed the hearings with Acholi interpretation; and (iii) had the assistance of the Defence team whose members are fluent in English and Acholi.[722] They argue that the Defence fails to identify a procedural error by the Trial Chamber, and that therefore ground of appeal 11 should be dismissed.[723]

(b) Background

384. On 8 July 2005, the Pre-Trial Chamber issued the Warrant of Arrest Decision against Mr Ongwen.[724] On 19 April 2006, an Acholi translation thereof was filed in the record[725] and on 16 January 2015, upon his surrender and transfer to the Court, Mr Ongwen was notified of the warrant of arrest, both in English and Acholi.[726]

385. Between August and December 2015, the Prosecutor disclosed to the Defence Acholi translations of the article 56 witness statements.[727] In addition, the Prosecutor disclosed to the Defence Acholi translations of witness statements upon which he relied throughout the proceedings.[728]

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[719] Prosecutor's Response, para. 46.
[720] Victims Group 1's Observations, paras 78-79.
[721] Victims Group 1's Observations, para. 80.
[722] Victims Group 2's Observations, para. 66.
[723] Victims Group 2's Observations, para. 67.
[724] Warrant of Arrest Decision.
[725] Acholi Translation of Warrant of Arrest Decision.
[726] Registry's Report on Mr Ongwen's Surrender and Transfer to the Court, para. 7; Record of Notification.
[727] *See* Annex A to Defence Response to Prosecution Request to Admit Evidence.
[728] *See* Prosecutor's Response, para. 46, fn. 186, *referring to* Disclosure of Evidence on 22 December 2015; Disclosure of Evidence on 18 April 2016; Disclosure of Evidence on 17 May 2016; Disclosure of

386. On 21 December 2015, the Prosecutor filed the Document Containing the Charges.[729] An Acholi translation was notified to Mr Ongwen on the same day.[730]

387. On 21 January 2016, during the confirmation of charges hearing, Mr Ongwen confirmed that he had read and understood the Acholi translation of the Document Containing the Charges.[731]

388. On 23 March 2016, the Pre-Trial Chamber issued the Confirmation Decision.[732] In its decision, the Pre-Trial Chamber, *inter alia*, rejected the Defence's request to exclude 17 witness statements and transcripts of interviews on the basis that he had not received Acholi translations thereof.[733] The Pre-Trial Chamber held that the Defence had failed to bring the matter to the Pre-Trial Chamber's attention in a timely manner and that there was no prejudice to the fairness of the proceedings,[734] referring, *inter alia*, to "the fact that Mr Ongwen was assisted by a Defence team with members, including counsel, fluent in English and Acholi" and "that interpretation services have been provided to him throughout the proceedings".[735]

389. At the commencement of the trial, on 6 December 2016, the charges contained in the operative part of the Confirmation Decision were read out by the Court Officer and made available to Mr Ongwen through Acholi interpretation.[736]

Evidence on 3 October 2016; Disclosure of Evidence on 21 October 2016; Disclosure of Evidence on 22 November 2016; Disclosure of Evidence on 23 November 2016; Disclosure of Evidence on 15 December 2016; Disclosure of Evidence on 17 January 2017; Disclosure of Evidence on 14 February 2017; Disclosure of Evidence on 10 March 2017; Disclosure of Evidence on 17 March 2017; Disclosure of Evidence on 22 March 2017; Disclosure of Evidence on 28 March 2017; Disclosure of Evidence on 12 May 2017; Disclosure of Evidence on 27 June 2017; Disclosure of Evidence on 18 July 2017; Disclosure of Evidence on 27 October 2017.

[729] Document Containing the Charges.

[730] Acholi Translation of Document Containing the Charges.

[731] T-20, p. 6, lines 5-14 ("Well, from my point of view, whether the charges are read or not read is all going to be a waste of time. You may speak five words and only two issues are correct. You may speak ten words and only two things are correct. The reading out these charges, whether they are true or not, is all going to be a waste of time. I've been handed out the document translated in Acholi, so I've read and understood it".).

[732] Confirmation Decision; Separate Opinion of Judge Perrin de Brichambaut.

[733] Confirmation Decision, para. 20.

[734] Confirmation Decision, para. 23.

[735] Confirmation Decision, para. 22.

[736] T-26, p. 8, line 20 to p. 15, line 25. *See also* Directions on the Conduct of the Proceedings, para. 6; Confirmation Decision, pp. 71-104.

390. On 13 December 2017 and 19 February 2018, Mr Ongwen was notified of the Acholi translations of the Confirmation Decision and the Separate Opinion of Judge Perrin de Brichambaut, respectively.[737]

391. As recalled above, in the Conviction Decision, the Trial Chamber noted, *inter alia*, that at the opening of the trial Mr Ongwen had available to him the full text of the charges in Acholi, as the Document Containing the Charges was translated into Acholi in its entirety, and the Confirmation Decision confirmed all counts contained in that document and copied it *verbatim* into its decision.[738] It also noted that because of the clear separation between the text of the charges and the other parts of the Confirmation Decision containing the reasoning of the Pre-Trial Chamber, the lack of a full translation of the entire decision at the opening of the trial was immaterial. It finally noted that at the opening of the trial the charges were read out in the courtroom and again made available to Mr Ongwen through Acholi interpretation [739]

(c) Determination by the Appeals Chamber

392. Article 67(1)(f) of the Statute provides that an accused shall be entitled

> [t]o have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings of or documents presented to the Court are not in a language which the accused fully understands and speaks.

393. The Appeals Chamber has held in this case that "the language of this provision requires a chamber to determine what is 'necessary to meet the requirements of fairness'".[740] To support its rejection of the argument brought by the Defence that article 67(1)(f) of the Statute requires that a full translation of the decision under article 74 of the Statute be provided to a convicted person before filing a notice of appeal, the Appeals Chamber, referring to jurisprudence from the ECtHR,[741] held "that it must also take into account the circumstances as a whole and the convicted person's

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[737] Acholi Translation of Confirmation Decision (notified on 13 December 2017); Acholi Translation of Separate Opinion of Judge Perrin de Brichambaut (notified on 19 February 2018).
[738] *See* section VI.B.3(c) (Alleged error in not providing Mr Ongwen with a full translation of the Confirmation Decision at the time of the plea) above.
[739] *See* section VI.B.3(c) (Alleged error in not providing Mr Ongwen with a full translation of the Confirmation Decision at the time of the plea) above.
[740] Decision on Time Extension Request for Notice of Appeal, para. 10.
[741] *See* Decision on Time Extension Request for Notice of Appeal, para. 10. *See also* references cited in fn. 10.

ability to understand the details of his conviction by other means".[742] It is recalled that in its determination, the Appeals Chamber took into account, *inter alia*, that Mr Ongwen had been provided with full translations into Acholi of the Confirmation Decision and other core documents, that he had followed all hearings in real-time through Acholi interpretation, and that he had had, throughout the proceedings, the assistance of a Defence team "whose members, including [the lead] counsel, [are] fluent in English and Acholi".[743] The Appeals Chamber considers that the same logic applies to the need or otherwise to translate any other documents in the record.

394. The Appeals Chamber notes that the Defence repeats some of the arguments made under ground of appeal 4, namely that at the time of the plea, Mr Ongwen was not on notice of the charges due to the alleged lack of a full translation in Acholi of the Confirmation Decision and that the reading in court of numbered counts in the Confirmation Decision which were interpreted into Acholi, at the opening of the trial, was insufficient to provide notice.[744] These arguments have already been addressed and rejected above.[745]

395. The Defence further submits that Mr Ongwen did not receive translations in Acholi of the Prosecutor's application for his arrest warrant, article 56 witness statements and witness statements during trial.[746] As noted above, Mr Ongwen was notified of the Acholi translations of the Warrant of Arrest Decision on 16 January 2015 and a number of witness statements relied upon by the Prosecutor during the pre-trial and trial proceedings.[747] The Appeals Chamber observes that the Defence does not specify which witness statements it is referring to when alleging that there was a lack of Acholi translations and thus fails to sufficiently substantiate its argument.

396. Moreover, the Appeals Chamber recalls that Mr Ongwen has followed all hearings in real-time through Acholi interpretation, including the article 56

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[742] Decision on Time Extension Request for Notice of Appeal, para. 10.
[743] Decision on Time Extension Request for Notice of Appeal, para. 11.
[744] Appeal Brief, paras 59, 62, 236-237.
[745] *See* section VI.B.3(c) (Alleged error in not providing Mr Ongwen with a full translation of the Confirmation Decision at the time of the plea) above.
[746] Appeal Brief, para. 234, *referring to* Defence Request to Change Date of the Closing Brief, paras 4-32.
[747] *See* paragraphs 384-385 above.

proceedings,[748] and has had the assistance of his defence team whose members are fluent in English and Acholi.[749] In these circumstances, the Appeals Chamber considers that the Defence fails to identify an error or any other ground affecting the fairness of the pre-trial and trial proceedings. The Appeals Chamber finds that Mr Ongwen has received sufficient translation and interpretation in Acholi as was necessary to meet the requirements of fairness.

397. Finally, the Appeals Chamber recalls that it has already dealt with the Defence's submissions concerning the translation of the Conviction Decision into Acholi for the purposes of its preparation for the appellate proceedings[750] and will therefore not delve into this matter any further.

(d) Overall conclusion

398. Having considered all the arguments raised under this ground of appeal concerning the lack of sufficient translation of particular documents into Acholi, the Appeals Chamber rejects this ground of appeal.

9. *Grounds of appeal 12 and 17: Alleged errors in the Trial Chamber's failure to rule on the Defence's objections to the Prosecutor's investigations and disclosure practice, as well as in its ruling on the Defence's allegations of fair trial violations*

399. The Appeals Chamber will address grounds of appeal 12 and 17 together. Under both grounds of appeal, the Defence incorporates by reference submissions contained in other documents.

(a) Summary of the submissions

400. Under ground of appeal 12, the Defence submits that the Trial Chamber failed to address the Defence's objections to the Prosecution's investigation and disclosure practices, which impacted Mr Ongwen's fair trial rights.[751] In response, the Prosecutor submits that this ground of appeal should be dismissed *in limine*, because the Defence "incorporates and relies upon" prior submissions "without explaining any of the legal

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[748] *See e.g.* T-8, p. 5, lines 6-8.
[749] *See* Decision on Introduction of Prior Recorded Testimony, para. 28; Confirmation Decision, para. 22; Decision on Time Extension Request for Notice of Appeal, para. 11.
[750] Decision on Time Extension Request for Notice of Appeal, paras 8-14.
[751] Appeal Brief, paras 239-240.

or factual arguments raised therein".[752] He contends that the Defence fails to identify an error and/or its impact on the Conviction Decision.[753] The Prosecutor further submits that, in any event, the Trial Chamber did not err, that it ruled on all specific violations alleged, and that the Defence's "broad and unsubstantiated" arguments amount to a mere disagreement with the Trial Chamber's findings.[754]

401. Under ground of appeal 17, the Defence challenges the Trial Chamber's rejection of the Defence's claims of fair trial violations and a violation of Mr Ongwen's right to family life.[755] With regard to the latter, the Defence indicates in a footnote that it "amends its Notice of Appeal to include this ground" and, as it had raised this issue in its closing brief and the Trial Chamber addressed it in the Conviction Decision, "it should be included as a ground of appeal".[756] In support of its submissions under this ground of appeal, the Defence incorporates by reference a significant part of the Defence Closing Brief.[757] In response, the Prosecutor submits that instead of identifying an error by the Trial Chamber, the Defence merely incorporates paragraphs from its closing brief.[758] He further submits that the Defence's claim about the alleged violation of Mr Ongwen's right to family life falls outside the scope of the appeal as it was not included in the Notice of Appeal and the Defence failed to seek leave pursuant to regulation 61 of the Regulations to vary the grounds of appeal to add this issue.[759] He submits that, in any event, the Trial Chamber did not err.[760] Both victims groups request the dismissal of this ground of appeal, arguing that the Defence fails to substantiate its submissions and instead refers to arguments from its closing brief.[761]

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[752] Prosecutor's Response, para. 47. *See also* paras 7-8.
[753] Prosecutor's Response, para. 47. *See also* paras 7-8.
[754] Prosecutor's Response, para. 48.
[755] Appeal Brief, paras 260-263.
[756] Appeal Brief, fn. 266.
[757] Appeal Brief, paras 260, 262.
[758] Prosecutor's Response, para. 66. *See also* paras 7-8.
[759] Prosecutor's Response, para. 67.
[760] Prosecutor's Response, para. 68.
[761] Victims Groups 1's Observation, para. 93; Victims Group 2's Observation, para. 3. With regard to the claim about the alleged violation of Mr Ongwen's right to family life, Victims Group 1 also submit that this argument was not included in the Notice of Appeal and that, since the Defence failed to seek leave pursuant to regulation 61 of the Regulations to vary the grounds of appeal to add this issue, this ground of appeal should be rejected (Victims Groups 1's Observation, paras 90-92).

(b) Determination by the Appeals Chamber

402. The Appeals Chamber recalls that the appellant is required to set out arguments on appeal in the appeal brief and mere references to arguments developed by the appellant in other filings are not sufficient.[762]

403. The Appeals Chamber notes that ground of appeal 12 consists of two paragraphs, one of which indicates that "[t]he Defence relies on its arguments in its Closing Brief, and the prior pleadings cited in the footnotes to same".[763] The other paragraph, in essence, states that alleged disclosure violations, discussed in the Defence Closing Brief, impacted Mr Ongwen's right to present a defence and that some information was unavailable to the Defence, "impeding its own investigations and preparation".[764] The Defence also refers to paragraphs of the Conviction Decision purportedly containing the Trial Chamber's findings on those issues.[765]

404. Similarly, ground 17 incorporates, by reference, parts of the Defence Closing Brief.[766] With regard to the alleged fair trial violations, the Defence limits itself to submit that the Appeals Chamber should "reverse Mr Ongwen's conviction based on fair trial violations" arguing that "[t]he underlying fair trial violations involved remain the same".[767] The remainder of this ground of appeal contains a general statement that communication restrictions violated Mr Ongwen's fair trial rights as well as his right to family and private life;[768] and that as the Appeals Chamber's resolution of this issue "can impact on policies and procedures governing the rights of accused persons in ICC custody", and "the right to family and private life under international instruments […] raises the legal question of the interpretation of the Statute, Article 21(3)", the Appeals Chamber "should intervene on this issue, as a matter of law".[769] The Defence also refers to paragraphs of the Conviction Decision purportedly containing the Trial Chamber's findings on those issues.[770]

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[762] *See* paragraph 97. *See also* section V.D (Substantiation of arguments) above.
[763] Appeal Brief, para. 239.
[764] Appeal Brief, para. 240.
[765] Appeal Brief, paras 239-240, *referring to* Conviction Decision, paras 103-105.
[766] Appeal Brief, paras 260, 262.
[767] Appeal Brief, para. 261.
[768] Appeal Brief, para. 262.
[769] Appeal Brief, para. 263.
[770] Appeal Brief, paras 260, 262, *referring to* Conviction Decision, paras 42-120.

405. As it is impossible to fully understand the arguments alleged by the Defence under these grounds of appeal, without consulting the Defence Closing Brief, and to discern any alleged error, grounds of appeal 12 and 17 are dismissed *in limine* for lack of substantiation.

406. Finally, the Appeals Chamber notes that the arguments concerning Mr Ongwen's alleged violation of his right to family and private life raised under ground of appeal 17 fall outside the scope of the appeal. Indeed, these allegations were not explicitly set out in the Notice of Appeal,[771] and the Defence introduces them in the Appeal Brief without complying with the procedure set out in regulation 61 of the Regulations.[772] The accompanying footnote and the reasons therein do not satisfy the requirement of this provision[773] or in any way justify the late addition to the appeal. As a result, the Appeals Chamber will not delve into this any further.

(c) Overall conclusion

407. In view of the foregoing, grounds of appeal 12 and 17 are dismissed *in limine.*

10. Ground of appeal 13: Alleged errors regarding the Prosecutor's selection of witnesses and collection of evidence with the assistance of P-0078

408. Under this ground of appeal, the Defence argues that the Trial Chamber erred in fact and in law by failing to properly assess the Defence's objections to the involvement of P-0078 in the collection of evidence and location of witnesses, which, in its view, amounted "to a flagrant breach of Mr Ongwen's fair trial rights and a gross miscarriage of justice".[774]

(a) Summary of the submissions

409. The Defence refers, in particular, to its objections regarding: (i) P-0078's "direct[…] involve[ment] in the conflict between the LRA and the Government of Uganda, and in the killing of Raska Lukwiya during the peace talks"; and (ii) the exercise of P-0078's role as an intermediary, which, the Defence submits, was in

[771] Notice of appeal.
[772] Appeal Brief, fn. 266.
[773] Regulation 61(1) and (2) of the Regulations.
[774] Appeal Brief, paras 242, 245.

conflict with article 44(2) of the Statute and with the Code of Conduct for the Office of the Prosecutor.[775]

410. In response, the Prosecutor submits that the Trial Chamber reasonably rejected the objections raised by the Defence and that on appeal, it "repeats the same unsubstantiated allegations without identifying any specific factual, legal or procedural error".[776]

(b) Relevant parts of the Conviction Decision

411. In the Conviction Decision, when setting out its general assessment of the testimonial evidence provided by government officers and agents from the UPDF, the Trial Chamber noted the Defence's allegation that the Prosecutor failed to carry out an impartial investigation "partly because 'the choice and management of witnesses was done by Major Patrick Ocira (P-0078), a UPDF officer who acted as resource person for the Prosecution'".[777] However, "[a]bsent specific allegations and proof", it "consider[ed] the Defence's assertion unsubstantiated and irrelevant".[778]

(c) Determination by the Appeals Chamber

412. The Appeals Chamber notes that the Defence appears to challenge the Trial Chamber's deferral of the ruling on its objections to the role of P-0078 to the Conviction Decision.[779] For the reasons that follow, the Appeals Chamber is unpersuaded that the objections advanced by the Defence and ruled upon by the Trial Chamber in the Conviction Decision warranted an earlier determination of the matter.

413. The Appeals Chamber understands the Defence to challenge the Trial Chamber's alleged failure to properly assess its objections to the involvement of P-0078 in the collection of evidence and location of witnesses, based on the following two broad arguments: (i) P-0078's involvement in the conflict between the LRA and the Government of Uganda, including his alleged killing of Raska Lukwiya during peace

[775] Appeal Brief, para. 243.
[776] Prosecutor's Response, para. 49. *See also* paras 50-55.
[777] Conviction Decision, para. 525.
[778] Conviction Decision, para. 525.
[779] Appeal Brief, paras 242, 245.

talks,[780] and (ii) the allegation that P-0078 acted contrary to article 44(2) of the Statute and the Code of Conduct of the Office of the Prosecutor.[781]

414. The Appeals Chamber recalls that the Defence raised these objections before the Trial Chamber and that the Trial Chamber ruled upon them in the Conviction Decision.[782] In addressing the Defence's allegation that the Prosecutor failed to carry out an impartial investigation "partly because 'the choice and management of witnesses was done by Major Patrick Ocira (P-0078), a UPDF officer who acted as resource person for the Prosecution'",[783] the Trial Chamber held as follows:

> the Chamber notes that the Defence does not make any specific allegation of wrong-doing. Rather, it asserts merely that the involvement of Patrick Ocira in allegedly facilitating the Prosecution's investigation is proof that the Prosecution did not carry out an impartial investigation. Further, the Chamber notes that neither the Defence nor the Prosecution called Patrick Ocira as a witness to these proceedings. Absent specific allegations and proof, the Chamber considers the Defence's assertion unsubstantiated and irrelevant.[784]

415. Rather than identifying an error in the Trial Chamber's determination of the arguments advanced by the Defence during the trial proceedings, the Defence seems to merely repeat the same arguments. It does not engage with the Trial Chamber's finding made in the Conviction Decision. Therefore, the Appeals Chamber finds that the Defence failed to sufficiently substantiate its arguments on appeal. In any event, the Appeals Chamber finds no error in the Trial Chamber's finding that the Defence presented no specific allegations of wrongdoing by P-0078.

416. Indeed, the Defence fails to show how P-0078's alleged involvement in the conflict between the LRA and the Government of Uganda, and his role as a UPDF officer, impacted the assistance he rendered to the Prosecutor's investigations, and how this impacted the reliability of the evidence collected or that of the witnesses located. In addition, as correctly observed by the Prosecutor,[785] it is within his investigatory

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[780] Appeal Brief, para. 243.
[781] Appeal Brief, para. 243.
[782] Conviction Decision, para. 525, *referring to* Defence Closing Brief, para. 10.
[783] Conviction Decision, para. 525.
[784] Conviction Decision, para. 525.
[785] Prosecutor's Response, para. 50.

powers under article 54(3)(c) of the Statute to seek the assistance of government agencies.

417. Regarding the alleged misuse by P-0078 of funds and a mobile phone provided by the Prosecutor,[786] the Appeals Chamber notes that the Defence fails to demonstrate how these facts in and of themselves adversely affected the integrity of the evidence-collection process. The Appeals Chamber also notes that these instances were specifically investigated by the Office of the Prosecutor in order to "provide a picture of the concerns raised about [P-0078's] behaviour and how the OTP ha[d] managed them".[787] Similarly, the Defence's allegation concerning purported pressure exerted by P-0078 on P-0037 and P-0105[788] was duly investigated by the Office of the Prosecutor[789] and, in any event, neither the Prosecutor in his case[790] nor the Trial Chamber in the Conviction Decision relied on P-0037 or P-0105.[791]

418. The Appeals Chamber further notes that the Defence does not identify any unfairness that affects the reliability of the Conviction Decision. It is insufficient to broadly submit, without proper substantiation, that P-0078 located or was in contact with more than 40 Prosecution witnesses and assisted in the collection of several evidentiary items.[792] Moreover, there is nothing inherently problematic or partial in P-0078's involvement as a UPDF resource person assisting the Prosecutor in locating relevant evidence/witnesses.

419. The Defence fails to identify how the alleged involvement of P-0078 in the conflict between the LRA and the Government of Uganda or his purported misconduct affected the collection of evidence by the Prosecutor and the reliability of that evidence. To the contrary, the testimony of four "key witnesses relied upon throughout the judgment"[793] contains no suggestion that P-0078 had any influence on the collection or

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[786] Appeal Brief, para. 243.
[787] UGA-OTP-0263-2689-R01 at 2689, 2691.
[788] Appeal Brief, para. 243.
[789] UGA-OTP-0263-2689-R01 at 2692; UGA-OTP-0263-2685-R01 at 2686.
[790] Prosecutor's Response, para. 53.
[791] Neither of these witnesses are cited or referred to in the Conviction Decision.
[792] Appeal Brief, para. 242.
[793] Appeal Brief, para. 245, fn. 250.

presentation of evidence.[794] The same holds true for the evidence of the other three witnesses referred to by the Defence.[795]

420. Finally, the Defence's submission that "the Chamber should have exercised caution when determining the admissibility of evidence provided by Article 56 witnesses sourced by P-0078"[796] is unfounded. The Defence does not explain why the Trial Chamber should have exercised caution in this respect and whether it actually failed to do so. In addition, the Appeals Chamber notes that [REDACTED].[797] However, this, in and of itself, is insufficient to establish the impact, if any, that P-0078's involvement had on the evidence provided by this witness.

(d) Overall conclusion

421. Having considered all the arguments raised under ground of appeal 13, the Appeals Chamber rejects this ground of appeal.

11. Grounds of appeal 14 and 15: Alleged discrimination based on the accused's mental disabilities

422. The Defence contends that Mr Ongwen's fair trial rights were violated when the Trial Chamber "discriminated" against him as a mentally disabled person.[798] First, the Defence alleges that the Trial Chamber's delay in implementing a recommendation by the ICC-DC Medical Officer (hereinafter: "Medical Officer") for a "time out" from court on Wednesdays, was discriminatory.[799] Second, it alleges that the Trial Chamber violated Mr Ongwen's right to decide whether or not he would exercise his right to testify in his case.[800] These arguments will be addressed in turn.

(a) Summary of the submissions

423. The Defence contends that, contrary to the Trial Chamber's conclusion, it did not misrepresent the facts in its Closing Brief when it stated that the Trial Chamber delayed the implementation of a sitting schedule to accommodate Mr Ongwen, for eight months,

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[794] It appears that the Defence did not question two of these four witnesses on their possible contacts with P-0078 [REDACTED].
[795] Appeal Brief, para. 242, fn. 245. [REDACTED].
[796] Appeal Brief, para. 244.
[797] [REDACTED].
[798] Appeal Brief, para. 248.
[799] Appeal Brief, para. 250.
[800] Appeal Brief, paras 251-254.

from the time of the first recommendation of the Medical Officer that was made in February 2018.[801] In its view, the delay of eight months was unjustifiable and discriminated against Mr Ongwen as a mentally disabled person in violation of article 2 of the Convention on the Rights of Persons with Disabilities.[802]

424. Furthermore, the Defence asserts that by denying its motion for a psychiatric examination of Mr Ongwen near the completion of the presentation of its case,[803] the Trial Chamber effectively denied Mr Ongwen an opportunity to determine whether he was suffering from any mental condition which in turn prevented him from making an informed decision as to whether or not to testify in his defence.[804] Furthermore, referring to the Trial Chamber statement that "[…] the question of whether the accused may be mentally disabled was never considered in the Impugned Decision […]",[805] the Defence argues that the use of the words "may be mentally disabled" suggests some recognition by the Trial Chamber that Mr Ongwen was mentally disabled but that this was not considered.[806] Consequently, the Defence questions the cogency of the Trial Chamber's statement in the Conviction Decision that "the fact that the Chamber has not ruled in favour of the Defence does not mean that it has not fully considered the situation of the accused when ruling on the Defence's request".[807]

425. The Defence further submits that the Trial Chamber's "disability blind-spot" caused it to make decisions about the conduct of the proceedings and the fair trial rights of Mr Ongwen as if he were not a mentally disabled person. This, in its view, severely impacted the exercise of Mr Ongwen's fair trial rights and occasioned a "miscarriage of justice".[808]

426. The Prosecutor submits that the Trial Chamber was correct in finding that the Defence "'fundamentally misrepresented' the facts in alleging that the Chamber discriminated against him as a mentally disabled person by being 'eight months late' in

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[801] Appeal Brief, para. 250.
[802] Appeal Brief, para. 250.
[803] Defence's Third Request for a Medical Examination.
[804] Appeal Brief, para. 252; Decision on Defence's Third Request for a Medical Examination, p. 11.
[805] Appeal Brief, para. 253 (emphasis in original), *referring to* Decision on Leave to Appeal the Decision on Defence's Third Request for a Medical Examination, para. 11.
[806] Appeal Brief, para. 254.
[807] Appeal Brief, para. 254, *referring to* Conviction Decision, para. 112.
[808] Appeal Brief, para. 255.

implementing the [ICC-DC] Medical Officer's recommendation […]".[809] The Prosecutor avers that the Trial Chamber received the Medical Officer's recommendation on 7 March 2018, and the following day informed the parties and participants that there would be no hearing on the next scheduled Wednesday, that is on 21 March 2018, noting that subsequently, the Trial Chamber did not schedule any five-day weeks of hearing until the conclusion of the hearings on 29 November 2019.[810] In the Prosecutor's view, the Trial Chamber's approach to the sitting schedule was flexible and reasonable and argues that the Defence shows no error in the Trial Chamber's reasoning nor does it show any impact on Mr Ongwen's fair trial rights.[811]

427. Furthermore, the Prosecutor submits that the Defence "mischaracterises the Chamber's decision and the applicable law" by arguing that the Trial Chamber erroneously rejected its request for a medical examination which prevented an assessment of Mr Ongwen's mental condition, to ascertain whether he could make an informed decision about whether or not to testify in his case.[812] The Prosecutor submits that the Defence's claim that the Trial Chamber had a "disability blind-spot" is "untenable" in light of the fact that the Trial Chamber "acted reasonably by adjourning hearing days when Ongwen's condition required it; reducing the sitting schedule […]; and requesting the Registry to monitor and report on Ongwen's health throughout the trial".[813] Finally, the Prosecutor argues that the Defence "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".[814]

428. Victims Group 1 observe, with respect to the Defence's allegations concerning the sitting schedule, that the Defence "conveniently omits" the "[Trial] Chamber's analysis of the adaptations that were made in this regard" which, they submit, "shows that the allegations made by the Defence are unfounded".[815] As to the Defence's allegation that the Trial Chamber violated Mr Ongwen's right to decide whether or not to testify, Victims Group 1 observe that the Trial Chamber addressed this allegation in

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[809] Prosecutor's Response, para. 57.
[810] Prosecutor's Response, para. 57.
[811] Prosecutor's Response, para. 59.
[812] Prosecutor's Response, para. 60.
[813] Prosecutor's Response, para. 62.
[814] Prosecutor's Response, para. 62.
[815] Victims Group 1's Observations, para. 83.

the Conviction Decision and that the Defence fails to show any error in the Trial Chamber's decision which was based on the evidence in the record.[816]

429. Victims Group 2, in similar vein, observe that these grounds of appeal should be dismissed since, *inter alia*, they constitute a repeat of arguments made at trial without any demonstration of an error in the Trial Chamber's rejection of same.[817]

(b) Relevant parts of the Conviction Decision

430. The Trial Chamber found the Defence's allegation, that it had failed to implement the Medical Officer's recommendation for an amended sitting schedule for a period of eight months, to be "without any reasonable justification and [to] fundamentally misrepresent the facts".[818] The Trial Chamber explained that it had first received information, that Mr Ongwen would benefit from not being present in Court on Wednesdays, in March 2018.[819] Mindful of the health of Mr Ongwen, the Trial Chamber adapted the sitting schedule to ensure that he "never spent five working days of a week in Court".[820] The Trial Chamber further noted that on the five instances that a hearing was held on a Wednesday, it ensured that another day of that week was off.[821] The Trial Chamber further observed that despite its claim of the direct effect that the sitting schedule had on Mr Ongwen, the Defence "does not cite to any specific issue resulting from the five Wednesdays the accused attended court".[822]

431. Specifically, with respect to the Defence's allegation, that by denying its motion for a psychiatric exam the Trial Chamber effectively prevented Mr Ongwen from making an informed decision as to whether or not to testify in his defence, the Trial Chamber held as follows:

> On three occasions, the Defence requested a medical examination of the accused, twice combined with arguing that this warrants a stay of the proceedings. The Chamber has ruled on each request. In these decisions, it based its assessments and rulings on information provided by independent medical experts, taking into account [Mr] Ongwen's specific situation. The Defence asserts that 'we

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[816] Victims Group 1's Observations, para. 84.
[817] Victims Group 2's Observations, para. 27.
[818] Conviction Decision, para. 114.
[819] Conviction Decision, para. 114.
[820] Conviction Decision, para. 114.
[821] Conviction Decision, para. 114.
[822] Conviction Decision, para. 114.

> concluded that sometimes when the Trial Chamber appears to us to not be looking at the disabilities of the client and not accommodating them fast enough or not believing there is merit to them, they were saying there may be, they may not be seeing the whole picture. It's as simple as that.' The fact that the Chamber has not ruled in favour of the Defence does not mean that it has not fully considered the situation of the accused when ruling on the Defence's request.[823]

432. Finally, the Trial Chamber concluded that the allegations that it had "discriminated" against the accused as a "mentally disabled defendant" are "baseless" and that the Defence "fails to show the claimed impact on the fair trial rights of [Mr] Ongwen".[824]

(c) Determination by the Appeals Chamber

(i) Alleged delay of eight months in implementing a sitting schedule to accommodate Mr Ongwen's needs

433. At the outset, the Appeals Chamber notes that at paragraph 247 of the Appeal Brief the Defence seeks to incorporate, by reference to the Defence's Closing Brief, arguments made therein relating to Mr Ongwen's mental disability and its impact on his fair trial rights. As found above,[825] the Appeals Chamber will address only those arguments that are properly developed in the present grounds of appeal.

434. The Appeals Chamber notes that central to these grounds of appeal is the Defence's contention that the Trial Chamber had notice of the Medical Officer's recommendation, concerning an amendment to the sitting schedule of the trial, as of February 2018, being the date when the recommendation was first made.[826] With reference to Annex E of the Defence Closing Brief, the Defence asserts that despite being notified four times of the Medical Officer's recommendation – once in February and March 2018 and twice in July 2018 – the Trial Chamber only implemented the "Wednesdays off" sitting schedule in October 2018 – eight months from the time of the first request in February 2018.[827] In support of its argument the Defence cites to the Registrar's Filing of 7 March 2018 and a further filing, namely, the Registrar's Filing

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[823] Conviction Decision, para. 112 (footnotes omitted).
[824] Conviction Decision, paras 106, 115.
[825] *See* paragraph 97 above. *See also* section V.D. (Substantiation of arguments) above.
[826] Appeal Brief, para. 250.
[827] Appeal Brief, para. 250.

of 27 July 2018.[828] For the reasons that follow, the Appeals Chamber is not persuaded by the Defence's argument.

435. First, while the Defence is correct in asserting that the Medical Officer first made his recommendation for an amendment to the sitting schedule in February 2018, the Appeals Chamber notes, however, that according to the record his recommendation was only communicated to the Trial Chamber on 7 March 2018, by way of the Registrar's Filing of 7 March 2018.[829] The Registrar annexed an email communication to this filing from the Medical Officer to the Chief Custody Officer, dated 28 February 2018, in which the former made his recommendation.[830] Furthermore, on 27 July 2018, following a request by the Trial Chamber conveyed *via* email on 6 June 2018, the Registrar notified it of yet another report from the Medical Officer (dated 25 July 2018) on the health situation of Mr Ongwen.[831] In this report the Medical Officer stated, *inter alia*, that his earlier recommendation for an amendment to the sitting schedule was "still opportune and necessary" to assist Mr Ongwen.[832] It follows that the respective filings of the Registrar, mentioned above and relied upon by the Defence, do not establish its claim that the Trial Chamber was aware of the Medical Officer's recommendation as of February 2018.

436. Second, the Appeals Chamber finds no merit in the Defence's further allegation that the Trial Chamber only implemented the "Wednesdays off" sitting schedule in October 2018 and thus disregarded the Medical Officer's recommendation for eight months.[833] As noted by the Prosecutor, on 8 March 2018, following notification of the Registrar's Filing of 7 March 2018, the Trial Chamber sent an email to the parties and participants informing them that there would be no hearing on the next scheduled Wednesday, 21 March 2018.[834] In the Conviction Decision, the Trial Chamber explained that it understood the Medical Officer's recommendation to "guide against the accused sitting a full five day court schedule" and thus adapted the sitting schedule to ensure that Mr Ongwen "never spent five working days of a week in Court" even on

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[828] Annex E to Defence Closing Brief.
[829] Registrar's Filing of 7 March 2018, para. 8.
[830] Annex to Registrar's Filing of 7 March 2018.
[831] Registrar's Filing of 27 July 2018, para. 1.
[832] Annex to Registrar's Filing of 27 July 2018, p. 3, para. 2.
[833] Appeal Brief, para. 250.
[834] Prosecutor's Response, para. 57; Annex C to Prosecutor's Response, p. 1.

those occasions where scheduling a hearing on a Wednesday was unavoidable.[835] Furthermore, the Appeals Chamber notes that, as further explained by the Trial Chamber, "each time the health condition of the accused warranted a break in the proceedings, this was immediately facilitated by the Chamber" and "[o]nly after receiving confirmation by the medical experts from the Registry that [Mr Ongwen's] state of health allowed for continuation did the Chamber resume hearings".[836]

437. Consequently, the Appeals Chamber notes that the claim that the Trial Chamber discriminated against Mr Ongwen by delaying to implement the Medical Officer's recommendation to have "Wednesdays off" is not borne out by any evidence. Rather, the information in the record proves otherwise. Contrary to the Defence's assertion, the Trial Chamber's amendment to the sitting schedule to accommodate Mr Ongwen's health condition was not "eight months late".[837] In the Appeals Chamber's view, the measures employed by the Trial Chamber to accommodate Mr Ongwen's needs and ensure that the trial proceeded expeditiously were reasonable and not incompatible with the Medical Officer's recommendation. Consequently, the Appeals Chamber finds that the Trial Chamber did not violate Mr Ongwen's fair trial rights in this regard. The argument is therefore rejected.

438. Finally, the Appeals Chamber notes the Defence's argument that the Trial Chamber discriminated against Mr Ongwen, in violation of article 2 of the Convention of the Rights of Persons with Disabilities,[838] by accommodating Mr Ongwen "eight months late".[839] Given that this argument is premised on an incorrect representation of the facts, it is rejected.

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[835] Conviction Decision, para. 114. The Trial Chamber noted the five instances in which a hearing was scheduled on a Wednesday and recalled that "[o]n two of the five instances […] [Mr Ongwen] attended court only two days in the entire week" while "[o]n one occasion he attended court only three days in that week" and "[o]n two occasions the accused attended court for four days in a week".
[836] Conviction Decision, para. 111, *referring to* Decision on Request to Order an Adjournment.
[837] Appeal Brief, para. 250.
[838] Convention on the Rights of Persons with Disabilities, article 2 defines discrimination on the basis of disability as: [A]ny distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation".
[839] Appeal Brief, paras 248, 250.

(ii) Alleged error in denying Mr Ongwen the right to decide whether to testify

439. The Defence asserts that by denying the Defence's Third Request for a Medical Examination of Mr Ongwen, near the completion of the presentation of the Defence's evidence,[840] the Trial Chamber effectively denied Mr Ongwen an opportunity to determine whether he was suffering from any mental condition, which in turn prevented him from making an informed decision as to whether or not to testify in his defence.[841] Furthermore, the Defence submits that in reaching its decision, the Trial Chamber contradicted the information provided by four experts on Mr Ongwen's mental status and made decisions "about the conduct of the proceedings and the fair trial rights of [Mr Ongwen's] as if he were not a mentally disabled defendant".[842]

440. The Appeals Chamber observes that, in assessing the material relied upon in support of the Defence's Third Request for a Medical Examination, the Trial Chamber found that: (i) the December 2016 report of Professor Joop T. de Jong (hereinafter: "Professor de Jong") did not contain any new *indicia* to warrant a medical examination;[843] (ii) the February 2019 report of the Medical Officer also did not contain any information indicating that a medical exam was warranted and instead stated that Mr Ongwen was "medically fit to resume the trial process" but that his condition should be continuously monitored;[844] and (iii) while the Defence noted that Mr Ongwen was taking medication that had potential side effects, the Defence did not claim that there were any actual side effects that affected Mr Ongwen's capacity.[845] In addition, even though the Defence did not refer to its own experts' report, the Trial Chamber noted that in the Defence Experts' Second Report they advised that "caution" should be exercised in case Mr Ongwen testifies.[846] In this regard, the Trial Chamber noted that the Defence Experts "did not give any indication that the accused would not be able to

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[840] *See* Defence's Third Request for a Medical Examination.
[841] Appeal Brief, para. 252.
[842] Appeal Brief, paras 252, 255.
[843] Decision on the Defence's Third Request for a Medical Examination, paras 21. Professor de Jong is a psychiatrist who was appointed by the Court to conduct a psychiatric examination of Mr Ongwen's mental state during the trial. Professor de Jong did not testify at the trial but produced a report dated 7 January 2017, *see* Professor de Jong's Report, UGA-D26-0015-0046-R01. *See also* Conviction Decision, para. 2576.
[844] Decision on the Defence's Third Request for a Medical Examination, para. 24.
[845] Decision on the Defence's Third Request for a Medical Examination, para. 25.
[846] Decision on the Defence's Third Request for a Medical Examination, para. 28.

testify (or take a decision whether to do so) but seem to be motivated by a concern for his state of health in the framework of his rehabilitation".[847]

441. The Appeals Chamber further notes that, in considering the issue of Mr Ongwen's ability to decide whether to testify on his behalf, the Trial Chamber observed that "in order to have the ability to take a procedural decision it is not necessary that the accused has the same capacity as if he was a trained lawyer" nor did he "need to understand the reach and implication of every potential question or how each of the answers provided could be legally interpreted".[848] The Trial Chamber found that he only needed to be able "to take an informed decision, with the help and advice of his lawyers, whether under these conditions he would like to exercise his right to testify in his defence".[849]

442. Accordingly, the Trial Chamber concluded that there was insufficient *indicia* to warrant a medical examination pursuant to rule 135 of the Rules and underlined that should Mr Ongwen exercise his right to testify, it would follow the Defence Experts' advice and exercise all necessary caution during his testimony.[850] The Appeals Chamber finds the Trial Chamber's approach and conclusions in relation to the Defence's Third Request for a Medical Examination to be reasonable. Rather than act in contravention of the information provided by the various medical experts, as alleged by the Defence, the Trial Chamber reasonably assessed their information in reaching its decision that a medical examination was not warranted.[851] Given that the Defence has not demonstrated any error in the Trial Chamber's decision, the Appeals Chamber considers that the exclusion of a medical examination, near the completion of the presentation of evidence by the Defence, did not inhibit Mr Ongwen from making an informed decision as to whether he should testify or not. As a result, the Appeals Chamber finds that the Trial Chamber did not violate Mr Ongwen's fair trial rights in this regard. This argument is therefore rejected.

443. In addition, the Appeals Chamber notes that the Defence calls into question the validity of the Trial Chamber's statement in the Conviction Decision that "the fact that

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[847] Decision on the Defence's Third Request for a Medical Examination, para. 28.
[848] Decision on the Defence's Third Request for a Medical Examination, paras 17-18.
[849] Decision on the Defence's Third Request for a Medical Examination, para. 18.
[850] Decision on the Defence's Third Request for a Medical Examination, para. 28.
[851] Appeal Brief, para. 255.

the Chamber has not ruled in favour of the Defence does not mean that it has not fully considered the situation of the accused when ruling on the Defence's request".[852] The Defence contends that this statement is "disingenuous" given an earlier statement of the Trial Chamber where it stated that "[…] the question of whether the accused may be mentally disabled was never considered in the Impugned Decision […]".[853]

444. The Appeals Chamber understands the Defence's argument to dispute whether the Trial Chamber actually did "fully consider the situation of Mr Ongwen" when it decided on the Defence's requests for medical examinations of Mr Ongwen. For the reasons discussed below, the Appeals Chamber considers the Defence's argument to be entirely misleading as it disregards the context and import of each of the above-mentioned statements of the Trial Chamber.

445. The Appeals Chamber observes that in the context of deciding on the Defence's request for leave to appeal the Decision on the Defence's Third Request for a Medical Examination, the Trial Chamber considered whether the issues, as framed by the Defence, qualified as appealable issues within the meaning of article 82(1)(d) of the Statute.[854] Specifically, with respect to the third issue, the Trial Chamber noted the Defence's claim that the Decision on the Defence's Third Request for a Medical Examination discriminated against Mr Ongwen as "a mentally disabled defendant".[855]

446. In rejecting leave to appeal the third issue the Trial Chamber reasoned as follows:

> In relation to the Third Issue, the Chamber notes that the Impugned Decision assessed whether any of the information presented in the Request for Medical Examination – which did not argue that the accused is 'mentally disabled' – would warrant a medical examination. Accordingly, *the question of whether the accused may be mentally disabled was never considered in the Impugned Decision*. Bearing this in mind, the question of whether the Chamber discriminated against the accused 'as a mentally disabled defendant' also does not arise from the Impugned Decision.[856]

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[852] Appeal Brief, para. 254, *referring to* Conviction Decision, para. 112.
[853] Appeal Brief, para. 253 (emphasis in original), *referring to* Decision on Leave to Appeal the Decision on Defence's Third Request for a Medical Examination, para. 11.
[854] Decision on Leave to Appeal the Decision on the Defence's Third Request for a Medical Examination, paras 7-12.
[855] Decision on Leave to Appeal the Decision on the Defence's Third Request for a Medical Examination, para. 4.
[856] Decision on Leave to Appeal the Decision on the Defence's Third Request for a Medical Examination, para. 11 (emphasis added).

447. It is thus clear that the Trial Chamber's statement that "[…] the question of whether the accused may be mentally disabled was never considered in the Impugned Decision […]", was intended to underscore the fact that the Defence's Third Request for a Medical Examination did not assert that Mr Ongwen was mentally disabled and, as such, the question as to whether he may have been mentally disabled was neither discussed nor determined in the Decision on the Defence's Third Request for a Medical Examination. Given this context, the Appeals Chamber considers that the Trial Chamber's statement that "[…] the question of whether the accused may be mentally disabled was never considered in the Impugned Decision […]", does not call into question the validity of the Trial Chamber's later statement in the Conviction Decision, namely, "the fact that the Chamber has not ruled in favour of the Defence does not mean that it has not fully considered the situation of the accused when ruling on the Defence's request".[857]

448. Indeed, the Appeals Chamber notes that the Trial Chamber's statement in the Conviction Decision was made in the context of the Trial Chamber's discussion of the three occasions in which the Defence requested a medical examination of Mr Ongwen.[858] In this respect, the Trial Chamber noted that in ruling on each request, including the Defence's Third Request for a Medical Examination, it took into account "information provided by independent medical experts" and Mr Ongwen's "specific situation".[859] In light of this, the Appeals Chamber considers that the Defence's argument does not establish that the Trial Chamber failed to " […] fully consider the situation of Mr Ongwen" when it decided on the Defence's requests for a medical examination of Mr Ongwen. The argument is therefore rejected.

449. Finally, the Appeals Chamber finds the Defence's contention that the Trial Chamber had a "disability blind-spot" to be misguided.[860] As noted by the Prosecutor and demonstrated above, the Trial Chamber acted reasonably by adjourning hearing days when Mr Ongwen's condition required it; reducing the sitting schedule in accordance with the Medical Officer's recommendation to ensure that Mr Ongwen had

[857] Conviction Decision, para. 112.
[858] Conviction Decision, para. 112.
[859] Conviction Decision, para. 112.
[860] Appeal Brief, para. 255.

at least one day in the week off from attending court and requesting the Registry to monitor and report on Mr Ongwen's health throughout the trial.[861] In these circumstances, the Appeals Chamber rejects the Defence's argument that the Trial Chamber discriminated against Mr Ongwen based on mental disability and finds no violation of his fair trial rights in this regard.

(d) Overall conclusion

450. Having considered all the arguments raised under grounds of appeal 14 and 15 concerning the Trial Chamber's alleged acts of discrimination against Mr Ongwen based on his mental disability and in violation of his fair trial rights, the Appeals Chamber rejects these grounds of appeal.

12. Ground of appeal 16: Alleged error in denying requests for leave to appeal

451. Under this ground of appeal, the Defence challenges the rejection by the Pre-Trial Chamber and the Trial Chamber, during the course of the proceedings, of all but one of its 43 requests for leave to appeal, "resulting in the violation of his fair trial right to appellate review of legal issues which were relevant to, and/or affected the fairness or reliability of the proceeding".[862]

(a) Summary of the submissions

452. The Defence submits that its requests for leave to appeal involved legal issues which were "significant to the fair conduct of the proceedings, and […] are critical issues in this appeal", and which impact the Conviction Decision – such as those related to evidentiary standards, evidentiary regime, expert witnesses, right to testify, discrimination based on mental disability, disclosure, standard of proof, and other fair trial rights under article 67 of the Statute.[863] The Defence requests that the Appeals Chamber "review" the Trial Chamber's decisions on its requests for leave to appeal and "rule on the legal issues" presented therein.[864]

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[861] Conviction Decision, para. 111; Prosecutor's Response, para. 62.
[862] Appeal Brief, p. 55, and para. 256.
[863] Appeal Brief, para. 257; Annex B to the Appeal Brief, including, *inter alia*, the list of the Defence's requests for leave to appeal.
[864] Appeal Brief, para. 259. As an example, the Defence refers to its request for leave to appeal an oral decision concerning the report presented by the rebuttal expert P-0447 (Appeal Brief, para. 259).

453. The Prosecutor submits that the Defence's argument under this ground of appeal should be dismissed *in limine*, as (i) the Defence does not explain why the Trial Chamber's rejection of its requests for leave to appeal was erroneous, and (ii) the Trial Chamber did not err and provided its reasons for denying leave to appeal.[865] The Prosecutor avers that the Defence does not specifically challenge any of these findings, nor does it explain how the lack of appellate review on the issues concerned materially affected the Conviction Decision.[866] Finally, the Prosecutor submits that the "wholesale review" of the Defence's requests for leave to appeal, sought by the Defence, falls outside the scope of appellate procedure in this Court and, to the extent that the Trial Chamber's interlocutory decisions materially affect Mr Ongwen's conviction, the Defence may raise these issues in the present appeal, which the Defence has done in numerous instances.[867]

454. Victims Group 1 submit that "the fair trial standards do not grant the defendant […] a right to an interlocutory appeal as such".[868] They argue that each of the Defence's requests for leave to appeal was considered in light of the requirements set out in article 82(1)(d) of the Statute and that the Defence fails to explain how the rejection of those requests affected the fair trial rights of the accused.[869]

455. Victims Group 2 submit that this ground of appeal is "totally unreviewable", as it fails to comply with the requirements of regulation 58 of the Regulations and the clear instruction of the Appeals Chamber regarding the substantiation of arguments raised on appeal.[870] Victims Group 2 argue that this ground of appeal is "apt for summary dismissal", as it "totally fails to present cogent arguments that would clearly explain how the Chamber erred".[871]

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[865] Prosecutor's Response, para. 63, providing examples of relevant Trial Chamber's decisions on Defence's requests for leave to appeal (referred to in footnotes 256-260).
[866] Prosecutor's Response, para. 63.
[867] Prosecutor's Response, para. 64.
[868] Victims Group 1's Observations, para. 86.
[869] Victims Group 1's Observations, para. 86.
[870] Victims Group 2's Observations, para. 30.
[871] Victims Group 2's Observations, para. 30.

(b) Determination by the Appeals Chamber

456. Under this ground of appeal, the Defence argues that the Pre-Trial Chamber and the Trial Chamber erred in denying its requests for leave to appeal in the course of the proceedings and it requests that the Appeals Chamber "review" the decisions denying leave and "rule on the legal issues" presented in the requests.[872]

457. The Appeals Chamber recalls that decisions denying leave to appeal may not be appealed[873] and that the Defence's request that the Appeals Chamber "review" the Trial Chamber's decisions on its requests for leave to appeal is contrary to the provisions regulating appellate proceedings.[874] Moreover, the Defence does not explain how the Chamber erred and how these decisions affected the fair trial rights of Mr Ongwen or the reliability of the Conviction Decision.[875] As a result, the Defence's arguments in this respect will not be considered further.

458. Similarly, the Defence's request that the Appeals Chamber rule on the legal issues with respect to which the Defence was denied leave to appeal is without merit. The present appeal is an appeal under article 81 of the Statute, and is thus concerned in principle with a review of the Trial Chamber's decision on Mr Ongwen's conviction. To the extent that the disposal of any particular issue in a procedural decision rendered by the Pre-Trial Chamber or Trial Chamber may materially affect Mr Ongwen's conviction or result in unfairness that may affect the reliability of the Conviction Decision, the Defence may raise any such issue within the context of its final appeal against the Conviction Decision.[876] In this regard, the Appeals Chamber notes that, as acknowledged by the Prosecutor,[877] the Defence does raise some of these issues in the present appeal.[878] Outside that context, the Appeals Chamber sees no merit in the

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[872] Appeal Brief, paras 256-259.
[873] *Ntaganda* Appeal Judgment, para. 242, *referring to* *Lubanga* OA3 Judgment, paras 35, 39-40.
[874] *Bemba et al.* Appeal Judgment, para. 660.
[875] *See* *Bemba et al.* Appeal Judgment, para. 659.
[876] See *Bemba et al.* Appeal Judgment, para. 660.
[877] Prosecutor's Response, para. 64.
[878] For example: Grounds of appeal 1-3, alleging errors regarding article 56 proceedings, previously raised in Defence Request for Leave to Appeal Decision on Article 56 Evidence; Grounds of appeal 4 and 11, alleging a violation of Mr Ongwen's rights under article 67(1)(f) of the Statute, previously raised in Defence Request for Reconsideration or Leave to Appeal ICC-02/04-01/15-1226; Grounds of appeal 8, 10 (in part), 25 and 45, alleging errors in relation to the standard and burden of proof for article 31(1)(a) defences, previously raised in Defence Request for Leave to Appeal Decision on Defence Request for a Ruling on the Burden and Standard of Proof Applicable to Article 31 of the Statute.

Defence's request that the Appeals Chamber "rule" on these issues merely on the ground that the Defence had unsuccessfully sought leave to appeal them in the course of the proceedings.[879] Accordingly, the Appeals Chamber rejects this request.

(c) Overall conclusion

459. In view of the foregoing, ground of appeal 16 is dismissed *in limine*.

13. Ground of appeal 18: Alleged error related to the rejection of the Defence's request to call D-0158

460. Under ground of appeal 18, the Defence challenges the Trial Chamber's rejection of its request to call D-0158, an expert witness related to sexual and gender-based crimes.

(a) Summary of the submissions

461. The Defence argues that the Trial Chamber erred in finding that there was no violation of Mr Ongwen's fair trial rights in rejecting the Defence's request to call D-0158.[880] The Defence submits that the Trial Chamber applied a "double-standard", in the sense that, on one hand, it granted the request made by Victims Group 1 to call a witness related to sexual and gender-based crimes on the basis that "the anticipated expert evidence differs from a first-hand account by a direct victim"[881] and, on the other hand, it rejected the Defence's request to call D-0158 on the ground that this evidence "would merely be additional evidence for topics for which direct evidence has already been elicited".[882] The Defence thus asserts that the Trial Chamber "erred in law by not applying the same legal standard for experts for [Victims Group 1] and the Defence", which resulted in a violation of Mr Ongwen's fair trial rights under article 67(1)(e) of the Statute.[883]

462. The Prosecutor argues that the Trial Chamber did not violate Mr Ongwen's fair trial rights by rejecting the Defence's request to call D-0158,[884] and that the Defence "mischaracterises the Chamber's reasons for rejecting [its] request to call D-0158 and

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[879] *See* *Bemba et al.* Appeal Judgment, para. 660.
[880] Appeal Brief, p. 57, para. 265, *referring to* Conviction Decision, para. 72.
[881] Appeal Brief, para. 266, *referring to* Decision on LRV Request to Present Evidence, para. 35.
[882] Appeal Brief, para. 267, *referring to* Decision on Defence Request to Add Expert Witnesses, para. 21.
[883] Appeal Brief, para. 268.
[884] Prosecutor's Response, para. 69.

repeats arguments that were already considered and rejected twice by the Chamber".[885] In the Prosecutor's view, this ground of appeal should be rejected for the following reasons: (i) the Trial Chamber did not apply a "double standard" as its decisions were "made in vastly different contexts" and were in both instances "*fact-specific*";[886] (ii) the Defence ignores the other relevant factors considered by the Trial Chamber in rejecting its request, "in particular the untimeliness of [its] request in light of the advance stage of the proceedings";[887] and (iii) the Trial Chamber permitted the Defence to submit "any existing academic work of D-0158" and thus Mr Ongwen's right to call and examine witnesses under article 67(1)(e) of the Statute was not prejudiced.[888]

463. Victims Group 1 submit that the Defence repeats the argument which was already addressed by the Trial Chamber.[889] They argue that the argument on the "double standard" ignores the content of the evidence given by the witness requested by Victims Group 1 and the one that was expected from D-0158.[890] They also submit that the Defence "misrepresents the substance of the Chamber's decision rejecting D-0158", which considered other important factors, namely that: (i) the Defence's request was filed over a year after the deadline set by the Trial Chamber to submit the final lists of witnesses; (ii) the Defence did not provide any explanation for the delay; and (iii) the Trial Chamber, while rejecting its request, allowed the Defence to submit "any existing academic work of D-0158".[891] Victims Group 1 submit that the Defence fails to demonstrate any legal error, nor has the Defence shown that the Trial Chamber's decision was "so unfair and unreasonable as to constitute an abuse of discretion".[892]

464. Victims Group 2 also argue that the Defence is "blatantly mischaracterising the reasoning of the Trial Chamber in rejecting the request to call D-0158".[893] Recalling the circumstances in which the requests were made and the content of the expected testimony of the two witnesses, they submit that the Defence's argument on the "double

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[885] Prosecutor's Response, para. 69, *referring to* Decision on Defence Motion for Reconsideration on Decision on Defence Request to Add Expert Witnesses; Conviction Decision, para. 72.
[886] Prosecutor's Response, para. 70.
[887] Prosecutor's Response, para. 71.
[888] Prosecutor's Response, para. 72.
[889] Victims Group 1's Observations, para. 94.
[890] Victims Group 1's Observations, para. 96.
[891] Victims Group 1's Observations, para. 97.
[892] Victims Group 1's Observations, para. 98.
[893] Victims Group 2's Observations, para. 69 (footnote omitted).

standard" is "hollow in substance" as "there is no measure of comparison which can genuinely be made between the proposals to call [these witnesses]".[894] Furthermore, they argue that, in any event, even if the Trial Chamber had allowed the Defence to call D-0158, it would not have relied on his evidence as "his anticipated report and testimony [would] not have touched upon the acts and conducts of the Accused, given the distinct subject matter on which he was instructed to produce his report".[895]

(b) Background and relevant parts of the Conviction Decision

465. On 13 October 2017, the Trial Chamber issued its preliminary directions on the presentation of evidence for the defence case and for a potential victim case,[896] in which it ordered, *inter alia*, that: the Victims "present [their] final lists of proposed witnesses and evidence by 2 February 2018",[897] and the Defence confirm its final list of evidence and witnesses within three weeks from the Prosecution's formal notice of the closure of the presentation of its evidence.[898]

466. On 2 February 2018, Victims Group 1 filed the final list of witnesses and request for leave to present evidence, which included witness Daryn Reicherter, an expert on issues related to rape and sexual and gender-based crimes.[899] On 6 March 2018, the Trial Chamber authorised this witness to present evidence at trial.[900]

467. On the same day, the Trial Chamber extended the deadline for the Defence to confirm its final list of evidence and witnesses to 31 May 2018,[901] which was further extended until 4 June 2018.[902]

468. On 4 June 2018, the Defence filed its list of evidence and list of witnesses.[903]

469. On 10 July 2019, the Defence filed a request to add D-0158, an expert witness on sexual and gender-based crimes, and D-0013 to its list of witnesses and related

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[894] Victims Group 2's Observations, paras 69-71.
[895] Victims Group 2's Observations, para. 72.
[896] Preliminary Directions for Evidence Presentation.
[897] Preliminary Directions for Evidence Presentation, para. 4.
[898] Preliminary Directions for Evidence Presentation, paras 5-7.
[899] LRV Submissions of Final List of Witnesses.
[900] Decision on LRV Request to Present Evidence, paras 33-37, p. 26.
[901] Decision on LRV Request to Present Evidence, para. 84.
[902] Decision on Defence Request to Add Expert Witnesses, para. 2.
[903] Defence Notification of List of Witnesses and Evidence.

material.[904] In relation to D-0158, the Defence submitted, *inter alia*, that "[h]is evidence [was] crucial and essential to [its] case and necessary for the determination of the truth regarding [sexual and gender-based crimes] with which Mr. Ongwen [was] charged".[905]

470. On 13 August 2019, the Trial Chamber granted the Defence's request with regard to D-0013 but rejected it in relation to D-0158.[906]

471. On 19 August 2019, the Defence filed a motion seeking reconsideration of the Trial Chamber's decision or, in the alternative, requesting leave to appeal it.[907] In support of its request for reconsideration, the Defence noted the previous decision of the Trial Chamber authorising the request of Victims Group 1 to call witness Daryn Reicherter,[908] and submitted that the Trial Chamber violated Mr Ongwen's fair trial rights under article 67(1) of the Statute as it had applied a "double standard" in determining its request and the one filed by Victims Group 1.[909] Accordingly, the Defence argued that "the application of different reasoning within the same case and to the same identical request from a party and a participant is unfair, and not in the interests of justice".[910]

472. On 6 September 2019, the Trial Chamber rejected the request for reconsideration as the Defence "[had] not demonstrated in which way the exceptional remedy of reconsideration would be justified".[911] The Trial Chamber noted with regard to the alleged "double standard" that "the two decisions compared by the Defence 'contain fundamentally different rulings made in vastly different contexts'".[912] It also rejected

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[904] Defence Request to Add Expert Witnesses, paras 1-2, 27.
[905] Defence Request to Add Expert Witnesses, para. 14. *See also* paras 4, 18-21.
[906] Decision on Defence Request to Add Expert Witnesses, paras 12-22 (D-0158); 23-26 (D-0013), p. 9.
[907] Defence Motion for Reconsideration on Decision on Defence Request to Add Expert Witnesses, paras 1-2, 32.
[908] Defence Motion for Reconsideration on Decision on Defence Request to Add Expert Witnesses, paras 8-12, *referring to* Decision on LRV Request to Present Evidence, paras 33-37.
[909] Defence Motion for Reconsideration on Decision on Defence Request to Add Expert Witnesses, para. 10.
[910] Defence Motion for Reconsideration on Decision on Defence Request to Add Expert Witnesses, para. 12.
[911] Decision on Defence Motion for Reconsideration on Decision on Defence Request to Add Expert Witnesses, para. 9. *See also* paras 8, 10-13.
[912] Decision on Defence Motion for Reconsideration on Decision on Defence Request to Add Expert Witnesses, para. 11.

the request for leave to appeal on the ground that the Defence "present[ed] no appealable issue arising from the [decision]".[913]

473. In its closing brief, the Defence submitted that it was denied an expert on sexual and gender-based crimes even though these crimes "comprised about 25% of the charges against [Mr Ongwen]",[914] and that the "double standard" applied by the Trial Chamber "prejudiced Mr Ongwen's fair trial rights".[915]

474. In the Conviction Decision, the Trial Chamber held:

> The Chamber repeats the reasons advanced in an earlier decision on this matter: the – belated – addition in the list of witnesses of the concerned expert was not considered necessary since 'the terms of reference instructing D-158 [the prospected witness] to produce [an expert] report indicate that much of the expected report – and anticipated testimony of D-158 – has already been discussed by other witnesses called by the Defence.' Therefore, the proposed witness's evidence 'would merely be additional evidence for topics for which direct evidence has already been elicited by the Defence'. Accordingly, the Chamber does not find any violation of the accused's rights and subsequently no justification for a permanent stay of proceedings.[916]

(c) Determination by the Appeals Chamber

475. The Defence argues that the Trial Chamber erred in law by applying a different legal standard in determining the two requests, by the Defence and Victims Group 1, for leave to present expert evidence. In the Defence's view, this resulted in a violation of Mr Ongwen's fair trial rights under article 67(1)(e) of the Statute.[917]

476. Article 67(1)(e) of the Statute provides, in relevant parts, that an accused shall be entitled

> […] to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute.

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[913] Decision on Defence Motion for Reconsideration on Decision on Defence Request to Add Expert Witnesses, paras 8, 14-18.
[914] Closing Brief, para. 72.
[915] Closing Brief, para. 72.
[916] Conviction Decision, para. 72 (footnote omitted), *referring to* Decision on Defence Request to Add Expert Witnesses, paras 16, 21.
[917] Appeal Brief, para. 268.

477. The Appeals Chamber agrees with Trial Chamber VII in the *Bemba et al.* Case that the right of the defence under this provision is not unlimited.[918] Indeed, a trial chamber has the discretion to make determinations on the relevance or admissibility of evidence pursuant to articles 64(9) and 69(4) of the Statute and thus the Defence's right to present evidence is subject to such discretion.[919] In this regard, the Appeals Chamber recalls that a trial chamber is required to balance this discretion with, *inter alia*, its duty pursuant to article 64(2) of the Statute, to ensure that the trial is fair and expeditious and is conducted with full respect for the rights of the accused.[920]

478. The Appeals Chamber recalls that the Trial Chamber rejected the Defence's request to call D-0158 because its request "[was] filed over a year after the deadline to provide the final lists of witnesses and of evidence expired" and that, while D-0158 had been known to the parties and participants for a considerable period of time, the Defence did not provide any explanation as to why it sought to add this witness only at that stage.[921] As to the nature of the testimony of D-0158 and the content of the related items, the Trial Chamber noted that "much of the expected report – and anticipated testimony of D-0158 – has already been discussed by other witnesses called by the Defence".[922] The Trial Chamber held that the testimony of D-0158 "would merely be additional evidence for topics for which direct evidence has already been elicited by the Defence" and thus rejected the Defence's request to add D-0158 and the associated material, while at the same time allowing the Defence to submit "any existing academic work of D-0158 if it wishe[d] to do so".[923]

479. In contrast, the Appeals Chamber notes that Victims Group 1 filed their request to call witness Daryn Reicherter within the set deadline and that the Trial Chamber's reasons for granting the request was that the proposed testimony "[was] not repetitive, since the anticipated expert evidence differ[ed] from a first-hand account by a direct victim",[924] and it "[would] allow [the Trial Chamber] to assess the impact of rape and [sexual and gender-based crimes] on the lives of victims in a more universal manner,

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[918] *Bemba et al.* Decision on Defence Witnesses, para. 10.
[919] *Bemba et al.* Decision on Defence Witnesses, para. 10.
[920] *See* *Bemba et al.* Appeal Judgment, para. 603.
[921] Decision on Defence Request to Add Expert Witnesses, paras 13-15.
[922] Decision on Defence Request to Add Expert Witnesses, paras 16-19.
[923] Decision on Defence Request to Add Expert Witnesses, paras 21-22.
[924] Decision on LRV Request to Present Evidence, para. 35.

which includes who did not provide testimony before [it]".[925] The Trial Chamber also found that the proposed testimony "affect[ed] the interests of the victims, [was] relevant to the issues of the case and [was] necessary for the determination of the truth".[926] It thus granted their request.[927]

480. The Appeals Chamber concurs with the Trial Chamber's view that the two decisions compared by the Defence "contain fundamentally different rulings made in vastly different contexts".[928] As noted above, when assessing the Defence's request, the Trial Chamber rejected it primarily because of its untimeliness and the absence of any justification for such delay.[929] Moreover, the Trial Chamber considered that the anticipated evidence would be repetitive and found that most of it had already been discussed by other witnesses.[930] Regarding Victims Group 1's request, however, the Trial Chamber noted that it was filed in a timely manner and that the proposed testimony was relevant.[931] As recalled above, the Trial Chamber has discretion in determining the relevance or admissibility of evidence presented by the parties and participants.[932] In the present case, rather than applying a "double-standard", the Trial Chamber considered the circumstances under which the Defence's request was brought, as well as the nature and content thereof, and on that basis, rejected the request. Thus, the Appeals Chamber finds that there was no violation of Mr Ongwen's rights under article 67(1)(e) of the Statute, nor was there any abuse of discretion by the Trial Chamber.

(d) Overall conclusion

481. In light of the foregoing, ground of appeal 18 is rejected.

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[925] Decision on LRV Request to Present Evidence, paras 35-36.
[926] Decision on LRV Request to Present Evidence, para. 36.
[927] Decision on LRV Request to Present Evidence, p. 26.
[928] Decision on Defence Motion for Reconsideration on Decision on Defence Request to Add Expert Witnesses, para. 11.
[929] *See* paragraph 478 above.
[930] *See* paragraph 478 above.
[931] *See* paragraph 479 above.
[932] *See* paragraph 477 above.

14. Ground of appeal 23: Alleged errors concerning the submission of evidence

482. Under ground of appeal 23, the Defence argues that the Trial Chamber erred in failing to explain the outcome of its evidentiary rulings either during trial or in the Conviction Decision or an annex to it.

(a) Summary of the submissions

483. The Defence submits that the Trial Chamber neither made evidentiary rulings during trial nor explicitly addressed the outcome of its evidentiary rulings in the Conviction Decision or an annex to it.[933] It argues that while the *Bemba et al.* Appeal Judgment and the *Bemba* OA5 / OA6 Judgment are not consistent on this issue, only the latter applies to trial proceedings concerning crimes under article 5 of the Statute and it requires an evidentiary ruling "at some point at the proceedings".[934] The Defence further submits that "even if rulings on specific items of evidence are discretionary", the *Bemba et al.* Appeal Judgment made it clear that "a trial chamber is obligated to rule on individual items of evidence if it is necessary to ensure the rights of the accused".[935] The Defence contends that when addressing this issue, the Trial Chamber misinterpreted the law, as rule 64(2) of the Rules requires that reasons for rulings on evidentiary matters be placed on the record.[936] The Defence argues that as a result of the Trial Chamber's erroneous approach, the Defence "was unable fully to identify errors in the Chamber's determinations of relevance, probative value and potential prejudice of items of evidence" and to know with certainty which items were found to be inadmissible.[937]

484. The Prosecutor submits that this ground should be dismissed, as the Defence merely repeats prior submissions already dismissed by the Trial Chamber, without explaining how the Trial Chamber erred.[938] The Prosecutor, however, also argues that the Trial Chamber did not err in adopting the so-called submission system, as confirmed

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[933] Appeal Brief, para. 298.
[934] Appeal Brief, paras 299-302, *referring to* *Bemba et al.* Appeal Judgment, para. 597; *Bemba* OA5 / OA6 Judgment, para. 37.
[935] Appeal Brief, para. 304, *referring to* *Bemba et al.* Appeal Judgment, para. 603.
[936] Appeal Brief, para. 303, *referring to* Conviction Decision, para. 241.
[937] Appeal Brief, paras 304, 305-306.
[938] Prosecutor's Response, para. 120.

in the *Bemba et al.* Appeal Judgment, as it is in line with the Court's legal framework,[939] which is equally applicable to article 5 crimes and article 70 offences.[940] The Prosecutor submits that, contrary to the Defence's argument, there is nothing in the legal framework of the Court that grants the parties a "predetermined right to obtain a ruling on all items of evidence submitted".[941] He argues that the Appeals Chamber's jurisprudence, as endorsed by the Trial Chamber, requires that a chamber consider the relevance, probative value and potential prejudicial effect of the evidence submitted, but that this can be done as part of its holistic assessment of the evidence.[942] Finally, the Prosecutor contends that the Defence failed to demonstrate how the so-called submission system in this case prejudiced Mr Ongwen[943] and, in particular, that a clearly relevant item of evidence was disregarded by the Trial Chamber,[944] or that the circumstances of this case warranted individualised rulings on the evidence.[945]

485. Victims Group 1 submit that the Trial Chamber's adoption of the submission system did not materially affect the Impugned Decision and, thus, the Appeals Chamber need not intervene.[946] Furthermore, they argue that the Defence should have demonstrated that the approach adopted by the Trial Chamber is inconsistent with the Statute or the Rules.[947] Finally, Victims Group 1 submit "there is no human right standard as to the treatment of evidence by a tribunal".[948]

486. Victims Group 2 submit that the Defence does not in fact challenge the Conviction Decision *per se*, but instead raises the issue of conflicting jurisprudence of the Court.[949] They argue that in any event this ground of appeal should be summarily dismissed because the Defence fails to identify the challenged factual findings, or to demonstrate that the alleged errors had a material impact on the Conviction Decision.[950]

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[939] Prosecutor's Response, paras 121-123.
[940] Prosecutor's Response, para. 126.
[941] Prosecutor's Response, para. 123.
[942] Prosecutor's Response, paras 127-128.
[943] Prosecutor's Response, para. 128.
[944] Prosecutor's Response, para. 124.
[945] Prosecutor's Response, para. 129.
[946] Victims Group 1's Observations, para. 111.
[947] Victims Group 1's Observations, para. 112.
[948] Victims Group 1's Observations, para. 115.
[949] Victims Group 2's Observations, para. 35.
[950] Victims Group 2's Observations, para. 35.

(b) Background and relevant parts of the Conviction Decision

487. On 13 July 2016, the Trial Chamber issued its Directions on the Conduct of the Proceedings, where it informed the parties that it would defer its assessment of the admissibility of the evidence until the deliberation phase of the proceedings.[951] The Trial Chamber stated that when the parties formally submit evidence during trial, then "all the Chamber [would] generally do is recognise their formal submission".[952]

488. The Trial Chamber further stated that it would assess the relevance, probative value and prejudicial effect of each item of evidence submitted "when deliberating the judgment, though it may not necessarily discuss these aspects for every item submitted in the judgement itself".[953] Nevertheless, the Trial Chamber retained the discretion to rule on admissibility issues upfront and when appropriate, particularly when the objections raised were based on procedural bars, such as those included in article 69(7) of the Statute and the procedural pre-requisites set out in rule 68 of the Rules.[954]

489. The Trial Chamber issued specific instructions on how the participants could formally submit evidence[955] and how the other participants could raise issues related to relevance or admissibility of the evidence thus submitted.[956] It also indicated how it would inform the participants which items of evidence were formally recognised as submitted.[957]

490. On 21 May 2019, the Defence objected to the Trial Chamber's approach to the submission of evidence, arguing that it was "opaque and erroneous as a matter of law".[958] It argued that the Trial Chamber's "evidentiary regime not only causes confusion and legal uncertainty, but continues to delay the proceedings and undermine Mr Ongwen's fair trial right to present a defence".[959] The Defence therefore requested the Trial Chamber to: (i) rule on the admissibility and/or relevance of all items submitted into evidence at the time or before closing briefs; or (ii) confirm that the

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[951] Directions on the Conduct of the Proceedings, para. 24.
[952] Directions on the Conduct of the Proceedings, para. 24.
[953] Directions on the Conduct of the Proceedings, para. 24.
[954] Directions on the Conduct of the Proceedings, para. 26, fn. 19.
[955] Directions on the Conduct of the Proceedings, para. 28(i).
[956] Directions on the Conduct of the Proceedings, para. 28(ii).
[957] Directions on the Conduct of the Proceedings, para. 28(iv).
[958] Defence Objections to Evidentiary Regime, para. 2.
[959] Defence Objections to Evidentiary Regime, para. 3.

evidential rulings for all submitted items of evidence and their assessment would be discussed in the judgment or an annex thereto.[960]

491. On 19 June 2019, the Trial Chamber rejected the Defence's objections, noting that they were in fact directed against the Directions on Conduct of the Proceedings, issued almost three years before, and that they therefore amounted to a motion for reconsideration.[961] The Trial Chamber, however, found that none of the arguments put forward by the Defence justified the exceptional measure of reconsideration.[962]

492. On 18 July 2019, the Trial Chamber rejected the Defence's request for leave to appeal the Decision on Objections to Evidentiary Regime.[963]

493. In its closing brief, the Defence reiterated its view that the evidentiary regime adopted by the Trial Chamber was prejudicial and erroneous, and that it undermined the fairness of the proceedings.[964] It argued that, as a result of the submission of over 4,200 items into evidence, the Defence "was required to work on the assumption that all [those] items […] [might] be used against Mr Ongwen".[965] The Defence contended that the Trial Chamber erroneously vested itself with "discretion not to provide any reasoned opinion on why certain submitted items were ruled (in)admissible and/or (ir)relevant".[966]

494. In the Conviction Decision, the Trial Chamber held that the procedure for the submission of documentary evidence at trial was in accordance with the relevant legal instruments and with the jurisprudence of the Court.[967] It noted that the Defence did not make any submission on the prejudice caused by the Trial Chamber's alleged selective and inconsistent application of the procedure for submission of evidence.[968] The Trial Chamber found that "a separate ruling by a trial chamber on the relevance and probative value of an individual item of documentary evidence under Article 69(4) of the Statute

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[960] Defence Objections to Evidentiary Regime, para. 55.
[961] Decision on Objections to Evidentiary Regime, paras 16-20.
[962] Decision on Objections to Evidentiary Regime, paras 23-34.
[963] Decision on Leave to Appeal the Decision on Objections to Evidentiary Regime.
[964] Defence Closing Brief, paras 97, 106.
[965] Defence Closing Brief, para. 98.
[966] Defence Closing Brief, para. 103 .
[967] Conviction Decision, para. 96.
[968] Conviction Decision, para. 99.

is discretionary in nature" and that "no admissibility 'test' – beyond that of not being inadmissible by virtue of the operation of specific exclusionary rules or 'procedural bars' – is envisaged as such in the applicable law for an item of evidence to be 'submitted' at trial".[969]

495. The Trial Chamber stated that, when no procedural bar to the submission of an item of evidence was found or raised, it recognised the submission and thus indicated that such an item was part of the evidentiary basis on which Mr Ongwen's guilt or innocence would be established.[970] The Trial Chamber held:

> The assessment of the relevance and probative value of all items of evidence so 'submitted' – and any argument in this regard raised by the parties and participants in the course of the trial – was therefore conducted by the Chamber as part of its deliberation on the guilt or innocence of [Mr] Ongwen and on the basis of a holistic evaluation of all items of evidence that are part of the evidentiary record in the present case, rather than for the purpose of discrete evidentiary rulings. Such assessment, including in terms of the disposal of the arguments advanced at trial by the parties and participants, is referred to in the present judgment as appropriate.[971]

496. The Trial Chamber also noted that

> the requirement of a reasoned judgment makes it possible for the parties and participants to verify precisely how the Chamber evaluated the evidence before it for its decision on the guilt or innocence of the accused, and enables appellate review as appropriate. This requirement constitutes the primary safeguard against a trial chamber erroneously relying on irrelevant or inadmissible evidence or failing to properly consider all relevant aspects of the evidence available to it, in that it enables proper oversight of the chamber's ultimate assessment of the evidence submitted and discussed before it at trial.[972]

497. The Trial Chamber held that

> [w]hile not every item of evidence eligible to be used for the determination of the guilt or innocence of the accused must in fact be explicitly addressed in the judgment and trial chambers have a degree of discretion as to what to address explicitly in their reasoning, what is at issue in this context is the chamber's compliance with its statutory duty to provide sufficient reasons for its determinations. This duty is unrelated to whether the procedure for submission of evidence in the course of a trial envisaged preliminary, *prima facie*

[969] Conviction Decision, para. 235 (footnotes omitted).
[970] Conviction Decision, para. 237.
[971] Conviction Decision, para. 237 (footnote omitted).
[972] Conviction Decision, para. 246 (footnote omitted).

> determinations of the relevance and probative value of individual items of evidence as a matter of course.[973]

498. The Trial Chamber therefore stated that as part of its determination of Mr Ongwen's guilt or innocence it duly considered the parties and participants' arguments with respect to evidence submitted in the course of the trial and that those arguments "are addressed and disposed of in the […] judgment as appropriate".[974]

(c) Determination by the Appeals Chamber

499. The Appeals Chamber notes that this ground of appeal concerns the question of whether a trial chamber is required to make rulings on the relevance, probative value or potential prejudicial effect of the documentary evidence submitted during trial and indicate in such rulings which items of evidence are recognised as "submitted". The Defence's argument is that the Trial Chamber ought to have made such rulings either during trial or in the Conviction Decision.[975] The Appeals Chamber notes that the Trial Chamber generally did not make such rulings during trial.[976] It therefore understands the Defence's argument to rather focus on whether evidentiary rulings ought to have been included the Conviction Decision. The Appeals Chamber will thus examine whether the Trial Chamber was required to include rulings on each item of evidence in the Conviction Decision.

500. At the outset, the Appeals Chamber recalls that the Court's legal texts provide for two types of evidentiary matters upon which a trial chamber can make rulings. First, pursuant to article 69(7) of the Statute, evidence may be ruled inadmissible if it is affected by one of the exclusionary rules, for instance where it was obtained by means of a violation of the Statute or internationally recognised human rights.[977] This consideration is "mandatory in nature", in that a trial chamber is required to ensure that an item of evidence affected by an exclusionary rule is ruled inadmissible.[978] Second, article 69(4) of the Statute reads:

> The Court may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that

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[973] Conviction Decision, para. 247 (footnotes omitted).
[974] Conviction Decision, para. 248. *See also* para. 250.
[975] Appeal Brief, para. 298.
[976] Directions on the Conduct of the Proceedings, para. 24.
[977] *Bemba et al.* Appeal Judgment, paras 580-581.
[978] *Bemba et al.* Appeal Judgment, paras 582, 586.

> such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.

501. Pursuant to this article, there are other evidentiary matters upon which a trial chamber may make rulings, such as relevance, probative value or "any prejudice that […] evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness".[979] The Appeals Chamber understands the present ground of appeal to concern rulings on evidentiary matters of this latter type.

502. The Defence relies on the *Bemba* OA5 / OA6 Judgment to argue that an evidentiary ruling with respect to each item of evidence is required "at some point at the proceedings".[980] It contends that, although the *Bemba et al.* Appeal Judgment, rendered later, stipulates that such rulings are not mandatory, that judgment only applies to proceedings concerning offences under article 70 of the Statute.[981] The Appeals Chamber recalls that in the *Bemba* OA5 / OA6 Judgment it held that

> [a]s borne out by the use of the word "may" in article 69 (4), the Trial Chamber has the power to rule or not on relevance or admissibility when evidence is submitted to the Chamber. Consequently, the Trial Chamber may rule on the relevance and/or admissibility of each item of evidence when it is submitted, and then determine the weight to be attached to the evidence at the end of the trial. In that case, an item will be admitted into evidence only if the Chamber rules that it is relevant and/or admissible in terms of article 69 (4), taking into account "the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness". Alternatively, the Chamber may defer its consideration of these criteria until the end of the proceedings, making it part of its assessment of the evidence when it is evaluating the guilt or innocence of the accused person. Nevertheless, under article 64 (2) of the Statute, the Chamber must always ensure that the trial "is fair and expeditious and conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses". In particular, if a party raises an issue regarding the relevance or admissibility of evidence, the Trial Chamber must balance its discretion to defer consideration of this issue with its obligations under that provision. Moreover, it should be underlined that irrespective of the approach the Trial Chamber chooses, it will have to consider the relevance, probative value and the potential prejudice of each item of evidence at some point in the proceedings - when evidence is submitted, during the trial, or at the end of the trial.[982]

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[979] Article 69(4) of the Statute; *Bemba et al.* Appeal Judgment, para. 583.
[980] Appeal Brief, paras 299-302, *referring to* *Bemba et al.* Appeal Judgment, para. 597; *Bemba* OA5 / OA6 Judgment, para. 37.
[981] Appeal Brief, paras 299-300.
[982] *Bemba* OA5 / OA6 Judgment, para. 37.

503. Regarding the question of whether this ruling requires the trial chamber to render rulings on evidentiary matters "at some point in the proceedings", the Appeals Chamber has previously clarified that in the *Bemba* OA5 / OA6 Judgment it "did not indicate that a trial chamber must render rulings on the relevance or admissibility of each item of evidence".[983] The Appeals Chamber held that, "[r]ather, what a trial chamber must do in any case is to *consider* the relevance, probative value and potential prejudice of the evidence submitted and the issues raised by the parties in this respect".[984] Furthermore, there is nothing to suggest that the Appeals Chamber's findings in the *Bemba et al.* Appeal Judgment regarding rulings on evidentiary matters were intended to apply only to proceedings under article 70 of the Statute. To the contrary, it is clear from (i) the Appeals Chamber's determination,[985] (ii) the provisions of the Statute and the Rules upon which it relied,[986] and (iii) the drafting history which it cited,[987] that those findings also apply to trial proceedings concerning crimes under article 5 of the Statute. The Appeals Chamber will therefore rely on the *Bemba et al.* Appeal Judgment for purposes of the present ground of appeal.

504. In the *Bemba et al.* Appeal Judgment, the Appeals Chamber held, based on its interpretation of article 69(4) of the Statute, that

> consideration by a trial chamber of the relevance and/or probative value of an item of evidence within the context of a possible ruling on its relevance or admissibility rendered separately from its assessment as part of the eventual evaluation of the guilt or innocence of the accused is, in principle, permitted, but is not mandatory.[988]

505. The trial chamber therefore has discretion to either:

> (i) rule on the relevance and/or admissibility of [a submitted] item of evidence as a pre-condition for recognising it as "submitted" within the meaning of article 74 (2) of the Statute, and assess its weight at the end of the proceedings as part of its holistic assessment of all evidence submitted; or (ii) recognise the submission of such item of evidence without a prior ruling on its relevance and/or admissibility and consider its relevance and probative value as part of the holistic assessment

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[983] *Bemba et al.* Appeal Judgment, para. 594, *referring to* *Bemba* OA5 / OA6 Judgment, para. 37.
[984] *Bemba et al.* Appeal Judgment, para. 594 (emphasis added), *referring to* *Bemba* OA5 / OA6 Judgment, para. 37.
[985] *Bemba et al.* Appeal Judgment, paras 592, 598-599.
[986] *Bemba et al.* Appeal Judgment, paras 573-574, 576, 579-587, 596-597.
[987] *Bemba et al.* Appeal Judgment, paras 588-592.
[988] *Bemba et al.* Appeal Judgment, para. 592.

> of all evidence submitted when deciding on the guilt or innocence of the accused.[989]

506. The Trial Chamber in this case chose the latter approach. It considered the relevance and probative value of the evidence submitted at trial holistically when deciding on Mr Ongwen's guilt or innocence. It was therefore not *per se* erroneous for the Trial Chamber not to include, in the Conviction Decision, evidentiary rulings with respect to each item of evidence submitted at trial. However, the Appeals Chamber notes that other provisions of the Court's legal texts may require that evidentiary rulings be included in the conviction decision. In particular, the Appeals Chamber recalls that article 74(5) of the Statute requires that the conviction decision "contain a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions". It follows that the trial chamber must "explain with sufficient clarity the basis for its determination".[990] In particular,

> when a trial chamber, in its decision under article 74 of the Statute, fails to explain sufficiently why it considers an item of evidence – whether documentary or testimonial – to be relevant and with sufficient probative value to be relied upon for its factual analysis (or *vice versa*) despite issues raised at trial in that regard, what is at issue is the trial chamber's compliance with its duty under article 74 (5) of the Statute to provide "a full and reasoned statement of [its] findings on the evidence and conclusion" in support of its decision on the guilt or innocence of the accused.[991]

507. The Appeals Chamber considers that this duty to provide a reasoned statement of findings on the evidence is of particular significance when any party raises an issue concerning the relevance, probative value or a potential prejudicial effect of a piece of evidence, especially when the opposing party raised an objection. Whether the trial chamber's failure to provide such a reasoned statement amounts to an error under article 74(5) of the Statute must be assessed on a case-by-case basis.

508. The Appeals Chamber recalls that according to the procedure adopted in this case, when the parties formally submitted evidence during trial, the Trial Chamber only recognised their formal submission.[992] The Trial Chamber indicated that it would assess

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[989] *Bemba et al.* Appeal Judgment, para. 598.
[990] *Bemba et al.* Appeal Judgment, para. 597.
[991] *Bemba et al.* Appeal Judgment, para. 597.
[992] Directions on the Conduct of the Proceedings, para. 24.

the relevance, probative value and prejudicial effect of each item of evidence submitted "when deliberating the judgment, though it may not necessarily discuss these aspects for every item submitted in the judgement itself".[993] As noted above, the Trial Chamber also acknowledged that the requirement of a reasoned judgment would enable "proper oversight of [its] ultimate assessment of the evidence".[994] The procedure adopted by the Trial Chamber provides for a discussion of evidentiary matters in the Conviction Decision. To this extent, this procedure complies with the legal framework set out above and falls within the scope of the Trial Chamber's discretion on evidentiary matters. The Defence has not demonstrated that this procedure, as stipulated by the Trial Chamber, violated Mr Ongwen's right to defend himself.[995]

509. The Trial Chamber's statement that it would "not necessarily discuss" evidentiary matters "for every item submitted" also is not inconsistent with the applicable law. However, as indicated above, a case-by-case assessment would be required to determine whether the Trial Chamber abused its discretion in failing to discuss evidentiary matters with respect to items of evidence about which concerns were expressed during the trial. The Appeals Chamber notes in this respect that under ground of appeal 23, the Defence alleges that the Trial Chamber did not sufficiently explain or did not at all explain in the Conviction Decision why it relied on certain items of evidence; however the Defence does not provide any examples of such items of evidence. In addition, the Appeals Chamber notes that the Conviction Decision contains a 228-page section on "Assessment of evidence", including a 76-page sub-section on documentary evidence. That sub-section on documentary evidence "lays out some general considerations with respect to the documentary evidence submitted in the case".[996] It also "responds […] to the arguments of the parties".[997] For instance, the Trial Chamber assessed in that section the intercept evidence before it, including specific intercepted communications.[998] In its analysis, the Trial Chamber addressed a number of arguments raised by the Defence regarding intercept related evidence,[999]

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[993] Directions on the Conduct of the Proceedings, para. 24.
[994] Conviction Decision, para. 246.
[995] Appeal Brief, paras 298, 304, 306.
[996] Conviction Decision, para. 613.
[997] Conviction Decision, para. 613.
[998] Conviction Decision, paras 645-810.
[999] Conviction Decision, para. 615.

including the argument that "these materials required witness testimony prior to being introduced" and that "these materials [we]re insufficiently authenticated".[1000]

510. Furthermore, in the sections of the Conviction Decision where factual findings are made the Trial Chamber addressed the Defence's objections to reliance on specific items of evidence. For instance, the Trial Chamber addressed the Defence's objections to the authenticity of LRA documents submitted by the Prosecutor,[1001] to the reliability of report UGA-OTP-0025-0069,[1002] and to the relevance and probative value of report UGA-OTP-0015-0158.[1003]

511. The Appeals Chamber recalls that the appellant must set out how the alleged error materially affected the impugned decision,[1004] or, when alleging unfairness, he or she must set out how the alleged ground affects the fairness or reliability of the proceedings or decision.[1005] Without concrete examples of rulings on evidentiary matters which, in the view of the Defence, the Trial Chamber ought to have included in the Conviction Decision, the Appeals Chamber is unable to determine whether the Trial Chamber erred and whether the Appeals Chamber's intervention is warranted.

(d) Overall conclusion

512. As the Defence has not shown any error in the Trial Chamber's approach to rulings on evidentiary matters and has not provided any example of the Trial Chamber's alleged failure to render such rulings with respect to specific objections and/or items of evidence, the Appeals Chamber rejects ground of appeal 23.

C. Other alleged evidentiary errors

513. The Defence has raised other alleged evidentiary errors: (i) errors in the Trial Chamber's assessment of the credibility and reliability of witness evidence (grounds of appeal 24 and 71) and (ii) errors in the Trial Chamber's assessment of intercept evidence (grounds of appeal 60, 72 and 73). The Appeals Chamber will addressed them in turn below.

[1000] Conviction Decision, paras 639-640.
[1001] Conviction Decision, para. 1090.
[1002] Conviction Decision, fn. 2370.
[1003] Conviction Decision, fn. 2377.
[1004] *Lubanga* Appeal Judgment, para. 30; *Ntaganda* Appeal Judgment, para. 48.
[1005] *Ntaganda* Appeal Judgment, para. 49.

1. Grounds of appeal 24 and 71: Alleged errors in the Trial Chamber's assessment of the credibility and reliability of witness evidence

514. Under these grounds of appeal, the Defence submits that the Trial Chamber erred in law when it failed to consistently apply "any discernible criteria" or the "statutory evidentiary standard of proof beyond reasonable doubt" when it assessed the credibility and reliability of witness evidence.[1006]

(a) Summary of the submissions

515. The Defence argues that, despite listing factors relevant to an assessment of reliability, the Trial Chamber "disregarded the said criteria without any consideration of the effect this had on the witness' general credibility".[1007] Rather, the Defence avers, the Trial Chamber identified "self-incrimination or positive feelings towards [Mr Ongwen] as factors which supported the credibility and reliability of witness statements".[1008] In particular, the Defence contends that the Trial Chamber erred in its assessment of the evidence from P-0054, P-0205 and P-0309.[1009]

516. The Prosecutor submits that the Defence does not acknowledge the Trial Chamber's "comprehensive assessment of the evidence" but merely refers to paragraphs of the Conviction Decision in isolation.[1010] The Prosecutor contends that the fact that a witness may incriminate himself or herself or show bias towards the accused "*may* be relevant in assessing his or her credibility, *together with other factors*".[1011] The Prosecutor submits that the Trial Chamber reasonably and correctly assessed the evidence of P-0054, P-0205 and P-0309, and that it made the necessary findings beyond reasonable doubt.[1012]

517. Victims Group 1 submit that the Trial Chamber "identified a host of factors for the determination of reliability of a witness" and "noted that the said factors were by no means exhaustive".[1013] Victims Group 1 argue that there is no error of law and/or

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[1006] Appeal Brief, paras 731-742.
[1007] Appeal Brief, para. 736.
[1008] Appeal Brief, para. 736.
[1009] Appeal Brief, paras 737-741.
[1010] Prosecutor's Response, para. 404.
[1011] Prosecutor's Response, para. 405 (emphasis in original).
[1012] Prosecutor's Response, paras 407-412.
[1013] Victims Group 1's Observations, para. 207.

fact identified, and that the Defence does not demonstrate that the Trial Chamber, in assessing the testimony of P-0054, P-0205 and P-0309, "rendered the witnesses unreliable and not credible".[1014]

518. Victims Group 2 note that, "because the Defence itself *wholly agrees* with the [Trial] Chamber's statements on the applicable evidentiary criteria and standards pronounced in the [Conviction Decision], these arguments actually lend support to the manner in which the [Trial] Chamber elaborated and applied the relevant evidentiary standards, rather than identify a concrete error".[1015] Victims Group 2 aver that the Defence's argument, that the Trial Chamber failed to consider all other evidence, is a mere allegation with respect to three witnesses and does not explain why the conviction should not stand on the basis of the remaining evidence from other witnesses.[1016]

(b) Relevant parts of the Conviction Decision

519. In outlining the standard of proof, the Trial Chamber noted:

> In accordance with Article 66(3) of the Statute, the Chamber, in order to convict the accused must be convinced of the guilt of the accused beyond reasonable doubt. The standard of beyond reasonable doubt is to be applied to any facts indispensable for entering a conviction, namely those constituting the elements of the crimes or modes of liability charged. For this determination, the Chamber must carry out a holistic evaluation and weighing of all the evidence taken together in relation to the facts at issue.[1017]

520. The Trial Chamber listed certain factors which it considered in its assessment of the reliability and credibility of witness testimony:

> 255. For the purpose of its assessment of the reliability of any witness's testimony, the Chamber considered a number of different factors. […]
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> 258. The Chamber also took into account the individual circumstances of the witness, including his or her relationship to the accused, age, the provision of assurances against self-incrimination, indication of bias against the accused – or the lack of such – and/or motives for telling the truth. […]
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> 260. Finally, the Chamber clarifies that the considerations expressed above can by no means be considered an exhaustive list of factors, or a "check-list" of requirements for a witness to be relied upon. Any assessment of testimonial

[1014] Victims Group 1's Observations, para. 208.
[1015] Victims Group 2's Observations, para. 38 (emphasis in original).
[1016] Victims Group 2's Observations, para. 39.
[1017] Conviction Decision, para. 227 (footnote omitted).

> evidence (like of any other type of evidence) is in fact dependent on the specific circumstances at hand.[1018]

(c) Determination by the Appeals Chamber

521. The Appeals Chamber notes that many of the arguments made under these grounds of appeal[1019] are also made under grounds of appeal 60 and 70; 77, 78 and 79; as well as 81 and 82. The Appeals Chamber finds it appropriate to consider these overlapping arguments under those grounds of appeal.[1020]

522. Turning to the remainder of the arguments, the Appeals Chamber notes that, when challenging the credibility of P-0054, the Defence refers to this witness's testimony regarding the order to attack Lukodi and the involvement of the Gilva brigade therein, as well as P-0054's statement that nobody looted food at Abok.[1021] The Appeals Chamber observes that the Trial Chamber was aware of the inconsistencies in the evidence of P-0054 to which the Defence points. In particular, the Trial Chamber noted:

> The Chamber is attentive to the fact that P-0054 testified firmly that Gilva brigade under Tulu was not involved. In light of the specific evidence to the contrary, including from persons who participated in the attack after being selected from the Gilva sickbay, the Chamber does not accept the evidence of P-0054 on this specific point, considering it entirely plausible that P-0054 simply did not get to know of the fact.[1022]

523. The Trial Chamber also noted:

> LRA fighter P-0054 testified that not much was looted from Abok IDP camp. P-0054 testified that nobody actually carried food from Abok because the situation was extremely chaotic. Given the volume of evidence to the contrary, the Chamber does not find the witness reliable in this regard. The Chamber finds it significant that he testified that he did not enter Abok IDP camp during the attack and stayed outside the camp. The Chamber does not imply that the witness was untruthful in this aspect of his testimony. Rather, given the circumstances, it is possible that the witness was sincere but not reliable as to what actually occurred in relation to what was taken from the camp by LRA fighters.[1023]

[1018] Conviction Decision, paras 255, 258, 260 (footnote omitted).
[1019] Appeal Brief, paras 737-739, 741.
[1020] *See* paragraphs 722-724, 728 below; section VI.D.2(c)(iii)(a). (Alleged erroneous assessment of evidence by P-0410, P-0205 and P-0054) below; section VI.D.2(c)(v)(b). (Alleged erroneous assessment of P-0205's evidence) below.
[1021] Appeal Brief, para. 740.
[1022] Conviction Decision, para. 1691 (footnote omitted).
[1023] Conviction Decision, para. 1908 (footnotes omitted).

524. The Appeals Chamber recalls that "[i]t is 'within the discretion of the Trial Chamber to evaluate any inconsistencies, to consider whether the evidence taken as a whole is reliable and credible and to accept or reject the "fundamental features" of the evidence'".[1024] The Appeals Chamber further recalls that a trial chamber may "rely on certain aspects of a witness's evidence and consider other aspects unreliable".[1025]

525. Moreover, the Appeals Chamber observes that the Trial Chamber also explored possible reasons for why the account of P-0054 differed from other evidence. The Defence does not identify any error in these specific findings of the Trial Chamber. The Defence's arguments on this point are therefore rejected.

526. The Appeals Chamber also notes the Defence's argument that "[t]he witnesses discussed above are just a few examples of the many instances in which inconsistencies and contradictions in Prosecution witness testimony are disregarded".[1026] The Appeals Chamber notes that in relation to the examples given by the Defence, it has concluded, above and under grounds of appeal 60 and 70, 77, 78 and 79, as well as 81 and 82, that the Defence has not identified any error in the Trial Chamber's findings. It also notes that the Defence identifies no other examples. The Appeals Chamber therefore rejects the Defence's argument that the Trial Chamber's failure to take due account of inconsistencies "mak[es] the judgment and convictions unsafe".[1027]

527. The Defence also seems to take issue with the Trial Chamber's reliance on self-incrimination or "positive feelings towards" Mr Ongwen as factors relevant to its assessment of credibility.[1028] This argument relates to the following findings of the Trial Chamber. In its general remarks about the credibility of P-0233, the Trial Chamber found that "the witness testified about experiences which incriminated the LRA as well as government forces, and testified that he liked [Mr] Ongwen, factors which support the credibility of the incriminatory statements".[1029] Similarly, with respect to [REDACTED], the Trial Chamber found that [REDACTED], and that he

[1024] *Ntaganda* Appeal Judgment, para. 806.
[1025] *Ngudjolo* Appeal Judgment, para. 168.
[1026] Appeal Brief, para. 742.
[1027] Appeal Brief, para. 742.
[1028] Appeal Brief, para. 736.
[1029] Conviction Decision, para. 319.

[REDACTED].[1030] [REDACTED],[1031] [REDACTED][1032] and P-0205.[1033] In its assessment of the credibility of their accounts of specific events the Trial Chamber [REDACTED].

528. The Appeals Chamber notes that other than referring to "the number of witnesses that testified with assurances" and asserting that providing "complementary or favourable statements regarding [Mr Ongwen] is wholly irrelevant",[1034] the Defence does not explain why, in its view, it was an error for the Trial Chamber to rely on these factors. The Appeals Chamber is also not persuaded that these factors are irrelevant. To the contrary, it was entirely reasonable for the Trial Chamber to consider that a witness's frankness about his own participation in potentially incriminating events demonstrates the credibility of his accounts.[1035] Similarly, the Appeals Chamber finds reasonable the Trial Chamber's conclusion that the absence of a witness's attempt to incriminate Mr Ongwen "at all cost",[1036] strengthens its finding that the witness was not biased against the accused. Furthermore, the Defence does not set out how, in its view, the credibility assessment of these witnesses would have been different, had the Trial Chamber not relied on said factors. This is particularly significant, given that the Trial Chamber referred to a number of other factors supporting its findings on credibility.[1037] These arguments of the Defence are therefore rejected.

[1030] Conviction Decision, para. [REDACTED]. *See also* [REDACTED].
[1031] The Trial Chamber found [REDACTED] (Conviction Decision, para. [REDACTED]).
[1032] In assessing the credibility of the testimony of [REDACTED] on certain facts, the Trial Chamber noted that [REDACTED] (Conviction Decision, para. [REDACTED]).
[1033] The Trial Chamber stated that it paid "due attention to the fact that P-0205 testified […] after having been given assurances against self-incrimination" (Conviction Decision, para. 1675).
[1034] Appeal Brief, para. 736.
[1035] Conviction Decision, para. [REDACTED].
[1036] Conviction Decision, para. 361.
[1037] For instance, the Trial Chamber considered that P-0233 was a former member of the LRA (Conviction Decision, para. 319); [REDACTED] (Conviction Decision, para. [REDACTED]) and [REDACTED] (Conviction Decision, para. [REDACTED]); that the testimony [REDACTED] (Conviction Decision, para. [REDACTED]); [REDACTED] (Conviction Decision, para. [REDACTED]); that "the statement [P-0205] gave to the Prosecution in 2015 was decidedly more favourable to him than his in-court statement" (Conviction Decision, para. 1675); and that [REDACTED] (Conviction Decision, para. [REDACTED]).

529. In view of the foregoing, the Appeals Chamber finds the Defence's additional argument under these grounds of appeal and regarding the Trial Chamber's alleged failure to uphold the beyond reasonable doubt standard[1038] to be without merit.

(d) Overall conclusion

530. Having considered most of the arguments raised under grounds of appeal 24 and 71 concerning the Trial Chamber's assessment of the credibility and reliability of witness evidence, the Appeals Chamber rejects these grounds of appeal. As indicated above, it will consider the remainder of these arguments under grounds of appeal 60 and 70; 77, 78 and 79; as well as 81 and 82.

2. *Ground of appeal 72: Alleged errors in the Trial Chamber's assessment of intercept evidence*

531. Under ground of appeal 72, the Defence argues that the Trial Chamber erred in law and in fact in the assessment of intercept evidence.[1039] More specifically, the Defence claims that the Trial Chamber: (i) "failed to review the complete evidentiary record of intercept evidence and abused its discretion by relying on a 'general discussion of the reliability of intercept evidence'";[1040] (ii) "relied on untested and unauthenticated logbook evidence" and "disregarded evidence raising reasonable doubt";[1041] and (iii) "impermissibly substituted short hand notes for intercepted LRA radio communications with logbook summaries".[1042]

532. The Appeals Chamber will address these arguments in turn.

(a) Alleged failure to review the complete evidentiary record of intercept evidence and abuse of discretion by relying on a general discussion of the reliability of intercept evidence

(i) Summary of the submissions

533. The Defence submits that the Trial Chamber abused its discretion by recognising the "submission", not "admission", of all items identified by the Prosecutor and deferring its consideration of the Defence's objections until the judgment.[1043] It argues

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[1038] Appeal Brief, paras 732, 742.
[1039] Appeal Brief, paras 743-772.
[1040] Appeal Brief, paras 745-752.
[1041] Appeal Brief, paras 753-766.
[1042] Appeal Brief, paras 767-772.
[1043] Appeal Brief, paras 745-746.

that the Trial Chamber "had the obligation to make assessments and determinations on the objections raised in the Defence Closing Brief and during trial".[1044] In addition, the Defence submits, by reference to the *Bemba et al.* Appeal Judgment, that the Trial Chamber was required "to establish discernible criteria and standards for the evaluation of [formally submitted] evidence" and "to make separate and discrete assessments and determinations of the [authenticity], relevance, probative value and reliability of the evidence".[1045] However, the Trial Chamber only made a "general and holistic" assessment of the reliability of intercept evidence "without explaining the criteria or standard it relied on".[1046] In the Defence's view, "this amounted to an abuse of discretion and a violation of Article 74(5) of the Statute".[1047]

534. The Prosecutor submits that the Trial Chamber correctly applied the so-called submission system and thus the Defence's argument should be dismissed.[1048] The Prosecutor argues that the Defence does not explain how the Trial Chamber abused its discretion by not granting its objections either at the time of submission of evidence or during trial, and instead addressing them at the deliberation stage.[1049] He argues that the Defence "neither raised any procedural or 'exclusionary' bars […], nor identified any circumstance pertaining to the intercepts which warranted 'exceptional' consideration of the evidentiary criteria at the time of their submission".[1050] The Prosecutor contends that the Trial Chamber fully respected Mr Ongwen's fair trial rights and the Defence shows no prejudice as a result of the alleged error.[1051] Finally, the Prosecutor submits that the Defence's reliance on the *Bemba et al.* Appeal Judgment is "misplaced", as the Appeals Chamber, in that case, "did not consider the propriety of the Trial Chamber accepting the material at the 'submission' stage".[1052]

535. Victims Group 1 submit that the Defence's argument under this ground of appeal is "a mere disagreement with the findings of the Chamber" and "[t]here is no error of

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[1044] Appeal Brief, para. 751.
[1045] Appeal Brief, paras 748, 750-751, *referring to* *Bemba et al.* Appeal Judgment, para. 1003.
[1046] Appeal Brief, paras 748, 750-751, *referring to* *Bemba et al.* Appeal Judgment, para. 1003.
[1047] Appeal Brief, para. 748.
[1048] Prosecutor's Response, para. 455.
[1049] Prosecutor's Response, para. 457.
[1050] Prosecutor's Response, para. 457.
[1051] Prosecutor's Response, para. 458.
[1052] Prosecutor's Response, para. 460.

law or fact identified".[1053] They argue that the Trial Chamber adopted "reasonable criteria" to address intercept evidence in the Conviction Decision.[1054]

(ii) Relevant procedural background

536. On 13 July 2016, the Trial Chamber issued its Directions on the Conduct of the Proceedings, in which it informed the parties that it would defer its assessment of the admissibility of the evidence until the deliberation phase of the proceedings.[1055] The Trial Chamber stated that when the parties formally submit evidence during trial, then "all the Chamber [would] generally do is recognise their formal submission"[1056] and "consider the relevance, probative value and potential prejudice of each item of evidence submitted when deliberating the judgment, though it may not necessarily discuss these aspects for every item submitted in the judgment itself".[1057]

537. On 28 October 2016, the Prosecutor requested that the Trial Chamber recognise the formal submission of 2,507 items related to the interception of LRA radio communications by the Ugandan government.[1058] On 21 November 2016, the Defence objected to the Prosecutor's request in its entirety, arguing, *inter alia*, that "Mr Ongwen's fair trial rights will be jeopardised by the blanket admission of the intercept evidence *via* the bar table".[1059]

538. On 1 December 2016, the Trial Chamber issued its Decision on Submission of Intercept Evidence, in which it recognised the items requested as "submitted".[1060] Recalling its approach adopted in the Directions on the Conduct of the Proceedings,[1061] the Trial Chamber "emphasise[d] that its general approach [did] not involve making any relevance, probative value or potential prejudice assessments at the point of

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[1053] Victims Group 1's Observations, para. 209.
[1054] Victims Group 1's Observations, para. 215.
[1055] Directions on the Conduct of the Proceedings, para. 24.
[1056] Directions on the Conduct of the Proceedings, para. 24.
[1057] *See* section VI.B.14. (Ground of appeal 23: Alleged errors concerning the submission of evidence) above.
[1058] Prosecutor's Request for Formal Submission of Intercept Evidence, paras 1-2, 58. The intercepted communications fell under six categories: (i) short-hand rough notes of LRA radio communications; (ii) logbooks containing summaries of said radio communications; (iii) faxed copies of logbook entries; (iv) intelligence reports; (v) sound recordings of LRA radio communications; and (vi) miscellaneous intercept evidence.
[1059] Defence Response to Prosecutor's Request for Formal Submission of Intercept Evidence, paras 1, 12, 52.
[1060] Decision on Submission of Intercept Evidence, p. 14.
[1061] Decision on Submission of Intercept Evidence, para. 4.

submission – not even on a *prima facie* basis".[1062] The Trial Chamber held that it "recognise[d] the submission, not 'admission', of all items identified by the Prosecution" and "[would] defer consideration of the Defence's various objections until the judgment and in [] light of the entirety of the evidence brought before it".[1063] The Trial Chamber nevertheless recalled that "though each and every item [would] be considered when deliberating its judgment, [it] may not necessarily discuss every item in the judgment itself".[1064]

539. On 7 December 2016, the Defence sought leave to appeal this decision "on the issue of *the scope of 'procedural objections' required to be examined pursuant to submission under Article 69(3)*".[1065] The Defence argued, *inter alia*, that "the issue [was] constituted by the wider subject of the jurisprudential shift at the ICC to receiving extensive evidence through bar-table motions and delaying the evaluation of evidence to the Article 74 Judgment".[1066] It submitted that the Trial Chamber's approach to receive "extensive non-testimonial evidence […] [was] a clear departure from the practice of the *ad-hoc* tribunals and […] 'international customary criminal procedural law'", which "significantly affect[ed] the fair and expeditious conduct of the proceedings".[1067]

540. On 20 December 2016, the Trial Chamber rejected the Defence's request for leave to appeal the Decision on Submission of Intercept Evidence, noting that the issue raised by the Defence was "a mere hypothetical exercise that [did] not relate to the Chamber's actual ruling in the [Decision on Submission of Intercept Evidence]" and "did not qualify as an appealable issue".[1068]

(iii) Relevant parts of the Conviction Decision

541. In the Conviction Decision, the Trial Chamber noted that

> in principle, the relevance and probative value of a given piece of evidence could be assessed more accurately only after having received all evidence presented at

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[1062] Decision on Submission of Intercept Evidence, para. 7.
[1063] Decision on Submission of Intercept Evidence, para. 26.
[1064] Decision on Submission of Intercept Evidence, para. 13.
[1065] Defence Request for Leave to Appeal Decision on Submission of Intercept Evidence, paras 2, 29 (emphasis in original).
[1066] Defence Request for Leave to Appeal Decision on Submission of Intercept Evidence, para. 12.
[1067] Defence Request for Leave to Appeal Decision on Submission of Intercept Evidence, paras 15, 17.
[1068] Decision on Defence Request for Leave to Appeal Decision on Submission of Interception Evidence, para. 9.

> trial in order to conduct such assessments in light of the entirety of the evidence submitted, rather than undertaking them during trial as the evidentiary record evolved. At the same time, the Chamber clarifies that under the procedure for submission of evidence as set out in the present case, it still maintains the discretion, vested in it by the relevant statutory provisions, to render separate rulings on the relevance and/or probative value of individual items of evidence as warranted by the specific circumstances at hand, and exclude at any time from the evidentiary record material which, on its face, is patently irrelevant or is manifestly lacking any probative value. In the Chamber's view, such discretion needs however to be exercised with caution and restraint, bearing in mind that the relevance and probative value of a given piece of evidence may not be evident in the course of the proceedings, but may become so when all the evidence is received and considered.[1069]

542. The Trial Chamber further noted that

> [c]onsistent with the considerations above and mindful that the 'submission' of evidence is a procedural act performed by the parties as a matter of statutory right, the Chamber, in the present trial, has been deferential to the parties in terms of the documentary evidence they submitted for the Chamber's consideration for the ultimate determination on the guilt or innocence of the accused. Importantly, upon submission of the different batches of documentary evidence by the Prosecution and by the Defence, and in the absence of any indication of an abuse on their part of their statutory right to submit evidence at trial in accordance with the relevant applicable law, the Chamber generally considered that an intervention on its part in terms of exclusion of material from the evidentiary record of the case in the course of the trial was unwarranted.[1070]

543. Consequently, the Trial Chamber held that it duly considered the arguments made by the parties and participants in the course of the trial "as part of the Chamber's determination of [Mr] Ongwen's guilt or innocence", and "addressed and disposed of [them] in the present judgment as appropriate".[1071]

(iv) Determination by the Appeals Chamber

544. At the outset, the Defence submits that, with respect to the approach adopted in the Decision on Submission of Intercept Evidence, the Trial Chamber "abused its discretion by failing to follow the statutory parameters, guidance and safeguards in its exercise of [the] discretionary powers".[1072] It takes issues with the Trial Chamber's statement that it "generally considered that an intervention on its part in terms of

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[1069] Conviction Decision, para. 239.
[1070] Conviction Decision, para. 240.
[1071] Conviction Decision, para. 248.
[1072] Appeal Brief, para. 746.

exclusion of material from the evidentiary record of the case in the course of the trial was unwarranted".[1073] The Defence contends that while the Trial Chamber "had the obligation to make assessments and determinations on the objections raised in the Defence Closing Brief and during trial", it "consistently deferred [them] to [the] Judgment".[1074]

545. As discussed above, the procedure on the submission of evidence adopted by the Trial Chamber complies with the legal framework of the Court and falls within the scope of its discretion on evidentiary matters.[1075] Accordingly, in the absence of any further arguments under this ground of appeal, the Appeals Chamber finds that the Defence has shown no error in the Trial Chamber's approach to ruling on evidentiary matters.

546. The Defence further submits that while the Trial Chamber was obliged "to establish discernible criteria and standards for the evaluation of [formally submitted] evidence" and "to make separate and discrete assessments of the [authenticity], relevance, probative value and reliability of the evidence", it only made a "general and holistic" assessment of the reliability of intercept evidence "without explaining the criteria or standard it relied on".[1076] The Defence argues that "this amounted to an abuse of discretion and a violation of Article 74(5) of the Statute".[1077]

547. The Appeals Chamber observes that the Trial Chamber indicated that it would consider the relevance, probative value and potential prejudicial effect of each item of evidence "when deliberating the judgment", though it "may not necessarily discuss every item submitted in the judgment itself".[1078] As found in ground of appeal 23, a trial chamber's duty under article 74(5) of the Statute to provide a reasoned statement of findings on the evidence is of particular significance when any party raises an issue concerning the relevance, probative value or a potential prejudicial effect of a piece of

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[1073] Appeal Brief, para. 746, *referring to* Conviction Decision, para. 240.
[1074] Appeal Brief, paras 747, 751.
[1075] *See* section VI.B.14. (Ground of appeal 23: Alleged errors concerning the submission of evidence) above.
[1076] Appeal Brief, paras 748, 751.
[1077] Appeal Brief, para. 748.
[1078] Decision on Submission of Intercept Evidence, para. 13. *See also* Directions on the Conduct of the Proceedings, para. 24.

evidence, especially when the opposing party raises an objection.[1079] The Appeals Chamber recalls that it found that the Trial Chamber's statement that it would "not necessarily discuss [evidentiary matters] for every item submitted in the judgment" is not inconsistent with the applicable law.[1080] A case-by-case assessment would be required to determine whether the Trial Chamber abused its discretion in failing to discuss evidentiary matters on items of evidence about which concerns were expressed during the trial.[1081] In this regards, the Appeals Chamber notes that the Defence refers to the *Bemba et al.* Appeal Judgment to support its argument that the Trial Chamber "had an obligation to establish discernible criteria and standards for the evaluation of [formally submitted] evidence".[1082] However, the Appeals Chamber cannot discern the relevance of this jurisprudence to the issue at hand, particularly given that the issue in that judgment was whether Trial Chamber VII disregarded "technical flaws" in the recording of intercepted conversations.[1083] The Appeals Chamber finds that the Defence's argument in this regard lacks substantiation.

548. The Appeals Chamber further observes that the Defence refers to footnotes 2082-2084 of the Conviction Decision to support its argument that the Trial Chamber only engaged in a "general and holistic" assessment of the reliability of intercept evidence.[1084] In these footnotes, the Trial Chamber referred to a UPDF logbook and noted that "there are no corresponding logbook entries from other intercepting agencies for these specific dates, but considers, in light of its general discussion of the reliability of intercept evidence, that the UPDF logbook is sufficiently reliable in the context at hand".[1085] The Appeals Chamber does not find that the Trial Chamber only engaged in

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[1079] *See* section VI.B.14. (Ground of appeal 23: Alleged errors concerning the submission of evidence) above.
[1080] *See* section VI.B.14. (Ground of appeal 23: Alleged errors concerning the submission of evidence) above.
[1081] *See* section VI.B.14. (Ground of appeal 23: Alleged errors concerning the submission of evidence) above.
[1082] Appeal Brief, paras 750-751, *referring to* *Bemba et al.* Appeal Judgment, para. 1003.
[1083] *Bemba et al.* Appeal Judgment, paras 991, 1003.
[1084] Appeal Brief, para. 748, fn. 946, *referring to* Conviction Decision, fns 2082-2084.
[1085] *See* Conviction Decision, fn. 2082 (The Trial Chamber noted in footnote 2082 as follows: "UPDF Logbook (Gulu), UGA-OTP-0254-3399, at 3446, 3450, 3452, 3457. The Chamber notes that there are no corresponding logbook entries from other intercepting agencies for these specific dates, but considers, in light of its general discussion of the reliability of intercept evidence, that the UPDF logbook is sufficiently reliable in the context at hand"). *See also* Conviction Decision, fns 2083-2084 (The Trial Chamber noted in footnote 2083 as follows: "UPDF Logbook (Gulu), UGA-OTP-0254-3399, at 3459. The Chamber notes that there are no corresponding logbook entries from other intercepting agencies for this specific date, but considers, in light of its general discussion of the reliability of intercept evidence,

a "general and holistic" assessment of the reliability of intercept evidence, as alleged by the Defence. The Appeals Chamber considers that by making this statement, the Trial Chamber simply recalled its discussion on intercept evidence in the section on "Documentary evidence" (more specifically, in the sub-section on "Intercept materials"), which, as discussed more in detail below, provided its "overall understanding of the voluminous intercept evidence submitted in this case", including the assessment of their reliability.[1086] The Appeals Chamber observes that other than referring to these footnotes, the Defence does not provide any examples where, in its view, the Trial Chamber did not explain in the Conviction Decision that it would rely on a certain piece of evidence. Accordingly, the Appeals Chamber rejects the Defence's argument that the Trial Chamber made a "general and holistic" assessment of the reliability of intercept evidence.

549. In light of the foregoing, the Appeals Chamber rejects the Defence's argument that the Trial Chamber did not review the complete evidentiary record of intercept evidence and abused its discretion by relying on a general discussion of the reliability of intercept evidence.

(b) Alleged error in relying on untested and unauthenticated logbook evidence and disregarding evidence raising reasonable doubt

(i) Summary of the submissions

550. The Defence submits that the Trial Chamber "relied on untested and unauthenticated logbook evidence" and "disregarded evidence raising reasonable doubt".[1087] Noting that the Trial Chamber in this case "compared 17 audio excerpts against logbook entries", the Defence argues that the Trial Chamber "[did] not explain why the 17 examples are sufficiently representative of all logbook entries".[1088] It contends that the Trial Chamber's "general assessment of the reliability and

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that the UPDF logbook is sufficiently reliable in the context at hand." It also noted in footnote 2084 as follows: "UPDF Logbook (Gulu), UGA-OTP-0254-3399, at 3461. The Chamber notes that there are no corresponding logbook entries from other intercepting agencies for this specific date, but considers, in light of its general discussion of the reliability of intercept evidence, that the UPDF logbook is sufficiently reliable in the context at hand.") .

[1086] *See* Conviction Decision, paras 614-685. *See* section VI.C.2(b) (Alleged error in relying on untested and unauthenticated logbook evidence and disregarding evidence raising reasonable doubt) below.

[1087] Appeal Brief, p. 178.

[1088] Appeal Brief, para. 753.

admissibility of logbook summaries significantly compromised the fairness and integrity of the trial".[1089] In addition, the Defence challenges a number of the Trial Chamber's findings with respect to the intercept evidence and related witness testimony.[1090]

551. The Prosecutor submits that the Trial Chamber "correctly applied a two-tier approach to authenticating and assessing intercept-related evidence before relying on it".[1091] He explains that "[a]t 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", which "was not limited to just 17 intercepts".[1092] The Prosecutor further argues that contrary to the Defence's arguments, the Trial Chamber "relied on logbook entries when corroborated" and "properly assessed and relied on interceptor evidence".[1093]

552. Victims Group 1 submit that the Trial Chamber considered particular corroborative aspects of intercept evidence and provided a reasoned statement for its reliance on such evidence.[1094]

(ii) Relevant parts of the Conviction Decision

553. The Trial Chamber held that "[t]he primary interceptor logbooks are a contemporaneous written record of the LRA's intercepted communications", which "[were] written in a systematic manner, have marks indicating that commanding officers read them, and summarise LRA communications".[1095] The Trial Chamber found that the logbooks "[gave] every indication of being what the witnesses describe them to be, and the various witnesses who authored or were otherwise familiar with these books identified them in the course of their testimony".[1096]

[1089] Appeal Brief, para. 754.
[1090] Appeal Brief, paras 755-766.
[1091] Prosecutor's Response, para. 462.
[1092] Prosecutor's Response, paras 462-465 (emphasis in original).
[1093] Prosecutor's Response, paras 467-471.
[1094] Victims Group 1's Observations, para. 215.
[1095] Conviction Decision, paras 658-659.
[1096] Conviction Decision, para. 659.

554. Furthermore, the Trial Chamber noted that "much of the value of these logbooks comes precisely from their providing a plain language summary of an otherwise indecipherable conversation".[1097] The Trial Chamber held that

> In principle in its evidentiary discussion, the Chamber has taken care to verify the meaning of any LRA conversation sourced from a single logbook, relying on available audio recording transcripts, witness testimonies or other logbooks to corroborate their accuracy. That said, the Chamber notes that in certain instances, it has not been possible to match the details of conversations as recorded in specific logbooks to other available evidence. This holds true in particular when looking at the logbooks produced by ISO in 2002, time for which the Chamber was not provided with logbooks from other intercepting agencies. In such cases, while the Chamber may be referencing the content of LRA communications sourced from a single logbook, the Chamber considers such logbook entries sufficiently reliable in the context of its evidentiary discussion and in light of the evidence received on how the logbooks were produced. This is also the case in particular bearing in mind the discussion of the specific intercepts below which demonstrates that witnesses corroborated summaries in logbooks when played the corresponding sound recordings, as well as that for years subsequent 2002, for which logbooks from other intercepting agencies are available, in many cases the logbook entries across agencies match to an extent which allows the Chamber to conclude sufficiently on the reliability of the ISO logbooks from 2002. To the extent possible, the Chamber has also noted corroboration for the content of such logbooks entries by reference to other material available.[1098]

(iii) Determination by the Appeals Chamber

555. The Appeals Chamber understands the core of the Defence's argument in this section to be that the Trial Chamber erred in making a "general assessment" of the reliability of logbooks, based on a limited sample of intercepted communications. The Defence argues that the Trial Chamber assessed the totality of the logbooks it relied on by only considering 17 specific intercepted communications.[1099] It avers that the Trial Chamber failed to "explain why the 17 examples are sufficiently representative of all logbook entries".[1100]

556. For the reasons that follow, the Appeals Chamber is not persuaded by this argument. First, as noted above, the Conviction Decision contains a 76-page section on "Documentary evidence" which "lays out some general considerations with respect to

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[1097] Conviction Decision, para. 666.
[1098] Conviction Decision, para. 666.
[1099] Appeal Brief, paras 753-754.
[1100] Appeal Brief, para. 753.

the documentary evidence submitted in the case".[1101] This section includes four sub-sections, two of which are on "Intercept materials" and "Specific intercepted communications", in which the Trial Chamber first set out "its overall understanding of the voluminous intercept evidence submitted in this case",[1102] and then provided "its foundational assessment for recordings [of 17 specific intercepted communications]".[1103] According to the Trial Chamber, "[a]ll intercepted evidence of LRA's radio communications has been considered and overall, [it] consider[ed] these communications to be highly probative evidence in this case".[1104]

557. Second, the Appeals Chamber notes that in the section on "Intercept materials", the Trial Chamber addressed: the interception process of relevant agencies (*i.e.* UPDF, ISO and Police);[1105] the transfer of intercept materials to the Prosecution;[1106] and the assessment of the intercepted related evidence, such as audio recordings, logbooks and short hand notes.[1107] In particular, the Trial Chamber found that when intercepting LRA radio communications, the UPDF interceptors tape recorded LRA radio communications, prepared short hand notes of communications, undertook necessary work required to understand the contents (including breaking any codes and listening again to the tape), and contemporaneously prepared a logbook summary based "exclusively [on] the information provided over the radio".[1108] It noted that as the communications "were predominantly in Acholi or Luo, the interceptors wrote the summaries in plain English", which were subsequently reviewed by the commanding officers and "were securely stored, either at the sites of interception or in Kampala".[1109] Moreover, the Trial Chamber found that the ISO interception process unfolded similarly to the UPDF process, namely that "conversation would be recorded, short hand notes prepared, language de-coded, plain language logbook summaries written chronologically (in English and based exclusively on the recording), and entries

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[1101] *See* section VI.B.14. (Ground of appeal 23: Alleged errors concerning the submission of evidence) above.
[1102] Conviction Decision, paras 616-685.
[1103] Conviction Decision, paras 686-810.
[1104] Conviction Decision, para. 686.
[1105] Conviction Decision, paras 616-632.
[1106] Conviction Decision, paras 633-636.
[1107] Conviction Decision, paras 637-685.
[1108] Conviction Decision, para. 621.
[1109] Conviction Decision, paras 621-622.

reviewed by commanding officers", and that "[t]he recordings and logbooks would likewise be securely stored".[1110] It noted that a distinguishing feature of the ISO process was that "the ISO would sequentially label each audio cassette, and then use this serial number in their logbooks", which "allow[ed] a reader to easily identify which logbook summaries reflect the contents of which tape".[1111] The Trial Chamber also noted that the UPDF and ISO interceptors "had sufficient experience that they could understand what the LRA was saying and recognise the voices of certain LRA members as they speak".[1112]

558. Regarding the logbooks, the Trial Chamber noted that the primary interceptor logbooks on which it relied were "a contemporaneous written record of the LRA's intercepted communications", which "[were] written in plain language", "a systematic manner" and "have marks indicating that commanding officers read them, and summarise LRA communications".[1113] It found that these logbooks "[gave] every indication of being what the witnesses describe[d] them to be, and the various witnesses who authored or were otherwise familiar with these books identified them in the course of their testimony".[1114] The Trial Chamber authenticated each set of logbooks "specifically relevant to its evidentiary discussion" by considering, *inter alia*, the testimony of relevant witnesses and its e-court metadata regarding when the logbook was provided to the Prosecution, and by whom.[1115] In response to the Defence's argument that "logbook entries may discuss conversation topics out of order or may have inaccurately interpreted proverbs or coded messages", the Trial Chamber stated, *inter alia*, that it "has taken care to verify the meaning of any LRA conversation sourced from a single logbook, relying on available audio recording transcripts, witness testimonies or other logbooks to corroborate their accuracy".[1116] The Trial Chamber

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[1110] Conviction Decision, para. 626.
[1111] Conviction Decision, para. 627. In addition, the Trial Chamber found that similar to the UPDF and ISO, the local police forces "would listen to the LRA, prepare short hand notes of what was being said, and summarise the conversation in a contemporaneous 'fair copy' (aka 'good note') of the conversations", while their interception operation "was conducted less formally than those of the UPDF or ISO", as they did not tape record communications and destroyed all short hand notes. *See* Conviction Decision, paras 630-631.
[1112] Conviction Decision, paras 619, 625.
[1113] Conviction Decision, paras 658-659.
[1114] Conviction Decision, para. 659.
[1115] Conviction Decision, paras 659-660, fns 1196-1227.
[1116] Conviction Decision, para. 666.

found that "the summaries in [the] logbooks have been extensively corroborated by witnesses who were played the corresponding recorded conversations in court", and that, for those which had no available evidence to match the details of conversations (*i.e.* the logbooks produced by ISO in 2002), the Trial Chamber still "consider[ed] such logbook entries sufficiently reliable in the context of its evidentiary discussion and in light of the evidence received on how the logbooks were produced".[1117]

559. The Appeals Chamber also recalls that in the subsequent section on "Specific intercepted communications", the Trial Chamber established with respect to the 17 specific intercepted communications: (i) that a given recording, as enhanced, contained radio communications intercepted by the Ugandan authorities; (ii) the approximate date of a conversation at issue; (iii) its speaker; and (iv) where available, the accuracy of the transcript reflecting what was said.[1118] The Appeals Chamber notes that the Trial Chamber assessed each audio recording based on corresponding logbook(s), testimony of witnesses who had identified the voices therein, and other relevant evidence.[1119] For instance, the Trial Chamber noted, *inter alia*, the following with respect to "Tape 693 (enhanced: UGA-OTP-0247-1102)": its e-court metadata indicated that P-0227 of the ISO provided this tape to the Prosecution on 23 February 2005; its enhanced audio file was prepared and registered as evidence; the ISO logbook entries for this tape indicated dates of 9-10 October 2003; the Prosecution played part of the enhanced audio in court to P-0003, an UPDF interceptor, who recognised the voice of Joseph Kony and Vincent Otti; P-0003 gave an overall summary of the recorded conversation, explained certain transcript annotations and confirmed that his annotated transcript matches what was played; and P-0138, a former LRA member, also played part of the recording in court and gave a similar overall summary to P-0003.[1120] The Trial Chamber also considered some discrepancies between the two testimonies and concluded that this tape "contain[ed] a recording of Joseph Kony, Vincent Otti and others speaking over the radio at some point in the period of 9-10 October 2003" and "at least for all portions where the reviewing witnesses had a consistent understanding, the corresponding annotated transcript accurately reflect[ed]

[1117] Conviction Decision, para. 666.
[1118] Conviction Decision, para. 687.
[1119] Conviction Decision, paras 690-810.
[1120] Conviction Decision, paras 701-705.

the speakers and words spoken".[1121] The Appeals Chamber notes that the Trial Chamber also assessed the remaining 16 specific intercepted communications in the same manner and identified the relevant information with respect to each tape.[1122]

560. Importantly, the Appeals Chamber notes that contrary to the Defence's argument,[1123] the Trial Chamber assessed not only the logbooks of 17 specific intercepted communications, but also those of other intercepted communications in the relevant parts of the evidentiary discussion. In this regard, the Trial Chamber indicated in the section of "Documentary evidence" that "[t]he analysis, which responds also to the arguments of the parties, must be read in conjunction with the evidentiary discussion further below in the present judgment. Indeed, certain aspects relating to the relevance or reliability of documentary evidence, are further addressed, as appropriate, in the relevant evidentiary discussion".[1124] The Appeals Chamber observes that when referring to a certain intercepted communication in the section of "Evidentiary analysis for findings of fact", the Trial Chamber noted the content of the communication, as well as its date, speaker(s) and location (*i.e.* Gulu, Achol Pii, Soroti, Lira), and by whom (*i.e.* UPDF, ISO, Police) it was recorded.[1125] In this regard, the Trial Chamber looked for overlapping content between different logbooks and, in many instances, relied on corroborating logbooks from more than one source to support its findings.[1126] Moreover, as discussed below, where there were discrepancies between the content of different logbook entries, the Trial Chamber also explained, even briefly, why it considered it appropriate to rely on particular logbook(s) or specific details therein.[1127]

561. In light of the foregoing, the Appeals Chamber finds that the Trial Chamber assessed the reliability of logbooks by first providing its overall understanding of the voluminous intercept evidence submitted in this case, including the procedures employed to produce them, and further by referring to all the relevant parts of logbooks

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[1121] Conviction Decision, para. 709.
[1122] Conviction Decision, paras 695-810.
[1123] Appeal Brief, para. 753 (The Defence argues that "[t]he Chamber does not explain why the 17 examples [of the specific intercepted communications] are sufficiently representative of all logbook entries.").
[1124] Conviction Decision, para. 613.
[1125] *See e.g.* Conviction Decision, paras 1107-1145.
[1126] Conviction Decision, para. 664. *See also e.g.* Conviction Decision, fns 2251-2307.
[1127] *See* section VI.C.3(a) (Alleged error in the Trial Chamber's finding that the logbooks were mutually corroborated and generally reliable) below.

which reflect each intercepted communication it relied upon in the Conviction Decision. As noted above, the Trial Chamber looked for overlapping content between different logbooks and, in many instances, relied on corroborating logbooks from more than one source to support its findings.[1128] In these circumstances, the Appeals Chamber is not persuaded by the Defence's argument that the Trial Chamber made a "general assessment" of the reliability of logbooks, based only on the 17 specific intercepted communications. The argument is therefore rejected.

562. The Defence further argues that "[n]o interceptor, whose unauthenticated reports were submitted into the trial records, testified at trial".[1129] The Appeals Chamber finds that, as the Prosecutor suggested, this argument is factually incorrect.[1130] It is noted that while not all persons involved in interception operations testified at trial, all the primary interceptors of the UPDF (P-0003), ISO (P-0059), and Police (Patrick Lumumba Nyero), as well as another witness involved in the UPDF interception operation (P-0339) testified in court on how they intercepted LRA radio communications and contemporaneously prepared the logbooks.[1131] In addition, the Appeals Chamber notes that the Trial Chamber allowed the introduction of prior recorded testimony under rule 68 of the Rules of other persons who were also involved in the interception operations.[1132] In its decision, the Trial Chamber considered the objections raised by the Defence, but found them not to be persuasive. In this regard it noted, *inter alia*, that "the Defence will be fully in a position to raise any argument against the use of the intercepts and related material in [the] proceedings even without the *viva voce* examination of all individuals who were part of the interception process" and that "having been part of the interception operations is not sufficient, in and of itself, to require the witnesses' appearance at trial as opposed to the introduction of their prior recorded testimony under Rule 68(2)(b) of the Rules – in particular because the Prosecution intends in any case to call the main interception officers of the three branches involved […] to testify at trial".[1133] The Appeals Chamber finds that the

[1128] *See* paragraph 560 above.
[1129] Appeal Brief, para. 755.
[1130] Prosecutor's Response, para. 470.
[1131] Conviction Decision, paras 555-556, 564-565.
[1132] Decision on Introduction of Prior Recorded Testimony, paras 146-220. *See also* Conviction Decision, paras 567-574, 576-580, 583-584.
[1133] Decision on Introduction of Prior Recorded Testimony, para. 148.

Defence disagrees with this decision without showing any error in the Trial Chamber's reasoning. The Defence's argument is thus rejected.

563. Moreover, the Defence's assertion that "the Chamber found that none of the witnesses gave indisputable evidence on all points relevant to the case and noted the difficulty in voice attribution after several years" is misguided.[1134] The Appeals Chamber notes that the Trial Chamber made this statement when it explained the "difficult[y] to understand [the intercepted communications] without additional evidence" and "to identify certain voices […] due to many factors, including the poor quality of certain recordings, the complexity of LRA communication, and the nearly 15 years which elapsed between an intercepted communication and the testimony about it".[1135] Given this context, the Appeals Chamber finds that this statement does not disclose any error in the Trial Chamber's assessment of intercept evidence, but rather, shows its careful approach to such evidence. Accordingly, the Defence's argument is rejected.

564. In addition, the Defence challenges the Trial Chamber's assessment of the evidence of P-0440, a LRA signaller who was involved in the creation of TONFAS codes.[1136] The Defence submits that while TONFAS codes "were a central communication tool for the exercise of Joseph Kony's command and authority over the LRA", "a complete forensic picture was not presented by the Prosecution".[1137] Moreover, noting the difficulties in identifying voices of LRA commanders and the testimony of P-0003 that Mr Ongwen "was quiet [and did not] like talking so much",[1138] the Defence argues that "[t]his caused an intrinsic bias in what was selected and preserved".[1139] It avers that "exculpatory radio exchanges such as threats being made against [Mr Ongwen] or his family were unlikely to be recorded".[1140]

[1134] Appeal Brief, para. 755.
[1135] Conviction Decision, para. 559.
[1136] Appeal Brief, para. 756. As noted in paragraph 565 below, the Trial Chamber noted that TONFAS codes are "the LRA version of a well-known classical cryptogram technique". The Trial Chamber further noted that "[n]ot all witnesses had a uniform understanding as to why these were called 'TONFAS' codes, but P-0301 describes TONFAS as an acronym for 'Time of opening/closing net, Operator, Nicknames, Frequencies, Address group, and Security'". *See* Conviction Decision, fn. 1248.
[1137] Appeal Brief, para. 757.
[1138] Appeal Brief, para. 758, *referring to* P-0003: T-42, p. 72, lines 22-25.
[1139] Appeal Brief, para. 758.
[1140] Appeal Brief, para. 758.

565. The Appeals Chamber recalls that the Trial Chamber understood TONFAS codes "as being the LRA version of a well-known classical cryptogram technique, where the letters of a word are defined by indicating their position in a secret code book, according to page, line and numerical position in a real word or group of letters".[1141] It found that the TONFAS code "was used by the LRA only for select messages" and that "[n]one of the specific intercepted communications discussed in the [Conviction Decision] required [it] to consult TONFAS code books in order to understand [them]".[1142] The Trial Chamber therefore concluded that "despite the importance of these books to the government intercept operation, the evidence related to TONFAS code [was] of limited relevance to the Chamber".[1143] The Appeals Chamber finds that the Defence does not identify an error in this reasoning. While the Defence appears to claim that exculpatory conversations were not recorded, the Appeals Chamber concurs with the Trial Chamber's view that "[its] obligation is to consider only evidence submitted and discussed at trial" and "[i]t [could not] speculate as to what further evidence there could have been".[1144] Therefore, as no error has been demonstrated, the Appeals Chamber rejects the Defence's argument.

566. The Defence also challenges the Trial Chamber's finding that the report prepared by P-0403 was of limited value.[1145] It also argues that the Trial Chamber "provided no reasoned statement" in reaching this finding,[1146] which, in its view, leads to a reasonable conclusion that the report "contained exculpating evidence" and "strong reservations on the limitations of the technical intelligence evidence".[1147] The Appeals Chamber recalls that P-0403, an evidence analyst of the Prosecution, testified before the Trial Chamber about a report "contain[ing] his analysis of the body of evidence collected by the Prosecution in relation to the interception of LRA radio communications by Ugandan authorities, as well as information on how the collection of this evidence took place and the evidence was registered by the Prosecution".[1148] The Trial Chamber noted that while the information provided by P-0403 was "comprehensive" and "helpful in

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[1141] Conviction Decision, paras 680, 682.
[1142] Conviction Decision, paras 682-683.
[1143] Conviction Decision, para. 683.
[1144] Conviction Decision, para. 644.
[1145] Appeal Brief, para. 759.
[1146] Appeal Brief, para. 759.
[1147] Appeal Brief, para. 760.
[1148] Conviction Decision, para. 589.

guiding the Chamber through the evidence related to the intercepted communications", "he only analysed a collection of evidence given to him by the Prosecution" and "[was] not able to say anything about how this evidence was created beyond what other witnesses said".[1149] Consequently, the Trial Chamber found that his evidence "was of limited value to [its] consideration of the charges".[1150]

567. Having regard to this reasoning, the Appeals Chamber considers that it was reasonable for the Trial Chamber to find that the report prepared by P-0403 was of limited value. Thus, the Appeals Chamber finds no merit in the Defence's argument that the Trial Chamber failed to provide a reasoned statement in that regard. Accordingly, this argument is rejected.

568. In addition, the Defence claims that the Trial Chamber relied on "an individual report from the UPDF Logbook (Gulu)", namely "UGA-OTP-0254-3399, at 3459" in order to undermine the findings of the Trial Chamber in relation to Mr Ongwen's "injury, the relief of his command over Oka battalion, his arrest by Vincent Otti and his alibi for the attack on Pajule".[1151] Contrary to the Defence's argument, the Appeals Chamber notes that for these findings, the Trial Chamber not only relied on the report, UGA-OTP-0254-3399, at 3459[1152] but also on a number of witnesses' testimony (*e.g.* P-0101, P-0205, P-0231, P-0366, and P-0379) and logbook entries which corroborated these testimonies.[1153] The Defence's argument is therefore rejected.

569. Finally, the Defence argues that the Trial Chamber erred by disregarding "favourable evidence provided by witnesses" and instead relying on logbook evidence to reject Mr Ongwen's alibi.[1154] The Appeals Chamber, however, notes that other than referring to paragraphs 1061-1064 of the Conviction Decision, the Defence does not indicate which evidence the Trial Chamber failed to take into consideration.[1155] Thus, this argument is dismissed for lack of substantiation.

[1149] Conviction Decision, paras 589, 685.
[1150] Conviction Decision, para. 589.
[1151] Appeal Brief, paras 763-764, fn. 974.
[1152] *See* Conviction Decision, para. 1047, *referring to* UGA-OTP-0254-3399, at 3459 (The Trial Chamber found, based on this document, that "on 10 February 2003, [Mr] Ongwen [was] recorded as informing Raska Lukwiya that Pokot was with him, but that Ojok had gone for another mission".).
[1153] *See e.g.* Conviction Decision, paras 1017-1070.
[1154] Appeal Brief, para. 766.
[1155] Appeal Brief, fn. 982, *referring to* Conviction Decision, paras 1061-1064.

570. In light of the foregoing, the Appeals Chamber finds that the Defence fails to show that the Trial Chamber relied on untested and unauthenticated logbook evidence and disregarded evidence raising reasonable doubt.

(c) Alleged error in substituting short hand notes and P-0403's report with logbook summaries

(i) Summary of the submissions

571. The Defence submits that the Trial Chamber "impermissibly mischaracterised and substituted contemporaneous short hand notes of intercepted LRA radio communications with logbook summaries of interceptors' recollections".[1156] In particular, the Defence challenges the Trial Chamber's reliance on the logbook "contemporaneously memorialising the 21-22 May 2004 radio communications" and other logbook evidence, which, in their view, "have no probative value" to support Mr Ongwen's conviction.[1157] In the Defence's view, "logbook summaries were nothing more than a repackage of inconsistent rough notes of the recollection of interceptors' memories and were neither considered credible nor reliable by the interceptors or their superiors".[1158] The Defence further contends that there is no evidentiary value in the logbooks as "the contemporaneous notes were coded and in languages the interceptors did not understand".[1159] It also argues that the Trial Chamber's rejection of P-0403's report in preference for intercept evidence was "unreasonable", given that "logbook summaries were merely secondary sources of interceptors recollections and inconsistent rough notes".[1160]

572. The Prosecutor submits that the Defence's arguments "completely ignore the meticulous process used by the interceptors in producing the logbooks".[1161] He further submits that "given the methodical manner by which the logbooks were produced", the Defence fails to show an error in the Trial Chamber's preference of logbooks over other intercept evidence, such as short hand notes, intelligence reports and the report prepared

[1156] Appeal Brief, para. 767.
[1157] Appeal Brief, para. 769.
[1158] Appeal Brief, para. 769.
[1159] Appeal Brief, para. 772.
[1160] Appeal Brief, para. 771.
[1161] Prosecutor's Response, para. 473.

by P-0403.[1162] The Prosecutor argues that the Trial Chamber reasonably accorded little weight to these items.[1163]

(ii) Relevant part of the Conviction Decision

573. With regard to the short hand notes, the Trial Chamber observed that

> On some level, these notes should be probative in that they provide an even more contemporaneous record of LRA conversations compared to the logbook summaries. But there are several competing considerations. First, and understandably, the witnesses' short hand notes are not as complete a record of the conversation as when they can collect their thoughts for the full logbook entry. Second, many of the notes are so hard to read as to be illegible. Third, even when the text is clear enough to read, the notes themselves are written in a mixture of Acholi and English and lack full translations. Fourth, full sentences are not always used, making it difficult for someone other than the author to know the import of isolated words or phrases.[1164]

574. Consequently, the Trial Chamber "plac[ed] little reliance on [the] short hand notes" and "instead use[d] the logbook summaries for a contemporaneous written record of the intercepted conversation".[1165]

575. Furthermore, regarding the report prepared by P-0403, the Trial Chamber noted that it was "helpful in guiding the Chamber through the evidence related to the intercepted communications" but "was of limited value to [its] consideration of the charges".[1166]

(iii) Determination by the Appeals Chamber

576. The Defence submits that the Trial Chamber "impermissibly mischaracterised and substituted contemporaneous short hand notes of intercepted LRA radio

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[1162] Prosecutor's Response, para. 474.
[1163] Prosecutor's Response, para. 474.
[1164] Conviction Decision, para. 668.
[1165] Conviction Decision, para. 669.
[1166] *See* section VI.C.2(b) (Alleged error in relying on untested and unauthenticated logbook evidence and disregarding evidence raising reasonable doubt) above. In this regard, the Trial Chamber noted that "[t]he actual evidence (the recordings, interceptor and LRA witnesses, logbooks, etc.) was the basis for the Chamber's assessments of particular communications. P-0403's testimony is useful, but he only analysed a collection of evidence given to him by the Prosecution. He is not able to say anything about how this evidence was created beyond what other witnesses said. Therefore, the Chamber does not rely upon P-0403 – or any chart/table prepared by the Prosecution – as proof". *See* Conviction Decision, para. 685.

communications with logbook summaries of interceptors' recollections", which, according to the Defence, had no probative value.[1167]

577. For the reasons that follow, the Appeals Chamber is not persuaded by this argument. The Appeals Chamber recalls that, with respect to the logbooks, the Trial Chamber discussed in detail the process of intercepting LRA radio communications and how the logbooks were produced by the interceptors.[1168] In particular, the Appeals Chamber notes that when intercepting LRA radio communications, the UPDF and ISO interceptors, who had sufficient experience and skills, recorded the conversations onto tape cassettes, prepared short hand notes of conversations as they unfolded, undertook necessary work to understand the contents (including breaking any codes or listening again to the tape), and contemporaneously prepared a logbook based exclusively on the information over the radio.[1169] The Appeals Chamber further notes that logbook entries were subsequently reviewed by commanding officers and were securely stored.[1170] Thus, the primary logbooks relied upon by the Trial Chamber were "contemporaneous written record of the LRA's intercepted communications", "written in plain language" and "in a systematic manner, [with] marks indicating that commanding officers read them, and summarise LRA communications".[1171] As noted above, these logbooks gave every indication of being what the various witnesses described them to be in their testimony.[1172]

578. In contrast, the Trial Chamber noted that while "[o]n some level, [short hand] notes should be probative in that they provide an even more contemporaneous record of LRA conversations compared to the logbook summaries", there were "several competing considerations": (i) the short hand notes "are not as complete a record of the

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[1167] Appeal Brief, paras 767, 769.
[1168] *See* section VI.C.2(b) (Alleged error in relying on untested and unauthenticated logbook evidence and disregarding evidence raising reasonable doubt) above.
[1169] *See* section VI.C.2(b) (Alleged error in relying on untested and unauthenticated logbook evidence and disregarding evidence raising reasonable doubt) above. It is recalled that while the local police forces also listened to the LRA communications, prepare short hand notes, and summarise the conversation in a contemporaneous "fair copy", their interception operations were less formal than those of the UPDF or ISO as they did not tape record communications and destroyed all short hand notes.
[1170] *See* section VI.C.2(b) (Alleged error in relying on untested and unauthenticated logbook evidence and disregarding evidence raising reasonable doubt) above.
[1171] Conviction Decision, paras 658-659.
[1172] *See* section VI.C.2(b) (Alleged error in relying on untested and unauthenticated logbook evidence and disregarding evidence raising reasonable doubt) above.

conversations as when they can collect their thoughts for the full logbook entry"; (ii) many of them "are so hard to read as to be illegible"; (iii) "even when the text is clear enough to read, [they] are written in a mixture of Acholi and English and lack full translations"; and (iv) the lack of full sentences made it difficult for the readers "to know the import of isolated words or phrases".[1173] For these reasons, the Trial Chamber placed "little reliance" on short hand notes and "instead us[ed] the logbook summaries for a contemporaneous written record of the intercepted conversation".[1174]

579. In light of the above, the Appeals Chamber finds that the Trial Chamber carefully considered the nature of logbooks and short hand notes, and on that basis relied on the former whilst placing little reliance on the latter. Given the methodical process in which the logbooks were produced, the Appeals Chamber finds no merit in the Defence's argument that the logbooks "were nothing more than a repackage of inconsistent rough notes of the recollection of interceptors' memories".[1175] Thus, the Appeals Chamber rejects the argument that the Trial Chamber impermissibly substituted short hand notes of intercepted LRA radio communications with logbook summaries.

580. The Defence further argues that by relying on the testimony of P-0404, the logbooks have no evidentiary value "because the contemporaneous notes were coded and in languages the interceptors did not understand".[1176] The Appeals Chamber finds this argument to be misplaced, as the cited parts of P-0404's testimony concern the TONFAS code, which was found to be of limited relevance to the Trial Chamber's

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[1173] Conviction Decision, para. 668, *referring to e.g.* P-0059: T-36, p. 27, line 18 to p. 28, line 2 ("Q. […] Did you ever include information in the logbook that was not in the rough note or that came from other sources? A. […] It is the rough notes (Speaks English) it depends on the communication, the person communicating. (Interpretation) Sometimes their speed is high, you have to draft very fast and you do not write everything, you skip some things. And then you start rewriting directly in the logbook. That is what can happen. You may not have it in the rough book, but it can surface in the notebook or on the paper. But there is nothing which I am told to write, write like this, but a few things which I could have forgotten to put in the rough book, I write it in the logbook because I will have remembered from the rough notes.").
[1174] Conviction Decision, para. 669.
[1175] Appeal Brief, para. 769.
[1176] Appeal Brief, para. 772, *referring to* P-0440: T-40, p. 13, lines 8-13 ("A. […] If we are talking about TONFAS and codes, if Kony wants to give directives to a commander, he would use the TONFAS, and he would select where the commander has to identify from the TONFAS and he sends his message. He doesn't send a message plainly. He uses the TONFAS so that the commander will interpret and say that I have been given directives to go and attack such and such a place."), p. 67, lines 1-14 [REDACTED]; p. 68, lines 3-6 [REDACTED].

assessment of intercepted communications.[1177] In any event, the Appeals Chamber notes that when preparing the logbooks, the interceptors undertook necessary work to understand the contents of intercepted communications, including breaking any codes, and wrote the summaries in plain English after translating them from the original language (*e.g.* Acholi or Luo).[1178] The Trial Chamber considered that "much of the value of these logbooks comes precisely from their providing a plain language summary of an otherwise indecipherable conversation".[1179] The Appeals Chamber finds that the Defence ignores this process and demonstrates no error in the Trial Chamber's assessment of logbooks. The Defence's argument is thus rejected.

581. Finally, the Defence argues that the Trial Chamber unreasonably favoured the intercept evidence over the report prepared by P-0403, although "logbook summaries were merely secondary sources of interceptors recollections and inconsistent rough notes".[1180] As noted above, the Trial Chamber considered the contents and sources of P-0403's report, and on that basis found that this evidence "was of limited value to [its] consideration of the charges".[1181] The Appeals Chamber finds that other than claiming that the logbooks were merely secondary sources, the Defence shows no error in the Trial Chamber's decision to place limited value on this report. The argument is therefore rejected.

(d) Overall conclusion

582. Having considered all of the Defence's arguments under ground of appeal 72 concerning alleged errors in the Trial Chamber's assessment of the intercept evidence, the Appeals Chamber rejects this ground of appeal.

3. Grounds of appeal 73 and 60: Alleged erroneous findings based on chains of inferences drawn from the intercept evidence

583. Under grounds of appeal 73 and 60, the Defence submits that the Trial Chamber "erred in law and in fact by making numerous findings based upon chains of inferences

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[1177] Conviction Decision, para. 683.
[1178] Conviction Decision, paras 620-621, 626.
[1179] Conviction Decision, para. 666.
[1180] Appeal Brief, para. 771.
[1181] Conviction Decision, para. 589. *See* section VI.C.2(b) (Alleged error in relying on untested and unauthenticated logbook evidence and disregarding evidence raising reasonable doubt) above.

drawn from the intercept material[s]".[1182] The Defence argues that the Trial Chamber erred "by first inferring that logbooks of intercepted communications were *in general* an accurate and reliable account of what was said in the period of 2002-2005" and then "by drawing inferences from the texts of the logbooks".[1183] The Defence also challenges the Trial Chamber's findings based on the logbooks with respect to the charges of persecution, sexual and gender-based crimes, and conscription and use of child soldiers.[1184]

584. The Appeals Chamber will address these arguments in turn.

(a) Alleged error in the Trial Chamber's finding that the logbooks were mutually corroborated and generally reliable

(i) Summary of the submissions

585. The Defence submits that the Trial Chamber erred by finding that the logbooks were mutually corroborated and generally reliable.[1185] In support of this assertion, the Defence argues, *inter alia*, that the Trial Chamber: (i) unreasonably concluded that the logbooks were reliable "based upon the limited sample discussed at trial";[1186] (ii) drew unreasonable inferences by considering the logbook entries as "direct evidence";[1187] and (iii) departed from the prior jurisprudence on the intercept evidence.[1188]

586. The Prosecutor submits that the Defence's arguments are "generally unsubstantiated and mischaracterise the Judgment",[1189] and that: (i) the Trial Chamber did not find that the logbooks were reliable "merely by executing a generalised reliability assessment, based on a limited logbook sample";[1190] (ii) it correctly treated logbooks of intercepted LRA radio communications as "direct evidence";[1191] and (iii) the Defence's reliance on other case law is "misguided".[1192]

[1182] Appeal Brief, para. 773. *See also* paras 776-792.
[1183] Appeal Brief, para. 774.
[1184] Appeal Brief, paras 793-801.
[1185] Appeal Brief, paras 776-790.
[1186] Appeal Brief, paras 776-784.
[1187] Appeal Brief, paras 785-787.
[1188] Appeal Brief, paras 788-790.
[1189] Prosecutor's Response, para. 478.
[1190] Prosecutor's Response, paras 479-480.
[1191] Prosecutor's Response, paras 481-482.
[1192] Prosecutor's Response, paras 483-484.

(ii) Determination by the Appeals Chamber

587. At the outset, the Appeals Chamber notes that the Defence's argument that it was not reasonable for the Trial Chamber "to conclude that the logbooks were reliable based upon the limited sample discussed at trial"[1193] largely overlaps with that raised under ground of appeal 72, which has already been addressed and rejected above.[1194] The Appeals Chamber will therefore not address this argument further.

588. Nevertheless, the Appeals Chamber notes that the Defence presents further arguments on the reliability of logbooks under these grounds of appeal. The Defence first argues that it was not reasonable for the Trial Chamber to conclude that all logbooks were equally reliable, as some of the logbooks had no corresponding audio recording or transcript.[1195] It contends that, without these items, the Trial Chamber "could not assess whether a logbook entry was a reflection of what was said or an interpretation of jargon, provers and codes".[1196] The Defence also argues that even where audio recordings existed, "they were not used by the Chamber" and thus, "had no corroborative value".[1197]

589. The Appeals Chamber observes that, as pointed out by the Defence, not all logbooks had corresponding audio recordings[1198] or transcripts.[1199] However, the Trial Chamber noted that while "not all of [the] recordings have translated transcripts", the

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[1193] Appeal Brief, p. 184, paras 793-801.
[1194] *See* section VI.C.2(b) (Alleged error in relying on untested and unauthenticated logbook evidence and disregarding evidence raising reasonable doubt) above. In that ground of appeal, the Appeals Chamber has found that the Trial Chamber considered the reliability of logbooks by first providing its overall understanding of the voluminous intercept evidence submitted in this case, and further by referring to all the relevant parts of logbooks which reflect each intercepted communication it relied on in the Conviction Decision.
[1195] Appeal Brief, para. 780.
[1196] Appeal Brief, para. 780.
[1197] Appeal Brief, para. 781, *referring to* Conviction Decision, para. 650 ("The contents of the audio recordings are in non-working languages, predominantly Acholi or Luo. They are impossible for the Chamber to understand without translated transcripts, and even then generally require further testimony from witnesses to understand their contents. The Chamber does not consider it has the requisite ability to identify voices on these recordings itself, and has resorted to witness testimony for such identifications. What the Chamber has been able to discern from the original recordings is only the general impression that all intercepts concern men speaking in a non-working language over the radio.").
[1198] *See e.g.* Conviction Decision, para. 623 ("The UPDF's intercept operation extended to locations beyond Gulu, most notably Achol Pii, Soroti and Lira. These locations did not record conversations, but the procedure for summarising intercepted communications was otherwise about the same."); para. 631 ("The police interception operation was conducted less formally than those of the UPDF or ISO in Gulu. They did not record communications onto cassettes.").
[1199] *See e.g.* Conviction Decision, para. 648.

Chamber "has focused only on those [audio] recordings which could be understood in a working language of the Court".[1200] In this regard, the Trial Chamber indicated that "the material which […] could be reviewed in a working language of the Court in itself, and even more so in combination with an abundance of witness evidence which confirms the veracity of the interception procedure, provides sufficient context for the Chamber's analysis of this material".[1201] The Appeals Chamber also notes that, in many instances, the Trial Chamber verified the meaning of any LRA conversation sourced from a logbook by relying not only on audio recording transcripts, but also on witnesses' testimony or other logbooks to corroborate their accuracy.[1202] In addition, the Appeals Chamber recalls that in a number of instances, the Trial Chamber made specific findings by assessing logbooks together with all other relevant evidence on the record.[1203]

590. In these circumstances, the Appeals Chamber finds that the lack of corresponding audio recordings or transcripts in some logbooks does not necessarily cast doubt on the reliability of the logbooks and the Trial Chamber's assessment thereof. In any event, the Appeals Chamber notes that the Defence does not show any specific instances in which the lack of audio recordings or transcripts would have undermined the Trial Chamber's assessment of logbooks. Similarly, the Defence provides no specific example in which the Trial Chamber did not use audio recordings even when they existed. Accordingly, the Defence's arguments are rejected.

591. Furthermore, the Defence submits that while "there [were] gaps in the available intercepts", the Trial Chamber used this fact "to explain away inconsistencies in the evidence and affirm the solidity of the inferences it was drawing".[1204] It also claims that where discrepancies existed between multiple logbooks of the same date, the Trial Chamber "did not exercise its powers to order transcripts or assistance from the witnesses who originally intercepted the audio" or "refuse to rely upon these

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[1200] Conviction Decision, para. 648.
[1201] Conviction Decision, para. 643.
[1202] Conviction Decision, para. 666. *See also* para. 650 (The Trial Chamber noted that since it was unable to understand the contents of the audio recordings or identify voices therein, it resorted to "witness testimony for such identifications".).
[1203] *See e.g.* Conviction Decision, paras 1092-1147; 2098-2113; 2312-2328.
[1204] Appeal Brief, para. 782.

entries".[1205] The Defence argues that "it is therefore […] reasonable to conclude that the logbooks contain[ed] errors *in general*".[1206] The Defence further claims that the different explanations and interpretations of audio recordings by the witness "confirm that it is *also* reasonable to conclude that errors exist within the material *in general*".[1207]

592. The Appeals Chamber recalls the Trial Chamber's finding that where more than two logbooks existed for a particular intercepted communication recorded on the same date, the Trial Chamber did not expect a "word-for-word mirroring across the agencies" when considering the corroborative effect between these different logbooks.[1208] Rather, such evidence can be relied upon if it is found to have "overlapping content sufficient […] to conclude that each logbook [was] describing the same overall conversation".[1209] The Appeals Chamber finds this approach to be reasonable because, as the Trial Chamber noted, "differences in details are to be expected, noting the diverse experience levels of the interceptors, the potential for varying quality of what could be heard at each interception site, and the inevitability that different people will summarise different parts and focus on varying details of a long conversation".[1210] The Appeals Chamber thus considers that, contrary to the Defence's argument,[1211] the existence of discrepancies in the logbooks does not necessarily require the Trial Chamber to order the transcripts of audio recordings or testimony of the interceptors, nor to decide not to rely on such logbooks.

593. In any event, the Appeals Chamber observes that where there were discrepancies between two or more logbooks of the same date, the Trial Chamber noted each of them and explained why it considered it appropriate to rely on the particular logbook(s) or specific details therein. For instance, in footnote 2138 of the Conviction Decision, as

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[1205] Appeal Brief, para. 782.
[1206] Appeal Brief, para. 783 (emphasis in original). The Defence argues in this regard that "[j]ust like the Chamber disregarded contradictions, inconsistencies and other factors raising reasonable doubts in its search for 'overlapping content' which it considered 'sufficient for it to conclude that each logbook is describing the same overall conversation' [i]f limited instances of corroboration can be used to draw conclusions about the whole then identified discrepancies in the material can also be used to make conclusions about the whole" (footnote omitted).
[1207] Appeal Brief, para. 783 (emphasis in original).
[1208] Conviction Decision, para. 664.
[1209] Conviction Decision, para. 664.
[1210] Conviction Decision, para. 664.
[1211] Appeal Brief, para. 782.

referred to by the Defence,[1212] the Trial Chamber noted the following to explain why it relied on the "ISO Logbook (Gulu)",[1213] although the particular detail was not included in the corresponding UPDF logbook entries:

> ISO Logbook (Gulu), UGA-OTP-0232-0234, at 0501. The Chamber notes that this particular detail is not included in the corresponding UPDF logbook entries. However, these entries clearly reflect the same radio communication (*compare* ISO Logbook (Gulu), UGA-OTP-0232-0234, at 0498 (Otti reporting on contact with UPDF the previous day, without sending anything on items taken) *with* UPDF Logbook (Gulu), UGA-OTP-0254-0725, at 1036 (Otti reporting on contact with UPDF the previous day, stating he could not take anything due to bushy grass) *and* UPDF Logbook (Soroti), UGA-OTP-0254-1991, at 2067 (Otti reporting on contact with UPDF the previous day, stating he could not take anything due to grass being very tall); *compare* ISO Logbook (Gulu), UGA-OTP-0232-0234, at 0499 (Kony stating that 'highest tactics/styles of guerrilla war fare are surprise attacks and ambushes') *with* UPDF Logbook (Gulu), UGA-OTP-0254-0725, at 1036 (Kony advising Otti that 'highest tactic of guerrilla's should be 'surprise attack and ambush and planting mines') *and* UPDF Logbook (Soroti), UGAOTP-0254-1991, at 2067 (Kony informing Otti that 'highest tactics of guerrillas is to surprise'); *compare* ISO Logbook (Gulu), UGA-OTP-0232-0234, at 0501 (Kony wanting all LRA to move to Teso) *with* UPDF Logbook (Gulu), UGA-OTP-0254-0725, at 1038 (Kony ordering Otti to inform all LRA units to immediately advance to Soroti) *and* UPDF Logbook (Soroti), UGA-OTP-0254-1991, at 2069 (Kony ordering that all LRA groups in Uganda move to Teso)). The UPDF Achol Pii logbook does not include an entry for this communication time (*see* UGA-OTP-0242-6018, at 6149-50). Bearing this in mind, and noting at the same time that the entries in the UPDF logbooks are overall less detailed than the entry in the ISO logbook and that interceptors at times would have focused on different details in summarising radio communications, the Chamber considers it appropriate to refer to this specific detail included in the record of the communication as prepared by ISO.[1214]

594. The Appeals Chamber notes that the Trial Chamber found it appropriate to refer to the specific detail in the ISO logbook, as the entries in the UPDF logbooks [were] less detailed than those in the ISO logbook and interceptors at times would have focused on different details in summarising radio communications.[1215] Given this reasoning, the

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[1212] Appeal Brief, para. 782 ("In the present case, it is accepted that there are gaps in the available intercepts. However, the Chamber used this finding to explain away inconsistencies in the evidence and affirm the solidity of the inferences it was drawing."), *referring to* Conviction Decision, fns 2138, 2299, 2416, 2417, 2459, 2460, 5833.
[1213] The Appeals Chamber notes that "ISO Logbook (Gulu)" is a logbook produced by the ISO interceptors in Gulu. Likewise, "UPDF Logbook (Gulu)" and "UPDF Logbook (Soroti)" are logbooks produced by the UPDF interceptors in Gulu and Soroti respectively.
[1214] Conviction Decision, fn. 2138.
[1215] Conviction Decision, fn. 2138.

Appeals Chamber finds that other than claiming that the Trial Chamber "used [the gaps in the intercept evidence] to explain away inconsistencies in the evidence and affirm the solidity of the inferences it was drawing", the Defence does not explain why it was unreasonable for the Trial Chamber to rely on the particular detail in the ISO logbook.[1216] The Appeals Chamber reaches the same conclusion for other instances to which the Defence refers in its Appeal Brief.[1217]

595. In light of the foregoing, the Appeals Chamber finds that the Defence shows no error in the Trial Chamber's assessment of discrepancies between the different logbooks. Accordingly, the Appeals Chamber rejects the Defence's assertion that it is reasonable to conclude that the logbooks contained errors in general.[1218] Furthermore, the Defence does not substantiate how different explanations and interpretations of audio recordings by witnesses show that errors exist within the material in general.[1219] The Appeals Chamber therefore rejects the Defence's arguments.

596. In addition, the Defence argues that the Trial Chamber considered the logbooks "as though they were direct evidence" and drew "unreasonable inferences that the logbooks were generally reliable".[1220] Noting the challenges faced by the interceptors, the Defence argues that "[t]he logbook entries are not verbatim transcripts" but "are at best derivative of direct evidence and at worst anonymous hearsay".[1221] It also submits that even if an interpretation of the text of logbooks was reasonable, "[i]t was not possible to objectively know whether the text reflects the occurrence and order of the utterances in the conversation and also accurately captures the whole context of the utterances".[1222]

597. The Appeals Chamber considers that contrary to the Defence's assertion, the Trial Chamber did not consider the logbooks as "verbatim transcripts". In this regard, the Trial Chamber explained that "[a]s soon as possible after the communication, the

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[1216] Appeal Brief, para. 782.
[1217] Appeal Brief, para. 782, *referring to* Conviction Decision, fns 2138, 2299, 2416, 2417, 2459, 2460, 5833, 5835, 5837.
[1218] Appeal Brief, para. 783.
[1219] Appeal Brief, para. 783.
[1220] Appeal Brief, para. 785.
[1221] Appeal Brief, para. 786.
[1222] Appeal Brief, para. 787.

interceptor then prepared a logbook *summary* of what transpired during the LRA communication", using " exclusively the information provided over the radio".[1223] The Appeals Chamber notes that the Trial Chamber also acknowledged the challenges confronted by the interceptors to understand the LRA communications.[1224] Consequently, the Trial Chamber took into consideration a logbook together with "available audio recording transcripts, witness testimonies or other logbooks" to accurately verify the meaning of any conversation.[1225] By focusing on overlapping content, the Trial Chamber "assess[ed] whether logbooks corroborate[d] [with] each other or [with] witness or documentary evidence (such as transcripts) for a given LRA conversation".[1226]

598. In light of the above, the Appeals Chamber finds the Defence's argument that the Trial Chamber considered the logbooks as "verbatim transcripts" to be inaccurate. In any event, the Defence fails to show an error that would call into question the reasonableness of the Trial Chamber's assessment of specific logbook entries. Furthermore, the Appeals Chamber finds that the Defence's assertion that "[i]t was not possible to objectively know whether the text [of logbooks] reflects the occurrence and order of the utterances in the conversation and also accurately captures the whole context of the utterances" is wholly unsubstantiated and does not identify an error by the Trial Chamber.[1227] The Appeals Chamber therefore rejects these arguments.

599. The Defence also submits that the evaluation and use of logbooks in the Conviction Decision departs from prior jurisprudence on intercept evidence.[1228] In the *Ntaganda* Conviction Decision, it was found that "there are limitations to the

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[1223] Conviction Decision, para. 621 (emphasis added).
[1224] Conviction Decision, para. 559 ("This said, the Chamber notes that none of these witnesses gave indisputably clear evidence on all points. The intercepted communications use so much unusual phrasing that they are difficult to understand without additional evidence. In some instances witnesses contradicted themselves or each other about particular lines or speakers. There were other occasions when a witness could identify information in a recording that another witness was unsure about. The Chamber recognises that struggling to identify certain voices could be due to many factors, including the poor quality of certain recordings, the complexity of LRA communication, and the nearly 15 years which elapsed between an intercepted communication and the testimony about it. It also cannot be excluded that witnesses attempted to identify speakers from context in limited instances, such as hearing a call-sign or signaller and then inconsistently deducing who is speaking.").
[1225] Conviction Decision, para. 666.
[1226] Conviction Decision, para. 664.
[1227] Appeal Brief, para. 787.
[1228] Appeal Brief, p. 187.

conclusions that can be drawn from logbooks".[1229] The Defence submits that "[t]his statement was made in [evaluating] logbooks created by Mr Ntaganda's own military", which "were not, in contrast to the present case, created by the adversary who was seeking to decode Mr Ntaganda's communications".[1230] The Defence contends that the Trial Chamber "treat[ed] the logbooks entries *as though they were* intercepts" but "[did] not apply the legal safeguards" developed in this jurisprudence.[1231]

600. The Appeals Chamber first notes that while the Defence refers to the *Ntaganda* Conviction Decision as "prior jurisprudence", the relevant part of this judgment was not challenged on appeal. Therefore, there is no pronouncement of the Appeals Chamber on this point. The Appeals Chamber further observes that in the *Ntaganda* Conviction Decision, Trial Chamber VI noted that "there are limitations to conclusions that can be drawn from the logbooks [of UPC/FPLC radio communications]".[1232] In this regard, Trial Chamber VI held with respect to the Prosecutor's arguments[1233] that

> [It] does not accept the Prosecution's proposed inference that the absence of messages on a given day means that 'Mr Ntaganda was close enough to his troops to use the Motorola or to speak in person'. Neither can any inference be drawn from the proportion of outgoing messages recorded as sent by Mr Ntaganda, given that the logbooks were prepared by a signaller personally assigned to Mr Ntaganda. Further, the Chamber considers that it must be kept in mind that in addition to formalised, coded, and recorded communications, which is recorded in the logbooks, the *radiophonie* could also be used for uncoded, informal, and direct voice communication, and was not the only technical means of communication available to the UPC/FPLC.[1234]

601. Having regard to the above, the Appeals Chamber finds the argument that the Trial Chamber failed to follow the legal safeguards developed in the *Ntaganda*

[1229] *Ntaganda* Conviction Decision, para. 66.
[1230] Appeal Brief, para. 789, *referring to* *Ntaganda* Conviction Decision, para. 66.
[1231] Appeal Brief, para. 790 (emphasis in original).
[1232] *Ntaganda* Conviction Decision, para. 66.
[1233] *See* *Ntaganda* Conviction Decision, para. 61 ("The Prosecution submits that the logbooks are 'key pieces' of evidence. It argues that they record Mr Ntaganda's 'own words at the time of the relevant events: his orders to obey and respect the chain of command, on discipline, on promotions and demotions, on troops deployments, on operational strategy, on weapons/ammunition distribution, and on coordination of troops before and during attacks', and show Mr Ntaganda's 'complete knowledge of all daily UPC military activities'. Further, the Prosecution submits that '[w]hen Ntaganda's two logbooks contain no messages on a given day, particularly in the days just before and during an attack, the Chamber can infer that this is because [Mr] Ntaganda was close enough to his troops to use the Motorola or speak in person'.").
[1234] *Ntaganda* Conviction Decision, para. 66 (emphasis in original).

Conviction Decision be misplaced, as no similar issues were raised in the present case. The Appeals Chamber also finds that the Defence fails to substantiate what impact the logbooks being "created by the adversary" had on the Trial Chamber's assessment of such evidence.[1235] Accordingly, the Defence's argument that the Trial Chamber departed from prior jurisprudence on intercept evidence is rejected.

602. Finally, the Appeals Chamber finds no merit in the Defence's assertion that even if it was reasonable to conclude that the logbooks were reliable in general, the Trial Chamber erred in relying on them as the following inferences could still be drawn: (a) "[t]he logbooks are not generally reliable or it is simply impossible to know where any given entry can be relied upon without corroborating testimony or additional sources"; (b) since "[t]he quality of intercepts and skill of the interceptors improved over time", "earlier records are more subject to error"; (c) even if "[t]he logbooks are somewhat reliable […] a sufficient number of unidentifiable errors exist within the texts".[1236] The Appeals Chamber finds that the Defence's argument is wholly unsubstantiated as it limits itself to suggest alternative inferences without identifying an error in the Trial Chamber's findings. Accordingly, the Defence's argument is dismissed for lack of substantiation.

(b) Alleged errors in the Trial Chamber's findings based on the logbooks with respect to the charges of persecution, sexual and gender-based crimes, and conscription and use of child soldiers

(i) Summary of the submissions

603. The Defence challenges the Trial Chamber's findings, based on the logbooks, regarding the charges of persecution, sexual and gender-based crimes, and conscription and use of child soldiers.[1237] It argues that the Trial Chamber "relied upon the logbooks to establish important elements of a conviction […] and not just facts that are auxiliary to core issues".[1238]

[1235] Appeal Brief, para. 789.
[1236] Appeal Brief, para. 791.
[1237] Appeal Brief, paras 793-801.
[1238] Appeal Brief, para. 793.

604. The Prosecutor argues that the Trial Chamber reached reasonable conclusions based on the logbook entries, "which were reliable evidence as to their contents".[1239] He contends that the Trial Chamber relied on the logbooks "only where they were corroborated, including by eyewitness testimonies".[1240]

605. Victims Group 1 submits that the Defence's argument is "a mere disagreement with the findings of the Chamber" and identifies "no error of law or fact".[1241] They argue that the Trial Chamber relied on the logbooks to corroborate witness testimony.[1242]

(ii) *Relevant part of the Conviction Decision*

606. In the relevant parts of the Conviction Decision, the Trial Chamber considered a number of witnesses' testimony, logbook entries and other relevant evidence in addressing the charges of persecution, sexual and gender-based crimes, and conscription and use of child soldiers.[1243]

(iii) Determination by the Appeals Chamber

607. The Defence claims that the Trial Chamber "drew impermissible inferences from logbook summaries of intercepted radio communications detailing the persecutory policy of […] the LRA".[1244] It argues that while the findings that the LRA as a whole, and Mr Ongwen himself, perceived civilians as the enemy "are core premises for numerous further convictions", the Trial Chamber found "that a pillar of these findings is [Mr Ongwen's] participation or presence on radio calls".[1245] The Defence also argues in relation to Mr Ongwen's subjective intent that the Trial Chamber erroneously "infer[red] [his] knowledge and awareness simply through his alleged presence on the radio".[1246]

608. The Appeals Chamber finds no merit in these arguments. In the Conviction Decision, the Trial Chamber noted that "there [was] considerable evidence on the

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[1239] Prosecutor's Response, paras 485-486.
[1240] Prosecutor's Response, para. 485.
[1241] Victims Group 1's Observations, para. 216.
[1242] Victims Group 1's Observations, paras 217-219.
[1243] *See e.g.* Conviction Decision, paras 1092-1147, 2098-2113, 2312-2328.
[1244] Appeal Brief, para. 795.
[1245] Appeal Brief, para. 795.
[1246] Appeal Brief, para. 796.

record demonstrating that the LRA perceived civilians in Northern Uganda as the enemy" and that it "[laid] out the most relevant evidence demonstrating that this perception was specifically articulated by the LRA leadership, including by [Mr] Ongwen".[1247] In this regard, the Appeals Chamber notes that the Trial Chamber relied primarily on a number of witnesses' testimony (*e.g.* P-0070, D-0032, P-0138, P-0145, P-0406, P-0264, and P-0101) and also on the logbooks as corroboration.[1248] In these circumstances, the Appeals Chamber finds that, contrary to the Defence's arguments, the Trial Chamber did not infer the LRA's persecutory policy and Mr Ongwen's intent for attacking civilians based only on the logbooks, but relied on them to corroborate the testimonial evidence.[1249] Accordingly, the Defence's arguments are rejected.

609. In relation to sexual and gender-based crimes, the Defence argues that the Trial Chamber "made legally impermissible inferences" based on the logbooks to reach the finding that "[Mr] Ongwen, Joseph Kony and the Sinia brigade leadership engaged in a coordinated and methodical effort, relying on the LRA soldiers under their control, to abduct women and girls in Northern Uganda".[1250] The Defence asserts that the logbooks "form[ed] the majority of the material leading to the core finding in paragraph 212 that supports all other findings".[1251] The Appeals Chamber recalls that in reaching this finding, the Trial Chamber relied on a number of logbooks to corroborate the testimony of P-0205, as well as the audio recording and written transcripts/translation into English of a radio broadcast on Mega FM radio station in December 2002.[1252] While the Defence asserts that the logbooks formed "the majority of the material" relied on by the

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[1247] Conviction Decision, para. 1092.
[1248] Conviction Decision, paras 1092-1147 (The Trial Chamber found that "[t]he LRA perceived as associated with the Government of Uganda, and thus as the enemy, the civilians living in Northern Uganda, in particular those who lived in government established IDP camps in Northern Uganda. LRA commanders routinely declared that civilians were failing to support the LRA in its effort against the government and should be killed by the LRA. [Mr] Ongwen knew that the LRA perceived, and also himself perceived, the civilians living in Northern Uganda as associated with the Government of Uganda – and thus as the enemy".).
[1249] The Appeals Chamber notes that in any event, there is no strict legal requirement that a certain item of evidence has to be corroborated by another item of evidence in order for the Trial Chamber to be able to rely on it. *See* rule 63(4) of the Rules ("Without prejudice to article 66, paragraph 3, a Chamber shall not impose a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the Court, in particular, crimes of sexual violence".). *See also* *Lubanga* Appeal Judgment, para. 218.
[1250] Appeal Brief, para. 797, *referring to* Conviction Decision, para. 212.
[1251] Appeal Brief, para. 797.
[1252] Conviction Decision, paras 2098-2113.

Trial Chamber, it does not substantiate what relevance this has for demonstrating the Trial Chamber's error. The Appeals Chamber thus dismisses this argument for lack of substantiation.

610. The Appeals Chamber notes that the Defence further challenges the Trial Chamber's reliance on the logbooks in two instances.[1253] First, regarding footnote 5835 of the Conviction Decision, the Defence argues that the Trial Chamber erred in relying on information in an ISO logbook, although that information was not mentioned in the two UPDF logbooks recording the same radio communication.[1254] The Trial Chamber found that "Vincent Otti is recorded as informing Joseph Kony that he was coming to him with three abducted girls to be given to him as his so-called 'wives', but that one remained in Uganda with [Mr] Ongwen because her feet got swollen" and noted in footnote 5835 that

> ISO Logbook (Gulu), UGA-OTP-0061-0002, at 0037-38. The Chamber notes that this particular detail is not included in the corresponding UPDF logbook entries. However, these entries clearly concern the same radio communication (*compare* ISO Logbook (Gulu), UGA-OTP-0061-0002, at 0038 (Otti telling Kony about capture of old hunter, Kony telling Otti to move with him to his location) *with* UPDF Logbook (Gulu), UGA-OTP-0254-4143, at 4221 (Otti telling Kony about capture of old hunter, Kony telling him to let that man be taken to him) *and* UPDF Logbook (Achol Pii), UGA-OTP-0242-7309, at 7361 (Otti telling Kony coming across old hunter, Kony telling Otti to keep him until further orders)). The UPDF Logbook (Soroti) does not include any entry for 1 February 2004 (*see* UGA-OTP-0254-2284, at 2491-97 (entry for 1 January followed by entry for 23 February 2004)). Bearing this in mind, and noting at the same time that interceptors at times would have focused on different details in summarising radio communications, the Chamber considers it appropriate to refer to this specific detail included in the record of the communication as prepared by ISO.[1255]

611. The Appeals Chamber observes that the Trial Chamber relied on the information in the ISO (Gulu) logbook, although "[that] particular detail [was] not included in the corresponding UPDF logbook entries".[1256] Again, the Trial Chamber noted that it was

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[1253] Appeal Brief, paras 797-798.
[1254] Appeal Brief, para. 798 ("One example of this is when it interprets certain logbooks as inferring that Vincent Otti told Kony that he was leaving some women with [Mr] Ongwen. One logbooks lacks an entry for the date and three logbooks contain information that contradicts the inference drawn by the Chamber. Three of the logbooks refer to Vincent Otti coming across an 'old hunter'. The Chamber infers that the sole logbook where the interceptor understood this to refer to women was the accurate one.").
[1255] Conviction Decision, para. 2103, fn. 5835 (emphasis in original).
[1256] Conviction Decision, fn. 5835.

appropriate to refer to that specific detail as "interceptors at times would have focused on different details in summarising radio communications".[1257] The Appeals Chamber finds that other than claiming that "[t]he Chamber infer[red] that the sole logbook […] was the accurate one", the Defence does not show any error that would call into question the reasonableness of the Trial Chamber's finding.[1258] The Appeals Chamber thus rejects this argument.

612. Similarly, the Defence contests the Trial Chamber's finding, in footnote 5837 of the Conviction Decision, that "it [was] more appropriate to rely on the entries as reflected in the ISO and UPDF (Gulu) logbooks".[1259] The Trial Chamber found that "[Mr] Ongwen is recorded as stating in response that he 'has many female recruits which can replace those ones who escaped', to which Joseph Kony replied with the argument that 'female recruits can't be compared with most of their senior LRA women who knows how LRA behave'" and noted in footnote 5837 that

> ISO Logbook (Gulu), UGA-OTP-0061-0002, at 0137. *See also* UPDF Logbook (Gulu), UGA-OTP-0254-4143, at 4277. The Chamber notes that the UPDF Logbook (Soroti), UGA-OTP-0254-2284, at 2569 instead records an exchange between an individual called 'Odongo Anaka' and Kony about the escape of troops. Given that both the ISO and UPDF (Gulu) logbooks include largely comparable entries, and considering that the UPDF (Soroti) logbook contains less detail regarding this radio communication, the Chamber is of the view that it is more appropriate to rely on the entries as reflected in the ISO and UPDF (Gulu) logbooks.[1260]

613. The Appeals Chamber notes that the Trial Chamber considered it appropriate to rely on the ISO and UPDF (Gulu) logbooks as "[they] include largely comparable entries", while "the UPDF (Soroti) logbook contains less detail regarding this radio communication".[1261] The Appeals Chamber finds that other than claiming that "[t]he Chamber provides no further reason for [this conclusion]", the Defence shows no error

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[1257] Conviction Decision, fn. 5835.
[1258] Appeal Brief, para. 798.
[1259] Appeal Brief, para. 799 ("Another prejudicial example concerns where the Chamber has inferred that a conversation occurred between Kony and [Mr] Ongwen where the Appellant claims that he will bring 'new recruits' in the context of a discussion about women. One of the three log books indicates that 'Odongo Anaka' was the speaker to whom Kony was speaking. The Chamber concludes that since the two incriminating log books are similar and contain more detail, they are reliable and the odd one out is not. The Chamber provides no further reason for concluding this.").
[1260] Conviction Decision, para. 2104, fn. 5837.
[1261] Conviction Decision, fn. 5837.

in the Trial Chamber's reliance on the ISO and UPDF (Gulu) logbooks. Thus, the argument is rejected.

614. Finally, with respect to the charges of the conscription and use of child soldiers, the Defence argues that while the Trial Chamber "relied heavily upon the ISO 2002 logbooks" to infer that Mr Ongwen, Joseph Kony and the Sinia brigade leadership engaged in "a coordinated and methodical effort" to abduct children under the age of 15, they "mostly lack[ed] audio recordings or UPDF logbooks against which the Chamber could examine any consistency".[1262] The Defence avers that the ISO 2002 logbooks "require[d] corroboration", as they "[were] used to support major pillars of the conviction for the conscription or use of child-soldiers".[1263]

615. The Appeals Chamber notes that as addressed in more detail under grounds of appeal 69, 83-86, the Trial Chamber did not rely on the ISO 2002 logbooks as the sole evidence, but used them to corroborate the testimonial evidence when finding that children below the age of 15 years were conscripted and used in armed hostilities.[1264] The Trial Chamber also recalled "its discussion of the reliability of the 2002 ISO logbooks".[1265] In these circumstances, the Appeals Chamber finds that other than claiming that "the logbooks require[d] corroboration", the Defence shows no error in the Trial Chamber's reasoning for relying on the 2002 ISO logbooks. Thus, the Appeals Chamber rejects the argument.

(c) Overall conclusion

616. Having considered all of the Defence's arguments under grounds of appeal 73 and 60 concerning alleged erroneous findings based on chains of inferences drawn from the intercept materials, the Appeals Chamber finds that the Defence has failed to show an error in the Trial Chamber's findings. The Appeals Chamber therefore rejects these grounds of appeal.

[1262] Appeal Brief, paras 800-801, *referring to* Conviction Decision, paras 2322-2327.
[1263] Appeal Brief, para. 801, *referring to* *Ntaganda* Conviction Decision, para 75; *Lubanga* Conviction Decision, para. 110; *Bemba* Conviction Decision, para. 245; *Katanga* Conviction Decision, para. 110; *Ngudjolo* Conviction Decision, para. 72; *Lubanga* Appeal Judgment, para. 218.
[1264] *See* section VI.D.3(c)(ii)(b)(iii) (Alleged erroneous reliance on logbook records) below.
[1265] Conviction Decision, para. 2322.

D. Alleged errors concerning Mr Ongwen's individual criminal responsibility as indirect perpetrator and as indirect co-perpetrator

617. Under grounds of appeal 60, 64-66, 68 and parts of 28, 69, 70, 74-90, the Defence challenges some of the Trial Chamber's findings underpinning its determination that Mr Ongwen is criminally responsible as an indirect perpetrator through an organised power apparatus for crimes committed in the context of the attacks on the Lukodi and Abok IDP camps (on or about 19 May 2004, and on or about 8 June 2004, respectively),[1266] and as an indirect co-perpetrator through an organised power apparatus for crimes committed in the context of the attacks on the Pajule and Odek IDP camps (on or about 10 October 2003, and on or about 29 April 2004, respectively), for sexual and gender-based crimes not directly perpetrated by Mr Ongwen, and for the conscription of children under the age of 15 years and their use in armed hostilities.[1267]

618. The Appeals Chamber will first address together grounds of appeal 64, 65 and 68, as well as part of grounds of appeal 28, 74, 75, 76, 81 and 82, which, to a large extent, overlap with ground of appeal 68. These grounds of appeal raise broad challenges to the Trial Chamber's interpretation and application of the law applicable to indirect perpetration and indirect co-perpetration. The Appeals Chamber will then address grounds of appeal 60, 70, 74 (in part), 75 (in part), 76 (in part), 77, 78, 79, 80, 81 (in part) and 82 (in part), all of which relate to the Trial Chamber's findings relevant to Mr Ongwen's individual criminal responsibility for crimes committed during the four attacks on IDP camps. Subsequently, the Appeals Chamber will address grounds of appeal 69, 83, 84, 85 and 86, all of which challenge the Trial Chamber's findings concerning Mr Ongwen's criminal responsibility for the crime of conscription and use in hostilities of children under the age of 15 years. Finally, given the specificity of the issues raised, grounds of appeal 66, 87, 88, 89 and 90 concerning Mr Ongwen's criminal responsibility for sexual and gender-based crimes are addressed and determined in a different section of this judgment.[1268]

[1266] Conviction Decision, paras 2973, 3020.
[1267] Conviction Decision, paras 2874, 2927, 3100, 3115.
[1268] *See* section VI.E (Alleged errors concerning sexual and gender-based crimes) below.

1. Grounds of appeal 64, 65, 68 and part of 28, 74, 75, 76, 81 and 82: Alleged erroneous Trial Chamber's interpretation and application of indirect perpetration and indirect co-perpetration

(a) Summary of the submissions

619. Under grounds of appeal 64, 65, 68 and part of 28, the Defence challenges some of the findings underpinning the Trial Chamber's conclusion that Mr Ongwen is criminally responsible as an indirect perpetrator and indirect co-perpetrator for crimes committed by members of the Sinia brigade.[1269] Under ground of appeal 64, the Defence alleges "[e]rrors on control over the crimes, […] essential contribution and resulting power to frustrate the commission of the crimes".[1270] In ground of appeal 65, the Defence submits that the Trial Chamber "erred in law and in fact regarding the structure of the LRA and [Mr Ongwen's] role".[1271] Finally, in ground of appeal 68 and in part of ground of appeal 28, the Defence submits that the Trial Chamber "erred in law and fact by disregarding evidence of [Mr Ongwen's] 'conditions of recruitment, initiation, training, and service in the LRA' which made him function as a tool of Kony, while otherwise finding that he subjected LRA fighters to these conditions, resulting in their functioning as tools with their conduct being attributed to [Mr Ongwen]".[1272]

620. The Prosecutor responds that the Trial Chamber "reasonably and correctly found Ongwen criminally liable under article 25(3)(a)".[1273] In relation to ground of appeal 64, the Prosecutor contends that the Trial Chamber was reasonable in determining "that Ongwen had control over the crimes and essentially contributed to them".[1274] Regarding ground of appeal 65, the Prosecutor argues that the Trial Chamber's assessment of "the structure of the LRA [and] Ongwen's role" was correct.[1275] Furthermore, in relation to ground of appeal 68 and part of ground of appeal 28, the Prosecutor submits that the Trial Chamber "considered Ongwen's submission that he was a 'tool' of Kony".[1276]

[1269] Appeal Brief, paras 423-429, 651-702. *See* Conviction Decision, paras 2874, 2927, 2973, 3020, 3100, 3115.
[1270] Appeal Brief, p. 150.
[1271] Appeal Brief, p. 153.
[1272] Appeal Brief, pp. 157-158, paras 423-429.
[1273] Prosecutor's Response, p. 175.
[1274] Prosecutor's Response, p. 176.
[1275] Prosecutor's Response, p. 182.
[1276] Prosecutor's Response, p. 185, paras 262-266.

621. Victims Group 1 submit that grounds of appeal 64, 65, 68 and part of 28 should be rejected.[1277] In their view, the Defence fails to identify an error of law or fact "warranting the Appeals Chamber's intervention".[1278] Victims Group 1 further submits that the Defence's arguments are "simply a disagreement with the findings of the Chamber".[1279]

622. In relation to grounds of appeal 68 and 28, Victims Group 2 submit that "the Defence is misrepresenting the relevant findings and rulings of the Chamber", arguing that the Trial Chamber "did assess the evidence relating to [Mr Ongwen's] abduction and his childhood in the bush".[1280]

(b) Relevant parts of the Conviction Decision

623. As recalled above, in the Conviction Decision, the Trial Chamber found that "the LRA had a hierarchical structure" and that orders issued by Joseph Kony "were generally complied with" while "[a]t the same time, in particular when Joseph Kony was geographically removed from LRA units, brigade and battalion commanders took their own initiatives".[1281] It also found that "[t]his was regularly the case during the period of the charges, when Joseph Kony was in Sudan while various LRA units operated in Northern Uganda".[1282] In addition, the Trial Chamber carried out an assessment of Mr Ongwen's individual criminal responsibility in the following circumstances: as an indirect perpetrator in relation to crimes committed during the attacks on Lukodi and Abok IPD camps,[1283] as an indirect co-perpetrator in relation to crimes committed during the attacks on Pajule and Odek IDP camps,[1284] and separate assessments of his responsibility as indirect co-perpetrator for sexual and gender-based crimes,[1285] and for the conscription and use in hostilities of children under the age of

[1277] Observations of Victims Groups 1, paras 192-197. *See also* paras 136-138.
[1278] Observations of Victims Groups 1, para. 195. *See also* paras 136, 193, 196.
[1279] Observations of Victims Groups 1, para. 196. *See also* para. 136.
[1280] Observations of Victims Group 2, para. 82. *See also* paras 84-85.
[1281] Conviction Decision, paras 123-124.
[1282] Conviction Decision, para. 124.
[1283] Conviction Decision, paras 2962-2973 (Lukodi IDP camp), 3009-3020 (Abok IDP camp).
[1284] Conviction Decision, paras 2851-2874 (Pajule IDP camp), 2909-2927 (Odek IDP camp).
[1285] Conviction Decision, paras 3088-3100.

15 years.[1286] More detailed references to the Conviction Decision are discussed in the Appeals Chamber's determination of the respective grounds of appeal.

(c) Determination by the Appeals Chamber

624. The Appeals Chamber notes that the arguments raised on appeal by the Defence are to a large extent premised either on a misunderstanding of, or a disagreement with, indirect perpetration and indirect co-perpetration as modes of liability provided for in article 25(3)(a) of the Statute.[1287] Consequently, the Appeals Chamber finds it important for this and future cases to set out the parameters of these modes of liability. This will also facilitate the Appeals Chamber's analysis of several grounds of appeal challenging the Trial Chamber's findings relevant to Mr Ongwen's individual criminal responsibility and further contribute to a proper understanding of these modes of liability.

625. In its determination, the Appeals Chamber will therefore first set out the parameters of indirect perpetration and indirect co-perpetration. It will then address ground of appeal 64 in which the Defence challenges the sufficiency of the Trial Chamber's reasoning on Mr Ongwen's control over the crimes physically perpetrated by members of the Sinia brigade. The Appeals Chamber will then discuss the Defence's more specific arguments raised under ground of appeal 65 regarding the Trial Chamber's alleged error in holding Mr Ongwen criminally responsible of the crimes committed by individual Sinia brigade members. Thereafter, the Appeals Chamber will address ground of appeal 68 and part of ground of appeal 28 dealing with the Trial Chamber's alleged failure to consider Mr Ongwen's conditions of recruitment, initiation, training and service in the LRA when finding him criminally responsible as an indirect perpetrator.

(i) Indirect perpetration and indirect co-perpetration – legal framework and relevant considerations

626. Article 25(3)(a) of the Statute reads as follows:

> 3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that

[1286] Conviction Decision, paras 3105-3115.
[1287] *See e.g.* Appeal Brief, paras 665, 671-672, 677, 679-680, 863, 869, 871, 884; T-265, p. 69, lines 13-16.

person:

> a. Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible.

627. The Appeals Chamber observes that the wording of article 25(3)(a) of the Statute is clear in that a person is considered a perpetrator when he or she (a) directly commits a crime as an individual (direct perpetration); (b) commits a crime jointly with another person (co-perpetration); and/or (c) indirectly commits a crime (indirect perpetration). In this regard, indirect perpetration refers to situations when "the perpetrator uses another person as a tool to commit a crime".[1288] The provision clarifies in this regard that it is irrelevant whether or not the direct perpetrator is criminally responsible him or herself.

628. While the direct perpetrators are those who physically execute the elements of the crimes, indirect perpetrators have control over the crime through controlling the actions of the direct perpetrators.[1289] In such cases, the direct perpetrators are instruments used for the commission of crimes. This is why indirect perpetrators are also referred to as perpetrators-by-means or perpetrators behind the perpetrator (*autor detrás del autor* in Spanish or *Täter hinter dem Täter* in German).[1290] It is clear that indirect perpetration, as contained in the Statute, includes both situations where the direct perpetrator is not liable and situations where the direct perpetrator and the indirect perpetrator bear criminal responsibility.[1291] Generally, indirect perpetrators control the actions of the direct perpetrators in different ways, including when the direct perpetrator is not responsible – for example because he or she is a minor, when the direct perpetrator is mentally disabled, or when the direct perpetrator is coerced – and through controlling

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[1288] *See e.g.* G. Werle, 'Individual Criminal Responsibility in Article 25 ICC Statute' in 5 *Journal of International Criminal Justice* (2007), p. 963.
[1289] *See e.g.* C. Roxin, 'Die Willensherrschaft' in De Gruyter Recht (ed.) Täterschaft und Tatherrschaft (2006) pp. 142, 144. As explained by Roxin, "the 'control of the will' is not synonymous with 'influence of will'. Not everyone who exerts a more or less strong influence on the decision of the immediate agent is therefore already in control of the action. […]. The concept of 'control' is to be interpreted according to its literal meaning and social understanding. It must be restricted to those cases in which the authoritative and final decision about what should happen lies with the person behind it".
[1290] *See e.g.* *Katanga and Ngudjolo* Confirmation Decision, para. 496; C. Roxin, 'El Dominio de la Voluntad' in Autoría y Dominio del Hecho en el Derecho Penal (2016), p. 238.
[1291] *Lubanga* Appeal Judgment, para. 465. *See also* G. Werle, 'Individual Criminal Responsibility in Article 25 ICC Statute' in 5 Journal of International Criminal Justice (2007), p. 964.

their will through the use of an organised power apparatus.[1292]

629. In order to distinguish between perpetrators and other forms of participation, the jurisprudence of the Court has adopted the objective "control over the crime" theory,[1293] which has been espoused by important scholars of criminal law[1294] and further developed by Claus Roxin.[1295] The Appeals Chamber confirmed the "control over the crime" as the objective criterion to distinguish between perpetration and other modes of liability in its first final appeal and subsequent jurisprudence, including the most recent *Ntaganda* Appeal Judgment.[1296] While perpetrators retain the sole power to frustrate the commission of the crime, an accessory merely contributes to it.[1297]

630. Regarding indirect perpetration, the Trial Chamber in the present case held that an indirect perpetrator retains control over the actions of those executing the material elements of the crimes "by subjugating their will".[1298] Such subjugation may occur in various ways, including through the use of an organised hierarchical organisation.[1299] As the Trial Chamber correctly noted,[1300] whether an indirect perpetrator retains control over the actions of the physical perpetrators by virtue of controlling their will through the functioning of an organised hierarchical organisation (also known as an organised power apparatus and which may or may not be criminal in nature)[1301] is a factual

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[1292] G. Werle, 'Individual Criminal Responsibility in Article 25 ICC Statute' in 5 Journal of International Criminal Justice (2007), p. 964. This notion is also known as perpetrator behind the desk or *Schreibtischtäeter* in German and *autor de escritorio* in Spanish

[1293] *See e.g.* *Katanga and Ngudjolo* Confirmation Decision, para. 488; *Lubanga* Confirmation Decision, paras 326-341; *Lubanga* Conviction Decision, para. 994; *Bemba* Confirmation Decision, para. 347; *Abu Garda* Confirmation Decision, para. 152; *Banda and Mohammed Jerbo* Corrigendum of Confirmation Decision, para. 126; *Mbarushimana* Confirmation Decision, para. 279; *Ruto et al.* Confirmation Decision, paras 291-292; *Muthaura et al.* Confirmation Decision, para. 296; *Al Bashir* Warrant of Arrest, para. 210; *Katanga* Conviction Decision, para. 1393; *Lubanga* Appeal Judgment, para. 469; *Bemba et al.* Appeal Judgment, para. 810; *Al Hassan* Confirmation Decision, paras 796-797.

[1294] G. Jakobs, 'El ocaso del dominio del hecho' in M. Cancio Meliá and G. Jakobs (eds.), *Conferencias sobre temas penales* (Rubinzal Culzoni: Buenos Aires, 2004), *referring to* H. Welzel, *Das Deutsche Strafrecht: Eine Systematische Darstellung* (1969); Gallas, *Materialien zur Strafrechtsreform I*, pp. 121 *et seq*., 128, 133, 137; Maurach-Gössel, *Strafrecht AT part 2* (1989).

[1295] C. Roxin, 'El Dominio de la Voluntad' in *Autoría y Dominio del Hecho en Derecho Penal* (2016), pp. 74-80.

[1296] *Lubanga* Appeal Judgment, para. 469; *Bemba et al.* Appeal Judgment, para. 820; *Ntaganda* Appeal Judgment, para. 1041.

[1297] *Lubanga* Appeal Judgment, paras 462, 473; *Ntaganda* Appeal Judgment, para. 1041.

[1298] Conviction Decision, paras 2783-2784.

[1299] Conviction Decision, paras 2783-2784.

[1300] Conviction Decision, para. 2784.

[1301] *See generally* for a detailed discussion on organised power apparatus: *Ntaganda* Separate Opinion of Judge Ibáñez Carranza, paras 248-261.

consideration. As a result, the use of an organised power apparatus is not a legal requirement for establishing this specific mode of responsibility.[1302]

631. The Appeals Chamber concurs with the Trial Chamber that when an organised power apparatus is used to retain control over the commission of crimes, "the criterion of control means that the indirect perpetrator used at least part of the apparatus of power subordinate to him or her, so as to steer it intentionally towards the commission of the crime, without leaving one of the subordinates at liberty to decide whether the crime is to be executed".[1303] Generally, the following features of an organised power apparatus may be of assistance in determining whether the indirect perpetrator retained control over the crimes by virtue of controlling the will of the physical perpetrators: the hierarchical organisation of the apparatus; the functional automatism; the replaceable nature of its members on the ground; and the fact that the criminal acts of the direct perpetrator are to the benefit of the organisation.[1304] Therefore, in an organised power apparatus, typically those at the top of the organisation retain functional control over the crimes committed and the low-level members are interchangeable (fungible).[1305] As Trial Chamber II correctly held in the *Katanga* Case "[t]he key to the superior's securing control over the crime is the functional automatism which propels the apparatus of power".[1306]

632. It is thus clear that the determination of whether an indirect perpetrator retains functional control over the actions of the physical perpetrators in the way described

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[1302] *See also* *Katanga* Conviction Decision, para. 1406 ("For the Chamber, this does not mean that the theory of control over the organisation is the one and only legal solution that allows the provisions of article 25(3)(a) concerning commission by an intermediary to be construed. As such, the theory need not be held up as an essential constituent element of commission by an intermediary. As mentioned above, the sole indispensable criterion, in its view, is the indirect perpetrator's exertion, in or other some fashion, including from within an organisation, of control over the crime committed through another person").
[1303] Conviction Decision, para. 2784.
[1304] *Katanga and Ngudjolo* Confirmation Decision, paras 512-513; *Ntaganda* Separate Opinion of Judge Ibáñez Carranza, para. 261.
[1305] C. Roxin, 'El Dominio de la Voluntad' in *Autoría y Dominio del Hecho en el Derecho Penal* (2016), pp. 74.
[1306] *Katanga* Conviction Decision, para. 1408. *See also* *Katanga and Ngudjolo* Confirmation Decision, paras 516-517 ("Above all, this "mechanisation" seeks to ensure that the successful execution of the plan will not be compromised by any particular subordinate's failure to comply with an order. Any one subordinate who does not comply may simply be replaced by another who will; the actual executor of the order is merely a fungible individual. As such, the organisation also must be large enough to provide a sufficient supply of subordinates. The main attribute of this kind of organisation is a mechanism that enables its highest authorities to ensure automatic compliance with their orders").

above is factual and will therefore depend on the specific circumstances of each case. In this regard, the Appeals Chamber agrees with Pre-Trial Chamber I in the *Katanga and Ngudjolo* Case that "it is critical" that the indirect perpetrator "exercise[…] authority and control over the apparatus and that his [or her] authority and control are manifest, *inter alia*, in the subordinates' compliance with his orders", instructions or directives and that his or her "means for exercising control may include his capacity to hire, train, impose discipline [on], and provide resources to his subordinates".[1307]

633. Indeed, the Appeals Chamber recalls that the question of whether an accused person is responsible as a perpetrator or as an accessory "cannot only be answered by reference to how close the accused was to the actual crime and whether he or she directly carried out the incriminated conduct. Rather, what is required is a normative assessment of the role of the accused person in the specific circumstances of the case".[1308] As to the proximity or remoteness of the indirect perpetrator to the criminal act, it is correct that in cases of direct perpetration the further removed a person is from the criminal act, the more he or she is pushed to the margins of events and excluded from control over the acts. However, in cases of indirect perpetration through the use of an organised power apparatus, the converse is generally true.[1309] In such cases, the loss of proximity to the act is compensated by an increasing degree of organizational control by the leadership positions in the apparatus.[1310] In other words, the individual criminal responsibility of an indirect perpetrator that controls the crime by virtue of controlling the will of the direct perpetrators through the functioning of an organised power apparatus will likely increase the further removed he or she is from the crime scene.

634. It follows that whether the criminal liability of an accused person, who is not a direct perpetrator, should be characterised as perpetration or accessorial requires a

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[1307] *Katanga and Ngudjolo* Confirmation Decision, paras 512-513; *Ntaganda* Separate Opinion of Judge Ibáñez Carranza, para. 234.
[1308] *Lubanga* Appeal Judgment, para. 473.
[1309] C. Roxin, '*Crimes as Part of Organized Power Structures'*, 9 Journal of International Criminal Justice (2011), p. 200; *A.G. v. Eichmann*, p. 193.
[1310] C. Roxin, '*Crimes as Part of Organized Power Structures'*, 9 Journal of International Criminal Justice (2011), p. 200; *A.G. v. Eichmann*, p. 193.

careful case-by-case assessment to determine whether or not the person retained control over the crimes.

635. In this case, the Defence appears to question the existence of *indirect co-perpetration* as a mode of liability under the Statute.[1311] However, the Appeals Chamber agrees with the finding of Pre-Trial Chamber I in the *Katanga and Ngudjolo* Case that "through a combination of individual responsibility for committing crimes through other persons together with the mutual attribution among the co-perpetrators at the senior level, a mode of liability arises which allows the Court to assess the blameworthiness of 'senior leaders' adequately".[1312] Indeed, indirect co-perpetration occurs when the execution of the material elements of the crime by the co-perpetrators takes place through another person or other persons, including through the use of an organised power apparatus in the way described above.

636. The Appeals Chamber notes that different views have been expressed as to whether indirect co-perpetration is a fourth mode of liability or rather a form of indirect perpetration or co-perpetration.[1313] Regardless of the labelling, the Appeals Chamber finds that the fundamental aspect is that indirect co-perpetration as a mode of liability is encompassed in article 25(3)(a) of the Statute. This article accounts for the possibility of holding someone responsible both as an indirect perpetrator and as a co-perpetrator. In this regard, the Appeals Chamber notes that indirect co-perpetration constitutes an integrated mode of liability provided for in the Statute that combines the constitutive elements of indirect perpetration and co-perpetration and is, therefore, compatible with the principle of legality and the rights of the accused.[1314]

637. The elements that must be established for indirect co-perpetration, including when the indirect co-perpetrators use an organised power apparatus to commit the crimes through other persons, have been set out in the jurisprudence of the Court. Specifically, the main elements of indirect co-perpetration are: the control over the

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[1311] *See* paragraph 223 above.
[1312] *Katanga and Ngudjolo* Confirmation Decision, para. 492.
[1313] *See e.g.* *Katanga and Ngudjolo* Confirmation Decision, paras 491-492. *See also* *Ruto et al.* Confirmation Decision, paras 287-288; E. van Sliedregt, L. Yanev, 'CoPerpetration Based on Joint Control over the Crime' in J. De Hemptinne, R. Roth, E. van Sliedregt, *Modes of Liability in International Criminal Law* (2019), p. 110; Conviction Decision, para. 772.
[1314] *See also* *Ntaganda* Separate Opinion of Judge Ibáñez Carranza, para. 299.

crime by the indirect co-perpetrators which, in cases of commission through organised power apparatus, occurs by virtue of controlling the will of the direct perpetrators through the automatic functioning of the apparatus; and the existence of an agreement or common plan between those who carry out the elements of the crime through another individual or other individuals,[1315] including when those persons form part of an organised power apparatus.

638. The Appeals Chamber also agrees with previous jurisprudence of this Court stating that when the co-perpetrators commit the crimes through others, "their essential contribution may consist of activating the mechanisms which lead to the automatic compliance with their orders [directions or instructions] and thus, the commission of the crimes".[1316] The orders, directives or instructions need not explicitly instruct the commission of crimes – rather, what is important, is that their implementation result in the commission of crimes.[1317] It follows that indirect co-perpetration is a mode of liability under the Statute and in contexts of mass and systematic criminality, it may generally be through the automatic functioning of an organised power apparatus that the indirect co-perpetrators control the will of the physical perpetrators and thus retain control over the crimes. This mode of liability is characterised as perpetration rather than accessorial due to the fact that the indirect co-perpetrator retains control over the crime.

639. The above reasoning and findings will guide the Appeals Chamber's review of the arguments raised by the Defence in this section of its judgment.

(ii) Grounds of appeal 64, 65 (in part), 81 (in part) and 82 (in part): Alleged lack of reasoning in the Trial Chamber's findings on Mr Ongwen's individual criminal responsibility

640. At the outset, the Appeals Chamber notes that some of the Defence's arguments are not substantiated. In particular, the Defence improperly attempts to incorporate previous submissions by reference without any further elaboration and fails to identify

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[1315] *Katanga and Ngudjolo* Confirmation Decision, para. 522.
[1316] *Katanga and Ngudjolo* Confirmation Decision, para. 525. *See also Ruto et al.* Confirmation Decision, para. 306; *Ntaganda* Separate Opinion of Judge Ibáñez Carranza, paras 234, 238.
[1317] *Ntaganda* Appeal Judgment, para. 1041; *Ntaganda* Separate Opinion of Judge Ibáñez Carranza, paras 234, 238, 311.

the specific findings challenged and/or the arguments or evidence that were, according to the Defence, incorrectly assessed or not considered at all.[1318] In line with its previous jurisprudence on the requirement to substantiate grounds of appeal,[1319] the Appeals Chamber will not consider these arguments further.

641. Furthermore, the Appeals Chamber notes that the Defence refers, without sufficient substantiation, to some arguments that are further elaborated, or are more properly addressed, in other grounds of appeal, namely: the alleged inconsistency between some of the Trial Chamber's findings concerning the attribution of responsibility to Mr Ongwen and those concerning the fact that Mr Ongwen was not the commander of the Sinia brigade for the entirety of the charged period as well as the finding regarding the "free agency" of individual battalion and brigade commanders;[1320] the Trial Chamber's alleged errors in the assessment of evidence to enter convictions for sexual and gender-based crimes and the conscription and use in hostilities of children under the age of 15 years;[1321] the alleged lack of reasoning in the Trial Chamber's findings on the *mens rea* of Mr Ongwen;[1322] the alleged lack of reasoning and an erroneous approach to establish Mr Ongwen's role in the system of abduction and victimisation of civilian women and girls in the LRA;[1323] and the Defence's broad claim concerning insufficiently reasoned and inconsistent findings on Mr Ongwen's *mens rea* for sexual and gender-based crimes committed by the Sinia brigade.[1324] To the extent that these arguments are properly substantiated in other grounds of appeal, they are addressed on their merits thereunder.

642. Apart from the above, the Defence raises some other discrete arguments that are addressed in turn below.

643. Under ground of appeal 64, the Defence submits that the Trial Chamber failed to "individualise [Mr Ongwen's] control over the crimes" committed by members of the

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[1318] Appeal Brief, para. 652.
[1319] *See* paragraph 97. *See also* section V.D (Substantiation of arguments) above.
[1320] Appeal Brief, paras 653, 656-657, *referring to* grounds of appeal 66, 83-89. These arguments are raised in grounds of appeal 65 and 68.
[1321] Appeal Brief, para. 655. These arguments are raised in grounds of appeal 83-86, 88, 90 and 60.
[1322] Appeal Brief, paras 655-656. These arguments are raised in grounds of appeal 65, 74-86, 88, 90 and 60.
[1323] Appeal Brief, paras 659-660. These arguments are raised in grounds of appeal 87, 89 and 66 (in part).
[1324] Appeal Brief, paras 661-663. These arguments are raised in grounds of appeal 87, 89 and 66 (in part).

Sinia brigade, and that it failed to establish the nexus between him and "individual battalion and brigade commanders in Sinia, the LRA, the so-called Sinia leadership and Kony".[1325] It argues in this regard that "the Statute does not provide a provision for the transformation of forms of article 25(3)(a) mode of liability into a conduit for conviction by association or an avenue for the depersonalisation of criminal responsibility".[1326] The Defence further submits that the "basic principle of criminal law that there has to be a direct relationship or a link between the culpability of the individual and the criminal conduct" does not "fit into" indirect co-perpetration.[1327] Similarly, the Defence contends that the Trial Chamber "did not provide a reasoned statement establishing the evidentiary and legal basis for the conviction" for the crimes charged after finding that Mr Ongwen did not personally participate in the charged attacks (except for the attack on the Pajule IDP camp) "and made no findings or sufficient findings about his personal participation in the commission of any of the charged conduct in Northern Uganda from 1 July 2002 to 31 December 2005".[1328]

644. The Appeals Chamber finds no merit in the Defence's broad arguments. In the Conviction Decision, the Trial Chamber assessed in detail Mr Ongwen's role in relation to the crimes committed during each of the four attacks on IDP camps, as well as with respect to sexual and gender-based crimes that he did not physically perpetrate, and the conscription and use in hostilities of children under the age of 15 years.[1329] The Trial Chamber's legal findings on Mr Ongwen's individual criminal responsibility were based on the factual findings reached after detailed evidentiary analyses.

645. With regard to Mr Ongwen's criminal responsibility as an indirect co-perpetrator, the Trial Chamber established: (i) the existence of an agreement or a common plan;[1330] (ii) the execution of the material elements of the crimes through other persons;[1331]

[1325] Appeal Brief, paras 652, 654.
[1326] Appeal Brief, para. 654.
[1327] T-265, p. 38, lines 19-21.
[1328] Appeal Brief, para. 658.
[1329] *See* Relevant parts of the Conviction Decision above.
[1330] Conviction Decision, paras 2851-2854 (Pajule IDP camp), 2910-2912 (Odek IDP camp), 3089 (sexual and gender-based crimes), 3106 (conscription and use of children under the age of 15 years and their use in armed hostilities).
[1331] Conviction Decision, paras 2855-2858 (Pajule IDP camp), 2913-2914 (Odek IDP camp), 3090-3091 (sexual and gender-based crimes), 3107-3108 (conscription and use of children under the age of 15 years and their use in armed hostilities).

(iii) Mr Ongwen's control over the crime;[1332] and (iv) the mental element.[1333] With regard to Mr Ongwen's criminal responsibility as an indirect perpetrator, the Trial Chamber established: (i) the execution of the material elements of the crimes through other persons, and (ii) the mental element.[1334]

646. By way of example, the Appeals Chamber notes that in support of its legal finding that Mr Ongwen executed the material elements of the crimes committed during the attack on Abok IDP camp through other persons, the Trial Chamber held as follows:

> 3010. The Chamber found that [Mr] Ongwen chose to attack Abok IDP camp. Prior to the attack, [Mr] Ongwen ordered LRA fighters subordinate to him to attack this camp, including civilians. At a gathering in the foothills of Atoo, [Mr] Ongwen addressed the troops before the attack and gave instructions to go and collect food, abduct people, attack the barracks and burn down the camp and the barracks. [Mr] Ongwen did not go to Abok as part of the fighting force. He appointed Okello Kalalang to command the attackers on the ground according to his instructions. Kalalang led the LRA fighters in the attack on the camp on behalf of [Mr] Ongwen; the LRA fighters executed [Mr] Ongwen's orders. After the attack, [Mr] Ongwen communicated the results of the attack on the LRA military radio to other LRA commanders and to Joseph Kony, reporting that his fighters carried out an attack on Abok IDP camp, directing fire and burning everything that was there including huts in the camp.
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> 3011. The Chamber refers to its above analysis and the resulting finding that the conditions of recruitment, initiation and training, and service in the LRA generally of its members were such that LRA commanders could rely for obedience in the execution of orders on a reliable pool of persons. Also taking into account that at least 20 LRA fighters participated in the attack, and that they were selected from an even larger pool of available persons, the Chamber considers that the will of the individual LRA soldiers was irrelevant in the execution of a given order. The LRA soldiers selected and sent for the attack on Abok IDP camp as a whole functioned as a tool of [Mr] Ongwen, through which he was able to execute his plan to attack Abok IDP camp, including the commission of crimes. Accordingly, the Chamber concludes that the conduct of the individual LRA fighters in the execution of the crimes during the attack on Abok IDP camp must be attributed to [Mr] Ongwen as his own.[1335]

[1332] Conviction Decision, paras 2859-2864 (Pajule IDP camp), 2915-2918 (Odek IDP camp), 3092-3095 (sexual and gender-based crimes), 3109-3111 (conscription and use of children under the age of 15 years and their use in armed hostilities).
[1333] Conviction Decision, paras 2865-2873 (Pajule IDP camp), 2919-2926 (Odek IDP camp), 3096-3099 (sexual and gender-based crimes), 3112-3114 (conscription and use of children under the age of 15 years and their use in armed hostilities).
[1334] Conviction Decision, paras 2963-2973 (Lukodi IDP camp), 3010-3019 (Abok IDP camp).
[1335] Conviction Decision, paras 3010-3011 (footnotes omitted), *referring to* paras 192-193, 204, 2856, 2858.

647. Each of the factual findings relied upon by the Trial Chamber to reach its legal conclusions were, in turn, supported by a detailed evidentiary assessment. Accordingly, and contrary to the Defence's arguments, Mr Ongwen was found to have had control over all of the crimes, for which he was convicted as either an indirect perpetrator or as an indirect co-perpetrator.

648. Similarly, in part of ground of appeal 65, the Defence refers to the Trial Chamber's "declaratory statement devoid of reasoning and motivation to find that [the requirement of control was] fulfilled".[1336] In the footnote supporting this argument, the Defence refers specifically to the findings on Mr Ongwen's control over the attacks on Pajule and Odek IDP camps as well as over the sexual and gender-based crimes not directly perpetrated by him.[1337]

649. The Appeals Chamber notes the Trial Chamber's findings challenged by the Defence[1338] contain several references to factual findings, each supported by a detailed analysis of the evidence. By way of example, the Appeals Chamber notes that at paragraph 2860, the Trial Chamber recalled that it "made specific findings to the effect that [Mr] Ongwen personally ordered disciplinary measures, issued threats to LRA members that they would be killed if they attempted to escape, and ordered killings of abductees in front of LRA members to illustrate this threat".[1339] These factual findings appear in paragraphs 131-132 of the Conviction Decision and a detailed evidentiary assessment supporting these findings spans over 40 paragraphs.[1340] In the absence of more specific submissions, the Appeals Chamber finds no merit in the Defence's broad argument that the Trial Chamber "relied on a declaratory statement devoid of reasoning and motivation".[1341]

650. Similarly, in relation to Mr Ongwen's individual criminal responsibility as an indirect perpetrator for the crimes committed during the attack on the Lukodi IDP camp,

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[1336] Appeal Brief, para. 667.
[1337] Appeal Brief, para. 667, fn. 809, *referring to* Conviction Decision, paras 2859, 2864, 2915, 2918, 3095. The remaining paragraph of the Conviction Decision (paragraph 2787) appears in the section setting out the applicable law.
[1338] Conviction Decision, paras 2859-2864, 2915-2918, 3092-3095.
[1339] Conviction Decision, para. 2860.
[1340] Conviction Decision, paras 950-990.
[1341] Appeal Brief, para. 667.

the Defence submits that the Trial Chamber "did not provide a reasoned statement on means at the disposal of [Mr Ongwen] and the resulting power to frustrate the crimes".[1342] As recalled above, the Trial Chamber found that in the context of indirect perpetration,

> the criterion of control means that the indirect perpetrator used "at least part of the apparatus of power subordinate to him or her, so as to steer it intentionally towards the commission of the crime, without leaving one of the subordinates at liberty to decide whether the crime is to be executed".[1343]

651. When assessing Mr Ongwen's individual criminal responsibility for the crimes committed in the course of the attack on Lukodi IDP camp, the Trial Chamber found that

> The LRA soldiers selected and sent for the attack on Lukodi IDP camp as a whole functioned as a tool of [Mr] Ongwen, through which he was able to execute his plan to attack Lukodi IDP camp, including the commission of crimes. Accordingly, the Chamber concludes that the conduct of the individual LRA fighters in the execution of the crimes during the attack on Lukodi IDP camp must be attributed to [Mr] Ongwen as his own.[1344]

652. In light of the above, the Appeals Chamber rejects the Defence's broad and unsubstantiated argument.

653. The Defence makes similar submissions under ground of appeal 65 and grounds of appeal 81 and 82, contending that the Trial Chamber did not provide sufficient reasoning to establish that Mr Ongwen "knew or intended" to commit the crimes for which he was convicted.[1345] In this respect, the Appeals Chamber notes that the Trial Chamber's findings on Mr Ongwen's knowledge and intent to commit the crimes charged span over 40 paragraphs.[1346] These paragraphs refer to several factual findings that are, in turn, supported by detailed evidentiary assessments. In these circumstances, and in the absence of more detailed submissions by the Defence, this argument is dismissed.

[1342] Appeal Brief, para. 676.
[1343] Conviction Decision, para. 2784 (footnote omitted).
[1344] Conviction Decision, para. 2964.
[1345] Appeal Brief, paras 678, 892.
[1346] Conviction Decision, paras 2865-2873 (Pajule IDP camp), 2919-2926 (Odek IDP camp), 3096-3099 (sexual and gender-based crimes), 3112-3114 (conscription and use of children under the age of 15 years and their use in armed hostilities), 2965-2973 (Lukodi IDP camp), 3012-3019 (Abok IDP camp).

654. In light of the foregoing, the Appeals Chamber rejects the Defence's arguments under ground of appeal 64 and its related arguments under ground of appeal 65, 81 and 82.

(iii) Grounds of appeal 65 (in part), 74 (in part), 75 (in part) and 76 (in part): Alleged errors in the Trial Chamber's findings regarding the structure of the LRA and Mr Ongwen's role

655. At the outset, the Appeals Chamber notes that the Defence refers, in passing, to arguments raised under ground of appeal 5,[1347] which have been addressed and rejected elsewhere in this judgment.[1348] In addition, the Defence's argument that the Trial Chamber did not provide sufficient reasoning for some of its findings underpinning its determination of Mr Ongwen's individual criminal responsibility as indirect perpetrator and indirect co-perpetrator[1349] has been addressed and rejected above.[1350]

656. The core argument made by the Defence is that the Trial Chamber erred in holding Mr Ongwen criminally responsible for the crimes committed by individual Sinia brigade members and in finding that he had the power to frustrate the commission of the crimes.[1351] In support of its position, the Appeals Chamber understands the Defence to raise a number of arguments, namely that: (i) the Trial Chamber's finding that the LRA had a functioning hierarchy is inconsistent with its finding that the LRA "also relied on the independent actions and initiatives of commanders at division, brigades and battalion levels, which made the LRA a collective project";[1352] (ii) Mr Ongwen had no control over the crimes committed by his subordinates given that the LRA brigades and battalion commanders exercised free will and had personal initiatives;[1353] (iii) the Trial Chamber did not enter any findings that Mr Ongwen used threats or other coercive means to force Sinia fighters to commit the charged crimes;[1354]

[1347] Appeal Brief, paras 666-668.
[1348] *See* section VI.B.4 (Ground of appeal 5: Alleged error in proceeding to trial and in entering a conviction on the basis of a defective Confirmation Decision, in violation of the right to notice under article 67(1)(a) of the Statute) above.
[1349] Appeal Brief, paras 667, 676, 678.
[1350] *See* section VI.D.1(c)(ii) (Grounds of appeal 64, 65 (in part), 81 (in part) and 82 (in part): Alleged lack of reasoning in the Trial Chamber's findings on Mr Ongwen's individual criminal responsibility) above.
[1351] *See e.g.* Appeal Brief, paras 665, 673, 677-678; T-265, p. 44, lines 9-10.
[1352] Appeal Brief, para. 665. *See also* paras 670-672, 677, 679-680.
[1353] *See e.g.* Appeal Brief, paras 676-677, 679-680.
[1354] Appeal Brief, para. 678.

(iv) the Trial Chamber failed to enter any findings on the *mens rea* of the physical perpetrators prior to attributing responsibility to Mr Ongwen as an indirect perpetrator;[1355] and (v) the Trial Chamber incorrectly assessed some evidence related to the attacks on Odek and Lukodi IDP camps.[1356]

657. The Appeals Chamber will address these arguments in turn.

(a) Alleged inconsistency in the Trial Chamber's finding about the LRA structure

658. As noted above, the Defence argues that the Trial Chamber's finding that the LRA had a functioning hierarchy is inconsistent with its finding that the LRA "also relied on the independent actions and initiatives of commanders at division, brigades and battalion levels, which made the LRA a collective project".[1357] According to the Defence, if the LRA was a collective project, in which brigades and battalion commanders exercised free will and took personal initiatives, then Mr Ongwen did not possess the "power within the common plan to frustrate the charged crimes".[1358] It further submits that the Trial Chamber did not explain "when the LRA operated as a functioning hierarchy and when it operated as a collective project or on the free will of subordinate units".[1359] The Defence refers in particular to the attack on Abok IDP camp where Mr Ongwen "delegated leadership of the physical attack" to another commander of the LRA.[1360]

659. As recalled above,[1361] in the Conviction Decision, the Trial Chamber held that "[a]n indirect perpetrator controls the person or persons who execute the material elements of the crime by subjugating their will", clarifying that "[w]hether the controlled person is also criminally responsible for the crime is irrelevant".[1362] It further

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[1355] Appeal Brief, paras 673, 678.
[1356] Appeal Brief, paras 673-675.
[1357] Appeal Brief, para. 665. *See also* paras 671-672.
[1358] Appeal Brief, para. 677. *See also* paras 679-680.
[1359] Appeal Brief, para. 672.
[1360] Appeal Brief, paras 679-680; T-265, p. 69, lines 15-16.
[1361] *See* section VI.D.1(c)(i) (Indirect perpetration and indirect co-perpetration – legal framework and relevant considerations) above.
[1362] Conviction Decision, para. 2783.

noted that one possible way to subjugate the will of the physical perpetrators is "[t]he use of an organisation".[1363]

660. In its assessment of the evidence, the Trial Chamber noted that

> the LRA had a functioning hierarchy, but that it relied also on the independent actions and initiatives of commanders at division, brigade and battalion levels. For the organisation to operate and sustain itself, coordinated action by its leadership, including the brigade and battalion commanders, was necessary. In other words, the LRA was a collective project, and the Chamber does not accept the proposition of the Defence that the LRA should be equated with Joseph Kony alone, and all its actions attributed only to him.[1364]

661. In line with the above findings on the proper understanding of indirect perpetration and indirect co-perpetration,[1365] the Appeals Chamber notes that the Defence's arguments are based on a misinterpretation of indirect co-perpetration as a mode of liability. The Appeals Chamber recalls that for co-perpetration "the decisive consideration is whether [the contributions of the co-perpetrator] as a whole amounted to an essential contribution to the crimes within the framework of the common plan, such that without it, 'the crime could not have been committed or would have been committed in a significantly different way'".[1366] In cases of indirect co-perpetration through an apparatus of power, as noted by the Trial Chamber,[1367] the indirect co-perpetrators use the organisation to execute the crimes envisaged within the framework of the common plan through replaceable physical perpetrators.[1368]

662. Thus, contrary to the Defence's submissions,[1369] the LRA was both a hierarchically organised structure and a collective project that required coordinated actions by its leadership (the indirect co-perpetrators) to operate and sustain itself. It is precisely the coordinated nature of the conduct undertaken by the leadership that makes essential the contribution of each indirect co-perpetrator to the crimes within the framework of the common plan. Consequently, the coordinated nature resulted in

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[1363] Conviction Decision, para. 2784.
[1364] Conviction Decision, para. 873 (footnote omitted).
[1365] *See* section VI.D.1(c)(i) (Indirect perpetration and indirect co-perpetration – legal framework and relevant considerations) above.
[1366] *Ntaganda* Appeal Judgment, para. 1060.
[1367] Conviction Decision, para. 2784.
[1368] *Ntaganda* Separate Opinion of Judge Ibáñez Carranza, paras 248-277, 297-308.
[1369] Appeal Brief, para. 665.

Mr Ongwen, as an LRA leader, being criminally responsible as indirect co-perpetrator for the crimes physically committed by the perpetrators on the ground. In this context, it has been noted that "organised power structures tend to be complex in that they are hierarchically organised with members and sympathisers operating on the ground and several hierarchical layers between those on the ground executing crimes and the persons at the top of the organisation's hierarchy".[1370]

663. The Trial Chamber's finding that the LRA was a collective project in that coordinated action by its leadership, including the brigade and battalion commanders, was necessary for it to operate and sustain itself[1371] is reinforced by the fact that brigade and battalion commanders followed their own initiatives, particularly when Joseph Kony was geographically removed from LRA units.[1372] Accordingly, the Trial Chamber was not required to explain "when the LRA operated as a functioning hierarchy and when it operated as a collective project or on the free will of subordinate units".[1373]

664. The Defence submits, both in its written and oral submissions, that the Trial Chamber's finding that Joseph Kony would sometimes issue orders directly to battalion commanders "contradicts the imputation that [Mr Ongwen] was responsible for the acts of battalion commanders and fighters under their command in Sinia brigade".[1374] The Appeals Chamber is unpersuaded by this argument. The Trial Chamber explained that, in light of the evidence of the witnesses, when Joseph Kony issued orders directly to brigade or battalion commanders, "these were occasional deviations from an otherwise effective hierarchical organisation".[1375]

665. Furthermore, as Victims Group 2 observed,[1376] the fact that Joseph Kony may have sometimes by-passed the chain of command does not result *per se* in the disappearance of the LRA as an organised power apparatus. In any event, as already

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[1370] *Ntaganda* Separate Opinion of Judge Ibáñez Carranza, para. 249.
[1371] Conviction Decision, para. 873.
[1372] Appeal Brief, para. 671, *referring to* Conviction Decision, para. 124.
[1373] Appeal Brief, para. 672.
[1374] Appeal Brief, para. 673; T-265, p. 43, lines 11-15.
[1375] Conviction Decision, para. 869. *See also* Prosecutor's Response, para. 432.
[1376] T-265, p. 55, lines 1-2.

explained,[1377] the Trial Chamber set out in detail Mr Ongwen's control over the crimes attributed to him as an indirect perpetrator and as an indirect co-perpetrator and the Defence's broad claim fails to identify an error in the Trial Chamber's reasoning and conclusions in this regard.

666. The Defence further contends that, given that "Kony had a sufficient number of fungible individuals […] to guarantee that the crimes were carried out", it was not possible for Mr Ongwen to frustrate the crimes.[1378] In its view, if one were to apply the concept of indirect perpetration through an organised power apparatus, "Kony is an indirect perpetrator and Mr Ongwen on the ground is the direct perpetrator".[1379] The Appeals Chamber finds that this argument is yet another misconception of the theory of indirect (co-)perpetration when committed through an organised power apparatus. Contrary to the Defence's argument,[1380] regardless of whether Joseph Kony or any other commander is also responsible for the same crimes for which Mr Ongwen has been convicted, Mr Ongwen remains responsible as an indirect perpetrator and as an indirect co-perpetrator for his own conduct insofar as the elements of that particular mode of liability are satisfied. Given that the Trial Chamber explained the basis of its determination on Mr Ongwen's individual criminal responsibility, the broad argument advanced by the Defence in this regard is rejected.

667. In light of the foregoing, the Defence's arguments under ground of appeal 65 are rejected.

(b) Mr Ongwen's control over the crimes

668. The Defence submits that Mr Ongwen had no control over the crimes committed by his subordinates given that the LRA brigades and battalion commanders exercised free will and took personal initiatives.[1381] According to the Trial Chamber's findings, Mr Ongwen was battalion commander in charge of the Oka battalion, which was part of the Sinia brigade, until 17 September 2003 when he was appointed second-in-

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[1377] *See* section VI.D.1(c)(ii) (Grounds of appeal 64, 65 (in part), 81 (in part) and 82 (in part): Alleged lack of reasoning in the Trial Chamber's findings on Mr Ongwen's individual criminal responsibility) above.
[1378] Appeal Brief, para. 670.
[1379] T-265, p. 40, lines 10-12.
[1380] T-265, p. 40, lines 19-21, p. 41, lines 1-5.
[1381] *See e.g.* Appeal Brief, paras 677, 679-680.

command of the Sinia brigade.[1382] Subsequently, on 4 March 2004, Mr Ongwen was appointed brigade commander of the Sinia brigade.[1383]

669. As noted above, the Trial Chamber assessed in detail Mr Ongwen's role in relation to the crimes committed during each of the four attacks on IDP camps, as well as with respect to sexual and gender-based crimes that he did not directly perpetrate, and the conscription and use in hostilities of children under the age of 15 years.[1384] In so doing, the Trial Chamber referred extensively to its factual findings reached on the basis of detailed evidentiary assessments throughout the sections addressing: (i) the existence of an agreement or a common plan;[1385] (ii) the execution of the material elements of the crimes through other persons;[1386] (iii) Mr Ongwen's control over the crime;[1387] and (iv) the mental element.[1388] The assessments of Mr Ongwen's criminal responsibility as an indirect perpetrator addressed: (i) the execution of the material elements of the crimes through other persons; and (ii) the mental element.[1389] It follows that Mr Ongwen himself was an LRA commander who committed crimes through Sinia fighters.

670. The Defence argues that Mr Ongwen cannot be held responsible as an indirect perpetrator for the actions of commanders who were his subordinates, given that they exercised free will and took personal initiatives. The Appeals Chamber considers this argument to be based once again on a misunderstanding of indirect perpetration as a mode of liability.[1390] From the Trial Chamber's findings on Mr Ongwen's individual criminal responsibility as an indirect perpetrator for crimes committed during the attack

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[1382] Conviction Decision, paras 134, 136.
[1383] Conviction Decision, para. 137.
[1384] *See* paragraph 645 above.
[1385] Conviction Decision, paras 2851-2854 (Pajule IDP camp), 2910-2912 (Odek IDP camp), 3089 (sexual and gender-based crimes), 3106 (conscription and use of children under the age of 15 years and their use in armed hostilities).
[1386] Conviction Decision, paras 2855-2858 (Pajule IDP camp), 2913-2914 (Odek IDP camp), 3090-3091 (sexual and gender-based crimes), 3107-3108 (conscription and use of children under the age of 15 years and their use in armed hostilities).
[1387] Conviction Decision, paras 2859-2864 (Pajule IDP camp), 2915-2918 (Odek IDP camp), 3092-3095 (sexual and gender-based crimes), 3109-3111 (conscription and use of children under the age of 15 years and their use in armed hostilities).
[1388] Conviction Decision, paras 2865-2873 (Pajule IDP camp), 2919-2926 (Odek IDP camp), 3096-3099 (sexual and gender-based crimes), 3112-3114 (conscription and use of children under the age of 15 years and their use in armed hostilities).
[1389] Conviction Decision, paras 2963-2973 (Lukodi IDP camp), 3010-3019 (Abok IDP camp).
[1390] *See e.g.* Appeal Brief, paras 677, 679-680; T-265, p. 69, lines 13-16.

on the Abok IDP camp, to which the Defence refers,[1391] it is clear that Mr Ongwen "ordered LRA fighters subordinate to him to attack this camp, including civilians", and that he appointed Okello Kalalang to command the attackers on the grounds "according to his instructions".[1392] Likewise, in relation to the attack on the Lukodi IDP camp,[1393] the Trial Chamber found that "[Mr] Ongwen instructed LRA fighters to attack Lukodi IDP camp and everyone present at that location, including civilians", appointing "his subordinate Ocaka to be commander on the ground".[1394]

671. The Appeals Chamber finds that the designation of a commander on the ground by an indirect perpetrator does not, without more, diminish his or her control over the crimes committed by the replaceable physical perpetrators. In the current case, the Appeals Chamber observes that Mr Ongwen relied on another commander who was his subordinate to "command the attackers on the ground according to his instructions".[1395] This evidence reveals the hierarchically organised nature of the LRA and Mr Ongwen's leadership role therein, as well as his ability "to issue orders or assign roles to the part of the organisation that is subordinate" to him.[1396]

672. In addition, the Appeals Chamber notes the inherent contradictions in the Defence's line of argument. The Defence seems to accept and emphasise that commanders in the LRA exercised free will[1397] but submits at the same time, that the will of Mr Ongwen, a high-level commander in the LRA during the time period relevant for the charges, had been quashed as a result of the organisational features of the LRA.[1398]

673. Finally, contrary to the suggestion of the Defence raised in grounds of appeal 74, 75, and 76,[1399] while the contribution of other co-perpetrators may be of assistance in determining whether an accused retained control over the crimes, the determination of any such contribution is not a legal pre-requisite to determining whether the accused

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[1391] Appeal Brief, paras 679-680.
[1392] Conviction Decision, para. 3010.
[1393] Appeal Brief, para. 676.
[1394] Conviction Decision, para. 2963.
[1395] Conviction Decision, para. 3010. *See also* para. 2963.
[1396] *Ntaganda* Separate Opinion of Judge Ibáñez Carranza, para. 275.
[1397] *See e.g.* Appeal Brief, paras 676, 680.
[1398] *See e.g.* Appeal Brief, paras 696, 698.
[1399] Appeal Brief, para. 808.

had the power to frustrate the commission of crimes. As explained above,[1400] the determination of whether an accused person retained control over the crimes is focused on the accused's power to frustrate the crimes[1401] and is therefore dependent on the specific circumstances of each case.

674. In light of the foregoing, the Defence's argument under this ground and its related argument raised in grounds of appeal 74, 75 and 76 are rejected.

(c) Absence of findings that Mr Ongwen used threats or other coercive means

675. The Defence submits that in order to establish Mr Ongwen's control over the crimes, it was incumbent upon the Trial Chamber to enter findings that he "used threats or other coercive means to force Sinia fighters to commit the charged crimes".[1402] The Appeals Chamber finds no merit in the Defence's arguments. These are illustrative of its misunderstanding of indirect perpetration and indirect co-perpetration where the control over the crimes by the indirect perpetrator is the result of his or her functional control over the apparatus rendering the will of the physical perpetrators irrelevant.

676. Indeed, for the reasons set out above[1403] the Appeals Chamber considers that the indirect perpetrator can trust that his or her plan will be executed and there is no need to force or deceive the executors given that if any of them does not comply, there will be another who will immediately do so.[1404]

677. Furthermore, contrary to the Defence's suggestion[1405] and as the Prosecutor correctly noted,[1406] the physical presence of the indirect perpetrator is also not required to establish control over the crimes charged.[1407] Therefore, it is immaterial whether

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[1400] *See* section VI.D.1(c)(i) (Indirect perpetration and indirect co-perpetration – legal framework and relevant considerations) above.
[1401] *Ntaganda* Appeal Judgment, para. 1060.
[1402] Appeal Brief, para. 678.
[1403] *See* section VI.D.1(c)(i) (Indirect perpetration and indirect co-perpetration – legal framework and relevant considerations) above.
[1404] As previously stated by Judge Ibáñez Carranza (*see* *Ntaganda* Separate Opinion of Judge Ibáñez Carranza, para. 248).
[1405] T-265, p. 67, lines 1-3; p. 71, lines 2-3.
[1406] Prosecutor's Response, para. 435; T-265, p. 50, lines 8-9.
[1407] *Ntaganda* Appeal Judgment, para. 1108; *Ntaganda* Separate Opinion of Judge Ibáñez Carranza, para. 271.

Mr Ongwen was physically present in all or some of the attacks on the IDP camps.[1408] As noted above,[1409] the determination of whether an accused can be held responsible as an indirect perpetrator or indirect co-perpetrator "cannot only be answered by reference to how close the accused was to the actual crime and whether he or she directly carried out the incriminated conduct".[1410]

678. In light of the above, the Defence's arguments are rejected.

(d) Absence of findings establishing the mens rea of the physical perpetrators

679. The Defence argues both under this ground of appeal and under grounds of appeal 74, 75 and 76, *inter alia*, that the Trial Chamber erred by not entering findings on the *mens rea* of the physical perpetrators prior to attributing responsibility to Mr Ongwen as an indirect perpetrator and an indirect co-perpetrator. The Defence argues that "[w]ithout a finding on the *mens rea* of the physical perpetrators the crimes committed by them cannot be imputed to [Mr Ongwen]".[1411] Based on the jurisprudence in the *Ntaganda* Appeal Judgment, the Prosecutor responds that "[t]he Chamber did not need to make separate findings with respect to the *mens rea* of the physical perpetrators".[1412]

680. As noted above,[1413] the Appeals Chamber is not persuaded by the Defence's argument. In cases of indirect (co-)perpetration through an organised power apparatus, the indirect (co-)perpetrator controls both the crime by virtue of his or her position within the organisation and the essential features of the organisation, which secures the functional automatism resulting in the commission of crimes.[1414] If the person is aware of the circumstances that enable this automatism, the identities and mental state of those who physically commit the crimes are irrelevant – they are interchangeable and the focus is on the automatic functioning of the organised power apparatus.

[1408] Appeal Brief, para. 678.
[1409] *See* section VI.D.1(c)(i) (Indirect perpetration and indirect co-perpetration – legal framework and relevant considerations) above.
[1410] *Lubanga* Appeal Judgment, para. 473.
[1411] Appeal Brief, paras 673, 678, 827.
[1412] Prosecutor's Response, para. 421.
[1413] *See* section VI.D.1(c)(i) (Indirect perpetration and indirect co-perpetration – legal framework and relevant considerations) above.
[1414] *Ntaganda* Separate Opinion of Judge Ibáñez Carranza, para. 238 *et seq.*; *Katanga and Ngudjolo* Decision on the Confirmation of Charges, paras 512-517.

681. In this context, as the Trial Chamber correctly found, "the will of [the physical perpetrators] becomes irrelevant, such that their action must be attributed to the perpetrator as if it were his or her own. Whether the controlled person is also criminally responsible for the crime is irrelevant".[1415]

682. As noted by the Pre-Trial Chamber in the *Katanga and Ngudjolo* Case:

> the direct author of the crime is still a free and responsible agent, who is punishable as the perpetrator with personal responsibility. But this circumstance is irrelevant in relation to the control exercised by the intellectual author, since from his viewpoint, the perpetrator does not act as a free and responsible individual, but as an anonymous, interchangeable figure.[1416]

683. In the present case, as the Prosecutor correctly noted,[1417] the Trial Chamber considered the fact that "the conditions of recruitment, initiation and training, and service in the LRA generally of its members were such that LRA commanders could rely for obedience in the execution of orders on a reliable pool of persons" and "the will of the individual LRA soldiers was irrelevant in the execution of a given order".[1418]

684. This understanding of the law is further supported by previous jurisprudence of the Appeals Chamber. In the *Ntaganda* Appeal Judgment, the Appeals Chamber held that a chamber is not required to assess the *mens rea* of an indirect co-perpetrator "in respect of the specific criminal acts committed", considering that,

> in order to find [a person] criminally responsible as an [indirect] co-perpetrator for specific criminal acts of murder or rape that took place on particular dates and in particular locations, it need not be established that [he or she] was aware of the details of these events. Rather, what must be established is that he possessed the requisite *mens rea* with respect to the crimes as such in the sense of murder, rape, persecution, pillage, *etcetera*, committed in [the] implementation of the common plan.[1419]

685. The Appeals Chamber further finds that often the indirect co-perpetrators are unaware of all of the specifics surrounding each of the criminal incidents that take place as a result of the implementation of the common plan. Therefore, for the purpose of fulfilling the mental element of indirect co-perpetration through an organised power

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[1415] Conviction Decision, para. 2783.
[1416] *Katanga and Ngudjolo* Decision on the Confirmation of Charges, para. 515.
[1417] T-265, p. 49, lines 7-13.
[1418] *See e.g.* Conviction Decision, para. 2964.
[1419] *Ntaganda* Appeal Judgment, para. 1065.

apparatus, the accused does not need to know the particularities of each criminal incident such as the exact time and place of its occurrence, who was the material perpetrator or the identity of the victim. This is because indirect co-perpetration is distinct from direct perpetration where the perpetrator fulfils the elements of the crime in person and not through another person. [1420]

686. Furthermore, as noted by the Prosecutor,[1421] and as fully developed by the Appeals Chamber earlier in this judgment,[1422] in light of the specific nature of indirect perpetration and indirect co-perpetration through an organised power apparatus – in this case, indirect (co-)perpetration through the part of the LRA over which Mr Ongwen had control – the Trial Chamber was not required to establish the *mens rea* of the physical perpetrators prior to attributing individual criminal responsibility to Mr Ongwen.

687. In these circumstances, the Defence's argument is rejected.

(e) Alleged incorrect assessment of evidence related to the attacks on Odek and Lukodi IDP camps

688. The Defence challenges the Trial Chamber's assessment of Prosecution evidence concerning the determination of the events that took place during the attacks on the Odek and Lukodi IDP camps.[1423] It submits that the evidence provided by P-0205, that Joseph Kony bypassed the hierarchy and gave orders to battalion commanders, contradicts the Trial Chamber's finding that Mr Ongwen was criminally responsible for the acts of those battalion commanders and fighters under his command.[1424] In the Conviction Decision, the Trial Chamber found that

> [o]rders were generally communicated from Joseph Kony directly or through Vincent Otti to the brigade commanders, who communicated them to the battalion commanders, who in turn passed them to their subordinates. Joseph Kony's orders were generally complied with.[1425]

[1420] As previously stated by Judge Ibáñez Carranza (s*ee* *Ntaganda* Separate Opinion of Judge Ibáñez Carranza, para. 354).
[1421] T-265, p. 50, line 23 to p. 51, line 1.
[1422] *See* section VI.D.1(c)(i) (Indirect perpetration and indirect co-perpetration – legal framework and relevant considerations) above.
[1423] Appeal Brief, paras 673-675.
[1424] Appeal Brief, para. 673.
[1425] Conviction Decision, para. 124.

689. In support of its finding, the Trial Chamber considered, *inter alia*, the testimony of P-0205. In particular, the Trial Chamber considered that, according to this witness, "occasionally Joseph Kony would bypass the hierarchy and issue orders directly to battalion commanders".[1426] In another paragraph of the Conviction Decision referred to by the Defence,[1427] the Trial Chamber noted that "Joseph Kony held the highest authority in the LRA, and as such also over Sinia" and "issued orders, mostly of a general nature as he was geographically removed". The Defence also refers to other evidence that "establishes clearly also that other high commanders of the LRA, namely the brigade and battalion commanders, and including [Mr] Ongwen" decided on the "'distribution' of women and girls in Sinia".[1428] The Appeals Chamber finds no contradiction in the Trial Chamber's reasoning. The Defence's argument is thus rejected.

690. The Defence further submits that no evidence was elicited from P-0205 "about the common plan within which the attack on Odek IDP camp occurred and the resulting power of [Mr Ongwen] to frustrate the crimes".[1429] It also contends that "[t]he witness did not testify about [REDACTED] […] functioning as a tool of [Mr] Ongwen".[1430] The Trial Chamber relied on the evidence of P-0205 when reaching the factual findings that established the existence of an agreement or common plan to attack Odek IDP camp, the execution of the material elements of the crime through other persons, and Mr Ongwen's control over the crimes. In establishing the existence of these three elements, the Trial Chamber considered that

> [Mr] Ongwen decided that LRA soldiers under his command would attack Odek IDP camp. He coordinated with subordinate commanders and appointed them to lead the attack on the ground. [Mr] Ongwen ordered the fighters to attack the camp in two groups, one focused on the military barracks in the camp and the other focused on the civilian areas. [Mr] Ongwen and his subordinate commanders ordered LRA soldiers to target everyone they find at Odek IDP camp, including civilians, and also instructed them to loot food and abduct civilians. [Mr] Ongwen ordered the selection of soldiers for the attack, and participated in a ritual and prayer before they set out. He encouraged the soldiers

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[1426] Conviction Decision, para. 868.
[1427] Appeal Brief, para. 673, fn. 813, *referring to* Conviction Decision, para. 2182.
[1428] Conviction Decision, para. 2182.
[1429] Appeal Brief, para. 673.
[1430] Appeal Brief, para. 673.

> and repeated the orders to target everyone, including civilians, to loot and to abduct civilians.[1431]

691. In its detailed assessment of the evidence supporting the above factual findings, the Trial Chamber relied, *inter alia*, upon the testimony of P-0205.[1432] The Defence argues that explicit evidence from the witnesses indicating that the Sinia fighters "function[ed] as a tool of Dominc Ongwen" is required to establish Mr Ongwen's commission of crimes through other persons.[1433] The Appeals Chamber finds that the fact that the witness did not explicitly refer to Sinia soldiers acting as tools at the disposal of Mr Ongwen does not render unreasonable the Trial Chamber's assessment of the witness' evidence or its conclusion on Mr Ongwen's individual criminal responsibility. In these circumstances, the Defence's challenge is rejected.[1434]

692. Finally, the Defence submits that, based on the evidence provided by P-0205, P-0142 and P-0101, it was unreasonable for the Trial Chamber to reject their "corroborated account […] that [Mr] Ongwen did not know about civilian attacks".[1435] It further maintains that having found that P-0205 and P-0142 [REDACTED], the Trial Chamber should have found that there was reasonable doubt as to Mr Ongwen's guilt.[1436]

693. In the Conviction Decision, when setting out its evidentiary assessment, the Trial Chamber referred to the evidence of P-0205, P-0101 and P-0142 to conclude that "LRA fighters returned from the attack [on the Lukodi IDP camp] and reported to [Mr] Ongwen about the success of their mission".[1437]

694. According to the Defence, the Trial Chamber rejected the evidence of P-0205, P-0101 and P-0142 without a reasoned statement.[1438] The Appeals Chamber notes that, as pointed out by the Prosecutor,[1439] the Trial Chamber provided reasons for its

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[1431] Conviction Decision, para. 161. The Trial Chamber referred to paragraph 161 at paragraphs 2910 (existence of an agreement or common plan), 2914 (execution of the material elements of the crime through other persons), 2916 (Mr Ongwen's control over the crimes).
[1432] Conviction Decision, paras 1396, 1407.
[1433] Appeal Brief, para. 673.
[1434] *See* *Ntaganda* Appeal Judgment, para. 38.
[1435] Appeal Brief, para. 674.
[1436] Appeal Brief, para. 675.
[1437] Conviction Decision, paras 1838-1845, 2963.
[1438] Appeal Brief, para. 674.
[1439] Prosecutor's Response, para. 436.

assessment of the testimony of the witnesses and explained the reasoning behind the main evidence on which the Trial Chamber relied.[1440] In these circumstances, and in the absence of more detailed arguments, the Appeals Chamber rejects the Defence's submission.

695. As to the Defence's contention that the Trial Chamber should have found that there was reasonable doubt as to Mr Ongwen's guilt after determining that P-0205 and P-0142 [REDACTED], the Appeals Chamber notes that the discrepancies in the testimony of the witnesses identified concerned the leadership role occupied by the different commanders who participated in the attack. The Trial Chamber's determination makes clear that

> [REDACTED]. Without more specific findings being necessary, the Chamber concludes that, in addition to Ocaka as commander on the ground, Ojok Kampala, Oyenga, Kobbi, Ojara and Abonga Won Dano participated in the attack in leadership roles.[1441]

[1440] Conviction Decision, paras 1842 ("P-0205 testified that [Mr] Ongwen appreciated 'the work well done'."), 1843 ("The Defence raised P-0205's previous statement to the Prosecution, in which he stated that he heard of civilian deaths on Mega FM public radio and that he raised this radio broadcast with [Mr] Ongwen. The Defence noted that in P-0205's statement, he had reported that [Mr] Ongwen stated, 'If the civilians had died then they have died, but what he knows is that he did not kill them'. The Defence also noted that P-0205 had stated that the LRA fighters had not written in their report that they killed any civilians. In response, P-0205 had stated that he did have this discussion with [Mr] Ongwen. The Chamber notes that P-0205 testified that he did not personally see any civilian deaths and did not report seeing any civilian deaths and that if there were civilian deaths in Lukodi then perhaps the group that went to collect food carried out the killing but did not tell the others.), 1844 ("the Chamber recalls the testimony of P-0101, one of [Mr] Ongwen's so-called 'wives' who testified that she overheard [Mr] Ongwen reproaching Ocaka saying that he had asked Ocaka to go and attack soldiers and take food and get civilians to carry the loot and that he had told them not to kill children, not to kill civilians but Ocaka had killed children and civilians and now 'they would say he is the one who did it'. According to P-0101, [Mr] Ongwen reproached Ocaka saying that Ocaka was spoiling his name on the radio. The Chamber does not consider it exceptional that one of [Mr] Ongwen's so-called 'wives' overheard him discussing the attack with Ocaka. However, the Chamber notes that evidence shows that [Mr] Ongwen ordered his fighters to attack Lukodi IDP camp and everyone within it and also, as discussed below, later reported his fighters' success to his superiors. Nothing in [Mr] Ongwen's reports to his superiors about the attack indicates that he disavowed the killings of civilians in the camp; indeed, he appears to laud the killings. In light of the overwhelming evidence to contrary, P-0101's testimony does not undermine the Chamber's findings as to the orders [Mr] Ongwen gave for the attack on Lukodi IDP camp."), 1845 ("The Chamber notes that P-0142 somewhat contradicts the accounts that [Mr] Ongwen knew about the reports of civilian deaths in Lukodi. P-0142 testified that after the fighters returned from Lukodi, [Mr] Ongwen was unhappy that people were not killed there. The Chamber also notes that P-0142 testified that 'we' heard over the radio a report stating that people were killed in Lukodi by the LRA. Given the ample evidence that [Mr] Ongwen heard about the civilians' deaths in Lukodi and reported it to his superiors, the Chamber finds his testimony unreliable in this regard.").
[1441] Conviction Decision, para. 1688.

696. It is thus clear that the Defence's argument is misplaced insofar as the Trial Chamber's holding does not relate to its finding on the reporting to Mr Ongwen of the outcome of the attack on Lukodi IDP camp. It is also unclear to the Appeals Chamber in what way the Trial Chamber should have found that there was reasonable doubt as to Mr Ongwen's guilt given the specific context in which these discrepancies were considered. In these circumstances, the arguments advanced are rejected.

(f) Conclusion

697. In light of the foregoing, the Appeals Chamber rejects the Defence's arguments.

(iv) Grounds of appeal 68 and 28 (in part): Alleged errors regarding evidence of Mr Ongwen's abduction, initiation, training, and service in the LRA

698. Under grounds of appeal 28 and 68, the Appeals Chamber understands the Defence's core argument to be that the Trial Chamber failed to consider Mr Ongwen's conditions of recruitment, initiation, training and service in the LRA when finding him criminally responsible as an indirect perpetrator and as an indirect co-perpetrator. The Defence questions the Trial Chamber's finding that despite the difficulties that Mr Ongwen faced as a child, at the time relevant to the charges, he was "an adult who [was] fully responsible for the crimes he is alleged to have committed, but also for those committed by others".[1442]

699. At the outset, the Appeals Chamber will address some of the arguments raised under ground of appeal 28 in the section relating to duress as a defence under article 31(1)(d) of the Statute[1443] Therefore, in this section, the Appeals Chamber will only address those arguments that call into question the Trial Chamber's findings on Mr Ongwen's individual criminal responsibility as an indirect perpetrator and as an indirect co-perpetrator.

[1442] Appeal Brief, paras 696-697, 701. These arguments are repeated elsewhere in the Appeal Brief (*see* Appeal Brief, para. 807).
[1443] *See* VI.F.2(c)(iii)(c) (Alleged impact of Mr Ongwen's abduction, indoctrination and experiences in the LRA (grounds of appeal 26, 28 (in part) and 47)) below.

700. At paragraph 2672 of the Conviction Decision, referred to by the Defence,[1444] in the context of reaching its conclusions as to whether the defence of duress under article 31(1)(d) of the Statute was established, the Trial Chamber found:

> In addition to specific arguments made under Article 31 of the Statute, the Defence also made some legally unspecified submissions emphasising that [Mr] Ongwen was himself a victim of crimes, on account of his abduction at a young age by the LRA. The Chamber has duly considered above the facts underlying these submissions. In addition, and while acknowledging that indeed [Mr] Ongwen had been abducted at a young age by the LRA, the Chamber notes that [Mr] 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 expressly regulated under the Statute.[1445]

701. Also of relevance, when determining "[Mr] Ongwen's status in the LRA hierarchy and the applicability of LRA disciplinary regime to him",[1446] the Trial Chamber found "that due to his status as a battalion and brigade commander, in charge of his group, [Mr] Ongwen's situation was fundamentally different from that of low-level LRA members or recent abductees".[1447]

702. The Defence contends that all members of the LRA were a tool at the disposal of Joseph Kony, the overall leader of the LRA.[1448] The Appeals Chamber recalls that, in its determination of ground of appeal 65, it rejected the Defence's challenge to the Trial Chamber's determination that "the LRA was a collective project" and that, based on its assessment of the evidence, it did "not accept the proposition of the Defence that the LRA should be equated with Joseph Kony alone, and all its actions attributed only to him".[1449] Under this ground of appeal, the Defence does not advance any further arguments in support of its challenge. Accordingly, the Appeals Chamber rejects its submission.

[1444] Appeal Brief, para. 697.
[1445] Conviction Decision, para. 2672 (footnote omitted).
[1446] Conviction Decision, para. 912.
[1447] Conviction Decision, paras 2590-2591.
[1448] *See e.g.* Appeal Brief, paras 425, 689, 693, 698-699; T-265, p. 43, lines 9-10, 24-25, p. 44, lines 4-7, p. 66, lines 9-23.
[1449] Conviction Decision, para. 873.

703. In addition, the Appeals Chamber notes that, in making its arguments, the Defence conflates the law applicable to indirect perpetration and indirect co-perpetration. In this context, regardless of any possible criminal responsibility of Joseph Kony for the same crimes that Mr Ongwen has been convicted of, Mr Ongwen is responsible as an indirect perpetrator and indirect co-perpetrator as long as the elements of these modes of liability are satisfied.

704. The Appeals Chamber observes that the Trial Chamber considered the conditions of recruitment, initiation and training, and service in the LRA and found that "commanders could rely for obedience in the execution of orders on a reliable pool of persons", and that the latter therefore functioned as Mr Ongwen's and other LRA commanders' tools, through which they were able to execute their agreement, which included the commission of crimes.[1450]

705. The Appeals Chamber further observes that the Trial Chamber made a distinction between the situation of commanders and those of "low-level member[s] or recent abductee[s]", the latter being "frequently placed in situations where they had to perform certain actions under threat of imminent death or physical punishment".[1451] Specifically, in relation to Mr Ongwen, the Trial Chamber found that he "was also personally the source of such threats, including the specific instance in which he explicitly threatened P-0226 and a number of other girls with death in order to make them beat a captured government soldier to death".[1452] It concluded that "due to his status as a battalion and brigade commander, in charge of his group, [Mr] Ongwen's situation was fundamentally different from that of low-level LRA members or recent abductees".[1453]

706. Contrary to the Defence's contention, and as the Prosecutor and Victims Group 2 correctly pointed out,[1454] as mentioned above, the Trial Chamber did consider the fact that Mr Ongwen had been abducted at a young age by the LRA and that he may have been the victim of crimes. However, the Trial Chamber found that this, in itself, does

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[1450] Conviction Decision, paras 2858, 2914, 2964, 3011, 3091, 3108.
[1451] Conviction Decision, para. 2951.
[1452] Conviction Decision, para. 2591.
[1453] Conviction Decision, para. 2591.
[1454] Prosecutor's Response, paras 440, 445; Observations of Victims Group 2, para. 82.

not constitute "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 expressly regulated under the Statute".[1455] It was indeed in the context of assessing the possible existence of defences under article 31(1)(a) and (d) of the Statute, that the Trial Chamber considered the Defence's arguments concerning his recruitment and training in the LRA.[1456] The Defence's challenges to the Trial Chamber's consideration of this factor are discussed in the section of this judgment addressing mental disease and duress as defences under article 31(1)(a) and (d) of the Statute.[1457] Moreover, as explained above, when reaching its conclusions on Mr Ongwen's individual criminal responsibility as an indirect perpetrator and as an indirect co-perpetrator, the Trial Chamber carried out an extensive and detailed assessment of each of the legal elements of indirect perpetration[1458] and indirect co-perpetration,[1459] including the "execution of the material elements of the crime through other persons".[1460]

707. Finally, the Defence argues that it was erroneous for the Trial 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.[1461] The Appeals Chamber finds this argument to be without merit. The Trial Chamber, in the passages cited by the Defence,[1462] referred to the conditions prevailing at the times material to the charges, and therefore did not rely on evidence from outside the temporal scope of the charges.

708. In light of the above and in the absence of more substantive challenges by the Defence, the Appeals Chamber considers that under this ground of appeal and in parts of grounds of appeal 28, 74, 75 and 76, the Defence fails to identify any error in the Trial Chamber's finding that "the fact of having been (or being) a victim of a crime

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[1455] Conviction Decision, para. 2672.
[1456] Conviction Decision, section IV.D.
[1457] *See* section VI.F (Alleged errors regarding grounds for excluding criminal responsibility) below.
[1458] Conviction Decision, paras 2962-2973, 3009-3020.
[1459] Conviction Decision, paras 2850-2874, 2909-2927, 3088-3100; 3105-3115.
[1460] Conviction Decision, paras 2855-2858, 2913-2914, 2963-2964, 3010-3011, 3090-3091, 3107-3108.
[1461] Appeal Brief, paras 420, 423-426
[1462] Appeal Brief, paras 424-426, *referring to* Conviction Decision, paras 2856, 2858, 2914, 2964, 3011, 3091, 3108.

does not constitute, in and of itself, a justification of any sort for the commission of similar or other crimes".[1463]

709. In light of the above considerations, the Defence's arguments are rejected.

(d) Conclusion

710. Having rejected the totality of the arguments raised by the Defence, ground of appeal 64, 65, 68 and the related arguments raised in part under grounds of appeal 28, 74, 75, 76, 81 and 82 are accordingly rejected.

2. Grounds of appeal 60, 70, 74 (in part), 75 (in part), 76 (in part), 77, 78, 79, 80, 81 (in part) and 82 (in part): Alleged errors concerning Mr Ongwen's individual criminal responsibility for crimes committed during the attacks on four IDP camps

(a) Summary of the submissions

711. Under grounds of appeal 60 and 70, the Defence submits that the Trial Chamber incorrectly assessed evidence relevant to its findings on Mr Ongwen's individual criminal responsibility for crimes committed during the attacks on four IDP camps. Specifically, the Defence contends that the Trial Chamber disregarded evidence favourable to Mr Ongwen and based its findings on hearsay and impermissible inferences.[1464]

712. In its grounds of appeal 74, 75, 76, 77, 78, 79, 80, 81 and 82, the Defence argues that the Trial Chamber erred in finding Mr Ongwen criminally responsible as an indirect perpetrator and as an indirect co-perpetrator for crimes committed during the attacks on four IDP camps: Pajule (grounds of appeal 74, 75 and 76),[1465] Odek (grounds of appeal 77, 78 and 79),[1466] Abok (ground of appeal 80)[1467] and Lukodi (grounds of appeal 81 and 82).[1468]

713. In response to grounds of appeal 60 and 70, the Prosecutor submits that the Trial Chamber "reasonably and correctly assessed the evidence challenged by [Mr]

[1463] Conviction Decision, para. 2672.
[1464] Appeal Brief, paras 709-730.
[1465] Appeal Brief, paras 802-829.
[1466] Appeal Brief, paras 830-859.
[1467] Appeal Brief, paras 860-870.
[1468] Appeal Brief, paras 871-892.

Ongwen".[1469] In relation to grounds of appeal 74, 75, 76, 77, 78 and 79, the Prosecutor contends that the Defence fails to show an error but rather "makes unsubstantiated claims, reargues [its] failed trial arguments, second-guesses the Chamber's reasonable assessment" and "speculates on alternative (and unsupported) interpretations of the evidence".[1470] Similarly, regarding ground of appeal 80, the Prosecutor argues that the Defence "misreads the record, makes sweeping claims, or speculates with alternative and unsupported interpretations of the evidence".[1471] Finally, in relation to grounds of appeal 81 and 82, the Prosecutor submits that the Defence's arguments, which "are largely limited to alleged errors concerning the Chamber's findings on the location of the meeting [where Mr Ongwen allegedly instructed fighters to attack Lukodi IDP camp] and the Chamber's assessment of P-0205", should be rejected.[1472] In his view, "[t]hese arguments repeat failed trial arguments and do not show any error".[1473]

714. In relation to grounds of appeal 60 and 70, Victims Group 1 submit that the Defence fails to properly substantiate the grounds of appeal and does not identify either an error of law or of fact.[1474] In relation to grounds of appeal 74, 75, 76, 77, 78, 79, 80, 81 and 82, they argue that the Defence "misrepresents the findings of the Trial Chamber",[1475] fails to identify an error of law or fact,[1476] does not properly substantiate aspects of these grounds of appeal,[1477] "ignores the overwhelming evidence against the [Mr Ongwen]"[1478] and raises "mere disagreements with the factual and legal findings of the Trial Chamber".[1479]

(b) Relevant parts of the Conviction Decision

715. As recalled above in the context of addressing ground of appeal 64,[1480] the Trial Chamber carried out detailed assessments of Mr Ongwen's individual criminal

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[1469] Prosecutor's Response, paras 386, 503. *See also* paras 387-403, 504-522.
[1470] Prosecutor's Response, para. 487. *See also* paras 488-501.
[1471] Prosecutor's Response, para. 523. *See also* paras 524-528.
[1472] Prosecutor's Response, para. 529. *See also* paras 530-537.
[1473] Prosecutor's Response, para. 529.
[1474] Observations of Victims Groups 1, paras 200-201. *See also* paras 202-205.
[1475] Observations of Victims Groups 1, para. 220.
[1476] Observations of Victims Groups 1, paras 220, 229, 232-233, 236-237, 245, 249.
[1477] Observations of Victims Groups 1, paras 229, 249.
[1478] Observations of Victims Groups 1, para. 233.
[1479] Observations of Victims Groups 1, para. 237.
[1480] *See* section VI.D.1(c)(ii) (Grounds of appeal 64, 65 (in part), 81 (in part) and 82 (in part): Alleged lack of reasoning in the Trial Chamber's findings on Mr Ongwen's individual criminal responsibility) above.

responsibility as an indirect co-perpetrator in relation to crimes committed during the attacks on Pajule and Odek IDP camps, and as an indirect perpetrator in relation to crimes committed in the context of the attacks on Lukodi and Abok IDP camps.[1481]

(c) Determination by the Appeals Chamber

716. In its determination, the Appeals Chamber will first address grounds of appeal 60 and 70 in which the Defence alleges an error in the Trial Chamber's assessment of what it considers to be "favourable" evidence or "evidence raising reasonable doubt" in relation to crimes committed in the course of the attacks on the four IDP camps. Secondly, the Appeals Chamber will consider grounds of appeal 74 to 76 in which the core argument made by the Defence is that the Trial Chamber erred in holding Mr Ongwen criminally responsible as an indirect co-perpetrator for crimes committed during the attack on Pajule IDP camp. Third, the Appeals Chamber will address grounds of appeal 77 to 79 in which the Defence argues that the Trial Chamber erred in holding Mr Ongwen criminally responsible as an indirect co-perpetrator for crimes committed during the attack on Odek IDP camp. Fourth, it will consider ground of appeal 80 in which the Defence raises arguments challenging the Trial Chamber's finding that Mr Ongwen is criminally responsible as an indirect perpetrator for crimes committed in the course of the attack on Abok IDP camp. Finally, the Appeals Chamber will address the remainder of the arguments under grounds of appeal 81 and 82 concerning alleged errors in the Trial Chamber's finding that Mr Ongwen is responsible as an indirect perpetrator for crimes committed during the attack on Lukodi IDP camp.

(i) Grounds of appeal 60 and 70: Alleged errors resulting from disregarding favourable evidence or evidence raising reasonable doubt

717. At the outset, the Appeals Chamber notes that the Defence improperly attempts to incorporate submissions made in annex C to the Appeal Brief, in which it outlines instances where "exculpatory" evidence of some witnesses was allegedly disregarded by the Trial Chamber.[1482] As explained above,[1483] to the extent that the arguments made

[1481] Conviction Decision, paras 2851-2874 (Pajule IDP camp), 2909-2927 (Odek IDP camp), 2962-2973 (Lukodi IDP camp), 3009-3020 (Abok IDP camp).
[1482] Appeal Brief, paras 709, 711, fns 866, 871.
[1483] *See* paragraph 97. *See also* section V.D (Substantiation of arguments) above.

in the Appeal Brief do not, in themselves, enable the Appeals Chamber to understand the Defence's position, they are dismissed *in limine*.[1484]

718. Furthermore, the Appeals Chamber notes that the arguments raised in paragraphs 723 to 727 of the Appeal Brief relate to the grounds of appeal addressing the Defence's challenges to the Trial Chamber's finding that "[d]uress as a ground excluding criminal responsibility under Article 31(1)(d) of the Statute is […] not applicable".[1485] The Appeals Chamber will consider these arguments in the section of the judgment determining those grounds of appeal.[1486]

719. The core argument of the Defence under grounds of appeal 60 and 70 is that the Trial Chamber erred by disregarding "favourable" evidence or "evidence raising reasonable doubt".[1487] In support of its position, the Defence submits that the Trial Chamber: (i) incorrectly relied on P-0205 "despite the many instances in which his testimony is contradicted or inconsistent" and failed to consider "each favourable piece of evidence or evidence raising reasonable doubt adduced by P-0205" as well as "exculpatory" evidence from P-0070, P-0142 and P-0231;[1488] (ii) incorrectly failed to rely on D-0139's expert report "regarding the political objectives of [Mr Ongwen]" which "raises reasonable doubt in the Chamber's findings that [Mr Ongwen] possessed the persecutory intent for the targeting of civilians at IDP camps";[1489] (iii) failed to properly assess a logbook entry indicating "that like other LRA members, [Mr] Ongwen was following instructions rather than planning an attack on Pajule alongside Kony, or even Vincent Otti";[1490] (iv) incorrectly found that Mr Ongwen's subordinates were present during the attack on Pajule IDP camp based on the evidence of P-0379 and P-0070;[1491] (v) incorrectly found that Mr Ongwen was aware "of the order issued by Kony to attack Odek IDP camp";[1492] (vi) incorrectly found that Mr Ongwen ordered the attack

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[1484] *Ntaganda* Appeal Judgment, paras 47-48, 354.
[1485] Conviction Decision, para. 2670.
[1486] *See* section VI.F.2 (Grounds of appeal 26, 28 (in part), 44, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 58, 61, 62 and 63: Alleged errors regarding findings on duress) below.
[1487] Appeal Brief, para. 710.
[1488] Appeal Brief, paras 710-711.
[1489] Appeal Brief, paras 713-714.
[1490] Appeal Brief, para. 715.
[1491] Appeal Brief, para. 716.
[1492] Appeal Brief, para. 717.

on the Odek IDP camp;[1493] and (vii) incorrectly rejected the likelihood of civilian deaths by crossfire during the attacks on the Odek and Lukodi IDP camps.[1494]

720. The Appeals Chamber will address these arguments in turn.

(a) Alleged erroneous assessment of the evidence provided by P-0205, P-0070, P-0142 and P-0231

721. The Appeals Chamber recalls that in its general assessment of the credibility of P-0205, the Trial Chamber held as follows:

> 272. […] P-0205, a former LRA fighter, testified about his role as an LRA commander, his knowledge of [Mr] Ongwen, the attacks on Lukodi and Odek IDP camp relevant to the charges and the treatment of women in the LRA. P-0205 was a calm, restrained and forthcoming witness. His recollection was detailed and precise. His testimony was comprehensive and included the kind of details that the Chamber would expect from a witness with his rank and time spent in the LRA. For example, the Chamber particularly notes his testimony about the Sinia brigade's military structure; the officers sent on the Lukodi attack as well the abduction and distribution of women in the LRA. The Chamber is of the view that his testimony was as would be expected from a witness who testified to events he actually experienced. The witness distinguished clearly between information he gained from personal experiences as opposed to events he was informed about.
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> 273. Contrary to the Defence suggestion, and as discussed further in the evidentiary discussion below, the Chamber does not find that the witness contradicted himself by recalling information in his testimony that were not discussed in his earlier interviews with the Prosecution. These aspects of the witness's testimony did not undermine the Chamber's view of the general credibility of his accounts.[1495]

722. The Defence argues that the Trial Chamber erred in deciding to rely on the evidence of this witness "despite the many instances in which his testimony is contradicted or inconsistent".[1496] To support its contention, the Defence refers to paragraphs 1040, 1396, 1674, 1675, and footnotes 1687, 2043, 5490 and 5860 of the Conviction Decision.[1497]

[1493] Appeal Brief, paras 718-719.
[1494] Appeal Brief, para. 720.
[1495] Conviction Decision, paras 272-273 (footnotes omitted).
[1496] Appeal Brief, para. 710.
[1497] Appeal Brief, para. 710, fn. 868.

723. As recalled above,[1498]

> trial chambers have "the main responsibility to resolve any inconsistencies that may arise within and/or amongst witnesses" testimonies'. It is "within the discretion of the Trial Chamber to evaluate any inconsistencies, to consider whether the evidence taken as a whole is reliable and credible and to accept or reject the 'fundamental features' of the evidence".[1499]

724. As correctly pointed out by the Prosecutor,[1500] in each of the passages of the Conviction Decision referred to by the Defence, the Trial Chamber provided reasons explaining why, in its view, certain discrepancies or inconsistencies concerning the testimony of P-0205 did not call into question the overall reliability of his testimony.[1501]

[1498] *See* paragraph 524 above.
[1499] *Ntaganda* Appeal Judgment, para. 806 (footnotes omitted).
[1500] Prosecutor's Response, para. 387.
[1501] Conviction Decision, paras 1044 ("[…] P-0205 also testified that he visited [Mr] Ongwen while he was in sickbay. The Chamber notes that P-0309 stated that he did not see Vincent Otti, Raska Lukwiya, Charles Tabuley or Tolbert Yadin come visit [Mr] Ongwen at the sickbay, and that he did not know whether Buk Abudema, David Oyenga or Cesar Acellam visited either. However, the Chamber considers that this evidence does not bring into question the reliability of the testimonies of P-0379 and P-0205, especially given that P-0309 was a low-ranking LRA member and that visits to [Mr] Ongwen could occur without his knowledge."), 1396 ("P-0205 stated that he remained behind and did not go to Odek for the attack, [REDACTED]. The Chamber does not deem it necessary for the present purposes to resolve this discrepancy in the evidence. Due to P-0205's in Court testimony, the manner of recounting the events, as well as the corroboration by other witnesses, the Chamber finds that it is without bearing on the reliability of P-0205's evidence as to the preparations for the attack."), 1675 ("The Defence argues that P-0205's testimony about the order given by [Mr] Ongwen should be disregarded as it 'drastically changed' from his interview with the Prosecution in 2015, where he stated that [Mr] Ongwen's order was to attack only the military at Lukodi, that the order was to attack at 18:00 hours at the latest so as to still be able to distinguish between soldiers and others, and that 'the mission was not to kill civilians'. The Chamber notes that P-0205 explained some of the discrepancy by stating that he had not remembered the information during the interview in 2015. But this explanation is not entirely satisfactory because, as pointed out by Defence counsel in court, the investigator asked specifically about orders in relation to civilians during the interview, and the witness at that time clearly stated that the attack on Lukodi IDP camp was designed so as not to harm civilians. Nevertheless, P-0205 insisted on his in-court testimony. The Chamber deems significant in this respect that he did so even though the statement he gave to the Prosecution in 2015 was decidedly more favourable to him than his in-court statement, considering his own involvement in the attack on Lukodi IDP camp. His statement of 2015 is at odds with the rest of the evidence on the order given, the events on the ground, and on the way the attack was reported, whereas his account in the courtroom is in accord with other reliable evidence. Finally in this context, the Chamber also pays due attention to the fact that P-0205 testified before it under oath, and did so after having been given assurances against self-incrimination under Rule 74 of the Rules. In these circumstances, the Chamber accepts P-0205's testimony in court as truthful."), fns 1687 ("It is noted that at some point, P-0205 stated that Buk Abudema replaced Tabuley as brigade commander in 2003 […]. However, in light of all other evidence, the Chamber considers that this was simply an inaccurate recollection of the year by the witness."), 2043 ("P-0205: T-50, p. 12, lines 14-16. See also P-0205: T-49-CONF, p. 64, lines 18-21. P-0231 testified that the part of Oka battalion which did not stay with [Mr] Ongwen at the sickbay was under the responsibility of Otto Agweng, the IO in Oka battalion, while there were also 'some other officers (P-0231: T-122, p. 59, lines 6-17). Noting that P-0231 explained that he was not sure about the matter, and noting that the issue is of limited importance, the Chamber considers that there is no need to further address the matter"), 5490 ("P-0205 recalls P-0227 being present at Lukodi for the mid-2004 attack. […]. P-0227 never mentions Lukodi. Given the distant events being recalled and how P-0227 is

Given the Trial Chamber's reasoning, and in the absence of any specific arguments identifying an error therein, the Appeals Chamber rejects the Defence's argument.

725. Concerning the Defence's argument that the Trial Chamber disregarded favourable evidence or evidence raising reasonable doubt provided by P-0205,[1502] the Appeals Chamber notes that at paragraph 1736 of the Conviction Decision referred to by the Defence,[1503] the Trial Chamber did not disregard the evidence of P-0205, but rather explained its content and potential inconsistencies.[1504] Similarly, at paragraph 1843 of the Conviction Decision referenced by the Defence,[1505] the Trial Chamber noted the Defence's questioning of the witness regarding possible inconsistencies between his in-court testimony and a statement previously given to the Prosecutor as to the reporting of the attack on Lukodi IDP camp to Mr Ongwen. As already noted, the Trial Chamber addressed these discrepancies and explained the basis upon which it considered P-0205's in-court testimony to be reliable.[1506]

726. Likewise, at paragraphs 2154, 2162 and 2613 of the Conviction Decision, to which the Defence refers,[1507] the Trial Chamber explained the content of P-0205's evidence.[1508] Furthermore, the Defence does not indicate, and it is unclear to the

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best placed to remember her own abduction year, the Chamber considers P-0205 to simply be mistaken on this point."), 5806 ("P-0205 recalls P-0226 suffering this same injury, but remembers P-0226 being present at Lukodi and thought that her injury was suffered after this mid-2004 attack. […]. P-0226 never mentions Lukodi and, given the distant events being recalled and how P-0226 is best placed to remember the year of her own escape, the Chamber considers P-0205 to simply be mistaken on this point.").

[1502] Appeal Brief, para. 710.

[1503] Appeal Brief, para. 710, fn. 870.

[1504] Conviction Decision, para. 1736 ("[…] The Chamber notes that both P-0205 and Okello Michael Tookwaro testified about the presence of a mamba, which fired on the LRA fighters. P-0205 however states that the mamba arrived when the LRA fighters had crossed the Unyama River, some distance from the camp. Thus, his evidence does not support the contention that the mamba fired in the camp and could have been responsible for the deaths of civilians within the camp. Indeed P-0205 also testified, as discussed below, that he did not see any civilians killed in the course of the attack.").

[1505] Appeal Brief, para. 710, fn. 870.

[1506] Conviction Decision, paras 273, 1675.

[1507] Appeal Brief, para. 710, fn. 870.

[1508] Conviction Decision, paras 2154 ("P-0205 described a specific instance of 'distribution' which was undertaken in Sudan at the Imatong Hills. Sinia brigade soldiers, under the leadership of [Mr] Ongwen, had arrived to meet Joseph Kony and brought with them a number of abducted girls. He stated that some girls were taken by Joseph Kony and went to his home, others were 'given' to [Mr] Ongwen and were 'distributed' to the officers of Sinia brigade."), 2162 ("The question of which commander was competent to decide on the 'distribution' of abducted girls was discussed with P-0205. He testified that on one occasion, [Mr] Ongwen took abducted girls to Joseph Kony in Sudan, where they were 'distributed'. P0205, asked why it was necessary to wait until Sudan, stated: 'In – in the LRA the boss has first to agree before ladies are distributed. Sometimes your brigade commander may come up with a decision, but often it is Kony who makes the decision'."), 2613 ("As for the killing of Vincent Otti, P-0205 testified

Appeals Chamber, which aspect of P-0205's testimony, as recounted in those passages, could be considered exculpatory. Moreover, the Trial Chamber did not disregard P-0205's testimony that Mr Ongwen was "'nice', 'straightforward' and that he 'cared about people'".[1509] In fact, this statement was noted, and considered to be of relevance, in the context of assessing whether Mr Ongwen's mental capacities were affected by a mental disease or defect. In light of the foregoing, the Appeals Chamber finds no merit in the Defence's submission that the Trial Chamber disregarded favourable evidence elicited from P-0205.

727. In line with its above considerations,[1510] the Appeals Chamber dismisses *in limine* the Defence's argument that "exculpatory evidence" elicited from witnesses P-0070 and P-0142 "was overlooked"[1511] as the substantive submissions of its argument can only be found in annex C to the Appeal Brief. In relation to P-0231, the Defence submits that the Trial Chamber overlooked his evidence that "generally […] during [Mr] Ongwen's time in sickbay, the members of Oka battalion who were in sickbay followed [Mr] Ongwen's instructions, but that [Mr] Ongwen otherwise did not issue any orders to other members of the group during that time",[1512] and contends that the evidence of P-0231, that Mr Ongwen did not have any radio communication equipment while in sickbay, was corroborated by P-0016, P-0309 and D-0056.[1513]

728. The Appeals Chamber finds the Defence's argument to be without merit. In its assessment of whether Mr Ongwen's time in sickbay, and the duration thereof, affected his exercise of authority within the LRA, the Trial Chamber noted the evidence referred to by the Defence together with a wealth of other evidence.[1514] This included the testimony of P-0016, who specifically "stated that when he visited [Mr] Ongwen in sickbay, his own radio was used to send out a message that [Mr] Ongwen was fine, as

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that at Ri Kwamba – in the DRC, Vincent Otti was apprehended and taken away across a river and shot; the witness could hear the gunshots. P-0233 testified that he witnessed Joseph Kony order the killing. While noting that he was low in rank and would only hear things from other people, P-0233 also testified that there was a 'divergence between what Otti stood for and what Kony was standing for'.").

[1509] Appeal Brief, para. 710, fn. 870, *referring to* Conviction Decision, para. 2508.

[1510] *See* paragraph 97. *See also* section V.D (Substantiation of arguments) above.

[1511] Appeal Brief, para. 711, fn. 871.

[1512] Appeal Brief, para. 711, fn. 872, *referring to* Conviction Decision, para. 1038.

[1513] Appeal Brief, para. 711.

[1514] Conviction Decision, paras 1038-1048.

[Mr] Ongwen did not have a radio at the time".[1515] Similarly, D-0056 testified "that there was no radio at the sickbay, but that the units which brought food sometimes came with the radio".[1516] As to P-0309, as also noted by the Prosecutor,[1517] the Trial Chamber held that "he did not see Vincent Otti, Raska Lukwiya, Charles Tabuley or Tolbert Yadin come visit [Mr] Ongwen at the sickbay, and that he did not know whether Buk Abudema, David Oyenga or Cesar Acellam visited either".[1518] However, the Trial Chamber concluded that "this evidence does not bring into question the reliability of the testimonies of P-0379 and P-0205, especially given that P-0309 was a low-ranking LRA member and that visits to [Mr] Ongwen could occur without his knowledge".[1519]

729. On the basis of a detailed evidentiary assessment, the Trial Chamber concluded that "any disruption to [Mr] Ongwen's exercise of his powers as Oka battalion commander was limited in time" and that he was "again exercising his authority as battalion commander" "as early as December 2002",[1520] and that Mr Ongwen's "access to radio communication during his stay in sickbay may not have been permanent, but that he nevertheless had access to a radio at times and did communicate on radio with some regularity".[1521] The Defence fails to identify any error in the Trial Chamber's reasoning and conclusion. Its arguments are therefore rejected.

(b) Alleged failure to rely on D-0139's expert report

730. The Defence argues that the Trial Chamber erred by not relying on D-0139's expert report "regarding the political objectives of [Mr Ongwen]".[1522] According to the Defence, this "raises reasonable doubt in the Chamber's findings that [Mr Ongwen] possessed the persecutory intent for the targeting of civilians at IDP camps".[1523] The Appeals Chamber notes that the Trial Chamber held as follows:

> Professor Adam Branch is a Professor for Politics and International Studies at the University of Cambridge, United Kingdom, who testified live before the Chamber. He also provided an expert report, which was submitted pursuant to

[1515] Conviction Decision, para. 1045.
[1516] Conviction Decision, para. 1045.
[1517] Prosecutor's Response, para. 389.
[1518] Conviction Decision, para. 1044.
[1519] Conviction Decision, para. 1044.
[1520] Conviction Decision, para. 1037.
[1521] Conviction Decision, para. 1049.
[1522] Appeal Brief, paras 713-714.
[1523] Appeal Brief, paras 713-714.

> Rule 68(3) of the Rules. He offered in particular a detailed account on the economic and security situation in IDP camps. However, his evidence is mostly based on indirect sources and literature, and his own personal experience relates primarily to the situation in Pabbo camp, which is not directly relevant to the charges of the present case. For this reason, in the presence of ample more direct evidence on the situation in IDP camps in Northern Uganda at the relevant time generally, and specifically in relation to the Pajule, Odek, Lukodi and Abok IDP camps, the Chamber does not rely on Professor Adam Branch.[1524]

731. The Appeals Chamber understands the Defence's argument to be that: (i) the Trial Chamber's determination not to rely on the evidence of D-0139 was inconsistent with its general approach to circumstantial evidence; and (ii) the evidence of the witness "raises reasonable doubt in the Chamber's findings that [Mr Ongwen] possessed the persecutory intent for the targeting of civilians at IDP camps".[1525]

732. The Appeals Chamber observes that the expert report of D-0139, entitled "Internment Camps and Forced Displacement in Northern Uganda", is 37-pages long and covers a wide variety of topics.[1526] Similarly, the testimony of the witness spans over 67 pages of transcript.[1527] In the Appeal Brief, the Defence does not indicate which particular aspects of the witness evidence would have been relevant to the charges and which would have raised reasonable doubt in the findings relevant to the charge of persecution.

733. In light of the above, the Appeals Chamber finds that the Trial Chamber explained the reasons why it decided not to rely on this evidence. The Defence fails to show an error in the Trial Chamber's reasoning and conclusion. In these circumstances, the Defence's arguments are rejected.

(c) Alleged incorrect assessment of a logbook entry

734. The Defence argues that the Trial Chamber erred by failing to properly assess a logbook entry indicating "that like other LRA members, [Mr] Ongwen was following instructions rather than planning an attack on Pajule alongside Kony, or even Vincent Otti".[1528] The Trial Chamber noted this logbook entry in its evidentiary assessment

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[1524] Conviction Decision, para. 598 (footnotes omitted).
[1525] Appeal Brief, para. 714.
[1526] UGA-D26-0015-1172.
[1527] D-0139: T-218.
[1528] Appeal Brief, para. 715.

supporting the factual finding that "[s]everal days before the attack on Pajule IDP camp, Vincent Otti summoned a number of LRA units to join him. Around that time, [Mr] Ongwen and his group of fighters joined Vincent Otti".[1529] Indeed, the Trial Chamber held:

> That [Mr] Ongwen was moving with or in close proximity of Vincent Otti is also corroborated by a 30 September 2003 entry in the same logbook, indicating that Joseph Kony issued an order for the LRA to move to Teso, with the exception of the groups of Vincent Otti and Opiro Livingstone, and specifically adding that "[Mr] Ongwen should remain behind with Otti b[ecau]se he has good plans which can help Otti".[1530]

735. The Appeals Chamber notes that at paragraphs 2851 to 2854 of the Conviction Decision, the Trial Chamber set out the reasons supporting its finding that "the attack on Pajule took place pursuant to an agreement involving [Mr] Ongwen, Vincent Otti, Raska Lukwiya, Okot Odhiambo and other LRA commanders".[1531] The Appeals Chamber does not find any contradiction or error in the Trial Chamber's findings. As found in the determination of ground of appeal 65, it was not contradictory for the Trial Chamber to find that the LRA had a functioning hierarchy with several layers, while at the same time determining that the LRA "also relied on the independent actions and initiatives of commanders at division, brigades and battalion levels, which made the LRA a collective project".[1532] The Appeals Chamber also found no merit in the Defence's suggestion that the LRA should be equated with Joseph Kony.[1533]

736. In these circumstances, the Appeals Chamber finds that the fact that Joseph Kony may have issued orders to Mr Ongwen does not, in itself, relieve the latter of individual criminal responsibility as an indirect co-perpetrator for the crimes committed in the context of the attack on the Pajule IDP camp. Accordingly, the Defence's argument is rejected.

[1529] Conviction Decision, p. 401.
[1530] Conviction Decision, para. 1180.
[1531] Conviction Decision, para. 2853.
[1532] *See* VI.D.1(c)(iii)(a) (Alleged inconsistency in the Trial Chamber's finding about the LRA structure) above.
[1533] *See* generally section VI.D.1(c)(iii) (Grounds of appeal 65 (in part), 74 (in part), 75 (in part) and 76 (in part): Alleged errors in the Trial Chamber's findings regarding the structure of the LRA and Mr Ongwen's role) above.

(d) Alleged erroneous finding that Mr Ongwen's subordinates were present during the attack on Pajule IDP camp

737. The Defence argues that the Trial Chamber erred in finding that Mr Ongwen's subordinates were present during the attack on Pajule IDP camp based on the evidence of P-0379 and P-0070.[1534] The Appeals Chamber notes that while the evidence of P-0379 is relied upon to support the Trial Chamber's factual finding that "[s]everal days before the attack on Pajule IDP camp, Vincent Otti summoned a number of LRA units to join him" and that "[a]round that time, [Mr] Ongwen and his group of fighters joined Vincent Otti",[1535] the hearsay evidence of P-0070 cited by the Defence is relied upon as corroboration to support the Trial Chamber's factual finding that

> After the meeting, on the eve of the attack, the LRA soldiers were selected from the Control Altar [the headquarters unit led by Vincent Otti], as well as Trinkle and Sinia brigades. Raska Lukwiya was designated as the overall commander for the attack. The attackers were briefed about the attack and instructed to attack the UPDF at the barracks, as well as civilian areas of the camp in order to loot radio equipment, food and other items. The attackers were also told to abduct civilians.[1536]

738. Each of these factual findings of the Trial Chamber is supported by other testimonial and documentary evidence.[1537] In addition, elsewhere in the Conviction Decision, the Trial Chamber carried out a detailed evidentiary assessment supporting its findings that "[Mr] Ongwen led a group of attackers to fight at the barracks, before directing them to attack the trading centre within the camp".[1538] The Trial Chamber further noted that "[d]uring the attack, LRA attackers, some of them led by [Mr] Ongwen, broke into homes and shops and looted food and other property from them in Pajule IDP camp",[1539] that "[Mr] Ongwen personally ordered LRA attackers to loot within the trading centre, ordering them to loot items from shops and homes within

[1534] Appeal Brief, para. 716.
[1535] Conviction Decision, p. 401.
[1536] Conviction Decision, para. 213, p. 413.
[1537] Conviction Decision, paras 1179-1188, 1204-1223.
[1538] Conviction Decision, paras 1264-1288.
[1539] Conviction Decision, paras 150, 1294-1296.

the camp",[1540] and that "[Mr] Ongwen also led a group of abductees and ordered abductees to carry looted goods and instructed them not to drop items".[1541]

739. Given the wealth of evidence relied upon by the Trial Chamber to support its above findings regarding the attack on the Pajule IDP camp, and noting in particular that the testimony of P-0379[1542] and P-0070[1543] was part of such a broader assessment of the evidence, the Appeals Chamber finds that the Defence's submissions are without merit. Accordingly, they are rejected.

740. Finally, the Appeals Chamber notes the Defence's argument that other "reasonable inferences" would be possible, considering that "movement of people from one unit to another, including between brigades, was a relatively common occurrence in the LRA".[1544] The Appeals Chambers finds that this argument is speculative and does not identify an error in the Trial Chamber's assessment of the relevant evidence and conclusions. The argument is therefore rejected.

(e) Alleged erroneous finding that Mr Ongwen knew of Joseph Kony's order before the attack on Odek IDP camp

741. The Defence challenges the Trial Chamber's finding that Mr Ongwen "knew of Joseph Kony's order before the attack" on Odek IDP camp.[1545] It submits that, based

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[1540] Conviction Decision, paras 150, 1294-1296.
[1541] Conviction Decision, paras 153, 1330-1331.
[1542] Conviction Decision, para. 1186 ("In this context, the Chamber notes the testimony of P-0379 who had previously been abducted by the LRA, was in captivity for eight months in Sinia's Oka battalion, and had escaped and returned to Pajule IDP camp around August 2003. During the attack on 10 October 2003, while trying to hide from the LRA, he saw an LRA fighter whom he recognised as Okello Tango, a member of Oka Battalion whom P-0379 had known while still in the bush. The Chamber recalls its finding that at the time of the Pajule IDP camp attack, [Mr] Ongwen was commander of Oka battalion. The presence of an Oka battalion fighter in the camp corroborates the evidence that [Mr] Ongwen's subordinates were present in the course of the Pajule IDP camp attack.").
[1543] Conviction Decision, para. 1223 ("Finally, the Chamber notes the evidence of P-0070, who testified that he was injured and in sickbay at the time of the attack on Pajule IDP camp, but that he heard of the attack on 'domestic radio' and from those who were injured during the attack and were brought to the sickbay, including one , an LRA soldier in Control Altar. P-0070 testified that he was told that the attack on Pajule was undertaken by the combined forces of the Control Altar and the Sinia brigade. Further, P-0070 stated that he was told that the plan for the attack on Pajule had been to overrun the barracks and thereafter to abduct civilians and 'burn down the entire place'. Even though P-0070 did not personally observe the facts, the Chamber sees value in his evidence as an element of corroboration.").
[1544] Appeal Brief, para. 716.
[1545] Appeal Brief, para. 717, *referring to* Conviction Decision, paras 1387-1389.

on the evidence of D-0032,[1546] P-0142,[1547] P-0205,[1548] P-0410[1549] and P-0054,[1550] "[t]his finding is based on an impermissible inference that fails to reflect the evidence on the trial record".[1551]

742. The Appeals Chamber notes that in its submissions, the Defence conflates the evidence relied upon by the Trial Chamber to establish the following two distinct factual findings: (i) that Mr Ongwen knew of Joseph Kony's order prior to the attack on the Odek IDP camp; and (ii) that Mr Ongwen ordered his subordinates to attack the Odek IDP camp. To support the first finding, the Trial Chamber considered the evidence provided by D-0032 and P-0410 that Joseph Kony ordered the attack on Odek IDP camp but noted that "P-0410 did not state that [Mr] Ongwen was present for the gathering with Joseph Kony in Sudan" and "[s]imilarly, D-0032's testimony does not

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[1546] Appeal Brief, para. 717, *referring to* Conviction Decision, para. 1388 ("Similarly, D-0032 testified that he heard Joseph Kony talking on radio, telling commanders: 'My people are also stubborn', referring to the people of Odek, and saying that they needed to be punished someday. According to D-0032, this message was transmitted on radio a short time before the attack on Odek. As D-0032's testimony is based on his personal recollection of a specific radio communication, the Chamber accepts his evidence as truthful, even though the communication does not appear to have been recorded by the agencies that were intercepting radio communications at the time.") (Footnotes omitted).
[1547] Appeal Brief, para. 717, *referring to* Conviction Decision, para. 1390.
[1548] Conviction Decision, para. 1396 ("This corresponds to the testimony of P-0205, who stated that after crossing the Aswa River, [Mr] Ongwen planned the attack on Odek. P-0205 stated that he was present when [Mr] Ongwen addressed the soldiers who were to go to Odek, and that he heard [Mr] Ongwen issue the order to 'go and destroy Odek completely' and to 'only leave bare ground'. P-0205 also testified that [Mr] Ongwen asked to abduct 'good girls' and boys, and said that those who were not fit to be in the army should be killed instead.") (Footnotes omitted).
[1549] Conviction Decision, para. 1395 ("In any case, in relation to [Mr] Ongwen, the evidence of P-0410 is detailed and specific. P-0410 stated that he got to know [Mr] Ongwen at the assembly, when he introduced himself. P-0410 testified that he heard [Mr] Ongwen say that there would be an operation in Odek, and that the intention was 'to exterminate everything, everything in Odek'. P-0410 stated that other commanders also spoke, saying that 'nothing should be left alive', that '[e]verything should be exterminated, even ants, even flies', and that '[a]nything alive, anything you see in front of you that is alive should be shot and killed'. P-0410 also testified that [Mr] Ongwen explained where people were going to go, how the attack was going to be done, and ordered to bring food from the camp.") (Footnotes omitted).
[1550] Appeal Brief, para. 717, *referring to* Conviction Decision, para. 1397 ("Further corroboration of the fact that [Mr] Ongwen ordered the attack on Odek IDP camp is provided by P-0054, who stated that 'when people were at a place called Orapwoyo, [Mr] Ongwen instructed people to go and collect food from Odek'. P-0054 specified that '[a]t that time there was a big problem of hunger so he invited Kalalang and other commanding officers and instructed them that since we do not have food people should go to Odek'. While P-0054 initially stated that he did not remember any further order by [Mr] Ongwen, he did confirm as truthful his prior testimony to the effect that [Mr] Ongwen also ordered to 'attack the civilians'. P-0054 stated that he was present when [Mr] Ongwen gave this instruction.") (Footnotes omitted).
[1551] Appeal Brief, para. 719.

provide a basis to conclude that the message was received by [Mr] Ongwen at the time".[1552]

743. The Trial Chamber only relied upon the evidence of P-0142 to infer Mr Ongwen's knowledge of the order issued by Joseph Kony:

> However, P-0142's testimony indicates that by the time that concrete plans for the attack were being made, Joseph Kony's order had indeed already reached the ground. In particular, according to P-0142's testimony, Okwer told him, before the attack, that Joseph Kony had issued an order that Odek should be attacked. As discussed below, Okwer is one of the commanders consistently referred to by witnesses as having been involved in the Odek attack, including in its planning together with [Mr] Ongwen. In light of [Mr] Ongwen's role in the preparation of the attack on Odek IDP camp, as discussed below, the Chamber finds that the necessary inference is that [Mr] Ongwen also knew of Joseph Kony's order.[1553]

744. The evidence of P-0410, P-0205 and P-0054 is cited in support of the second finding, namely, that Mr Ongwen ordered his subordinates to attack the Odek IDP camp.[1554] The Appeals Chamber will consider this evidence below when addressing the Defence's challenge to that specific finding.

745. In relation to its finding that Mr Ongwen knew of Joseph Kony's order to attack Odek IDP camp, the Trial Chamber noted the Defence's argument that Joseph Kony's order was directed to Ben Acellam and was not received by Mr Ongwen, and addressed it as follows:

> this submission is based on evidence merely stating that, on 30 April 2004, Ben Acellam was communicating on radio before [Mr] Ongwen. From this, the Defence concludes that Ben Acellam "was given the order to attack Odek, not Ongwen". The Chamber finds that this argument is purely speculative, not confirmed by any other evidence, and therefore unfounded.[1555]

746. The Trial Chamber also emphasised that "[i]n any case, […] the significance of any order by Joseph Kony specifically for the attack on the Odek IDP camp is limited".[1556] It held in this regard that

> there is evidence that in early 2004, in the period before the Odek attack, Joseph Kony, on several occasions, called upon the LRA commanders to engage in

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[1552] Conviction Decision, para. 1389.
[1553] Conviction Decision, para. 1390 (footnote omitted).
[1554] Conviction Decision, paras 1395-1399.
[1555] Conviction Decision, para. 1391 (footnote omitted).
[1556] Conviction Decision, para. 1392.

> attacks against civilians in Northern Uganda, including specifically against IDP camps. At times, Joseph Kony ordered that a specific location be targeted. But the majority of his orders to commanders during this period were more general. By the terms of those orders, it fell upon the commanders to determine the specific times and locations of attacks. For this reason, and considering the relevant charges as brought by the Prosecution in this regard, it is not decisive for the determination of [Mr] Ongwen's criminal responsibility to establish conclusively that the attack on Odek took place pursuant to a specific order by Joseph Kony.[1557]

747. In light of the Trial Chamber's reasoning, the Appeals Chamber finds no merit in the Defence's arguments. The Trial Chamber explained the basis of its decision to rely on the evidence provided by P-0142. The fact that the evidence of P-0142 may not have been relied upon by the Trial Chamber in other parts of the Conviction Decision for being "inconsistent"[1558] does not automatically lead to an error in the Trial Chamber's reliance on the evidence of this witness when it considers it consistent with the evidence on the record,[1559] as it did in this particular instance. In addition, and as the Prosecutor correctly noted,[1560] the Trial Chamber explained the immateriality of the finding.[1561] In these circumstances, the argument advanced by the Defence is rejected.

(f) Alleged erroneous finding that Mr Ongwen ordered the attack on Odek IDP camp

748. With regard to the Trial Chamber's finding that Mr Ongwen ordered the attack on Odek IDP camp, the Defence submits that it is possible to make a literal interpretation of the evidence elicited from witnesses P-0054, P-0264, P-0142, P-0314, P-0340, P-0372 and P-0314 that "the instructions primarily related to collecting food as there was a genuine hunger problem at the time".[1562] In its view, the factual finding is based upon an "impermissible inference" for which the Trial Chamber relied upon P-0205, P-0410 and P-0054.[1563]

749. In the Conviction Decision, the Trial Chamber referred to the evidence provided by P-0410, P-0205, P-0054 and P-0264. P-0410 "testified that he heard [Mr] Ongwen

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[1557] Conviction Decision, para. 1392 (footnotes omitted).
[1558] Appeal Brief, para. 717.
[1559] *Ngudjolo* Appeal Judgment, para. 168.
[1560] Prosecutor's Response, para. 395.
[1561] Conviction Decision, para. 1392.
[1562] Appeal Brief, para. 718.
[1563] Appeal Brief, para. 719.

say that there would be an operation in Odek and that the intention was 'to exterminate everything, everything in Odek'".[1564] P-0205 "heard [Mr] Ongwen issue the order to 'go and destroy Odek completely' and to 'only leave bare ground'" and "to abduct 'good girls' and boys, and said that those who were not fit to be in the army should be killed instead".[1565] P-0054 stated that people were instructed "to go and collect food from Odek", and that while he "initially stated that he did not remember any further order by [Mr] Ongwen, he did confirm as truthful his prior testimony to the effect that [Mr] Ongwen also ordered to 'attack the civilians'".[1566] Finally, P-0264 "stated that all the commanders, 'even [Mr] Ongwen', said that people who can be recruited into the LRA should be abducted, and also that civilians should be abducted to carry the looted food".[1567]

750. After recounting the evidence provided by P-0142,[1568] P-0314,[1569] P-0340[1570] and P-0352,[1571] the Trial Chamber considered that "the fact that the witnesses expressed in their own terms their recollection is natural and expected". Contrary to the Defence's argument, the Trial Chamber did "not find that witnesses contradict each other on the point or that their evidence is otherwise inconsistent".[1572] It considered "that the evidence before it justifies and necessitates the finding that [Mr] Ongwen, as well as other commanders, ordered LRA fighters to target everyone they find at Odek, including civilians", noting that "[t]his is plainly the content of the testimony of P-0205

[1564] Conviction Decision, para. 1395 ("P-0410 testified that he heard [Mr] Ongwen say that there would be an operation in Odek, and that the intention was 'to exterminate everything, everything in Odek'. P-0410 stated that other commanders also spoke, saying that 'nothing should be left alive', that '[e]verything should be exterminated, even ants, even flies', and that '[a]nything alive, anything you see in front of you that is alive should be shot and killed'. P-0410 also testified that [Mr] Ongwen explained where people were going to go, how the attack was going to be done, and ordered to bring food from the camp.").
[1565] Conviction Decision, para. 1396.
[1566] Conviction Decision, para. 1397.
[1567] Conviction Decision, para. 1398.
[1568] Conviction Decision, para. 1399 ("P-0142 stated that he heard a gathering of [Mr] Ongwen and the commanders who were designated for the attack, during which [Mr] Ongwen gave the order to 'attack the soldiers' and 'loot food'.").
[1569] Conviction Decision, para. 1401 ("P-0314 stated that soldiers were selected from various households and told that they were going to 'collect food items'").
[1570] Conviction Decision, para. 1402 ("The witness asked Mukwaya where they were going, and Mukwaya replied that they were going to collect food.").
[1571] Conviction Decision, para. 1403 ("She stated that there was a gathering of soldiers at [Mr] Ongwen's. Then she heard the soldiers whistling and [REDACTED] came and told her to leave the things she usually carried because she was going on a trip.").
[1572] Conviction Decision, para. 1407.

and P-0410, who stated, respectively, that the order was to 'destroy Odek' and to 'exterminate everything', and who are corroborated by P-0054" and recalling that "there is consistent evidence from multiple witnesses that the orders included looting food and abducting civilians".[1573]

751. With respect to the instruction to "collect food", the Trial Chamber recalled the testimony of P-0340 as to the meaning of this expression. The witness stated that "[w]hen you go there, you have to fight, you have to shoot at them, and they shoot at you because they are the people who protect that food" and further indicated that collecting food means that "when we reached there, other people went to the barracks and other people went to the camp".[1574]

752. From the above passages, it is clear that the Trial Chamber's finding was not "based on an impermissible inference that fails to reflect the evidence on the trial record" as suggested by the Defence.[1575] Rather, it is supported by the evidence on the record. The Appeals Chamber notes that P-0142,[1576] P-0314,[1577] P-0340[1578] and P-0372[1579] confirmed that the order involved the looting of food. Furthermore, the Trial Chamber noted P-0314's mention of an instruction from Mr Ongwen to abduct children.[1580] As the Trial Chamber correctly found,[1581] this evidence is consistent with that provided by P-0410, P-0205, P-0054 and P-0264. Based on the foregoing, the Appeals Chamber considers that the Defence fails to identify any error in the Trial Chamber's finding that "the evidence before it justifies and necessitates the finding that

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[1573] Conviction Decision, para. 1407.
[1574] Conviction Decision, para. 1407.
[1575] Appeal Brief, para. 719.
[1576] Conviction Decision, para. 1399 ("P-0142 stated that he heard a gathering of [Mr] Ongwen and the commanders who were designated for the attack, during which [Mr] Ongwen gave the order to 'attack the soldiers' and 'loot food'.").
[1577] Conviction Decision, para. 1401 ("Similarly, P-0314 stated that soldiers were selected from various households and told that they were going to 'collect food items'"; para. 1405: "P-0314 similarly said that [Mr] Ongwen addressed the selected people on the day of the attack before they set off, telling them to 'abduct some children' and 'bring food items'.").
[1578] Conviction Decision, para. 1402 ("The witness asked Mukwaya where they were going, and Mukwaya replied that they were going to collect food.").
[1579] Conviction Decision, para. 1405 ("P-0372 testified that before the Odek attack, [Mr] Ongwen spoke to the soldiers selected for the attack and said that he was going to attack.").
[1580] Conviction Decision, para. 1405 ("P-0314 similarly said that [Mr] Ongwen addressed the selected people on the day of the attack before they set off, telling them to 'abduct some children' and 'bring food items'.").
[1581] Conviction Decision, para. 1407.

[Mr] Ongwen, as well as other commanders, ordered LRA fighters to target everyone they find at Odek, including civilians".[1582] The Defence's argument is accordingly rejected.

(g) Alleged erroneous rejection of the likelihood of civilian deaths by crossfire

753. The Defence submits that the Trial Chamber erred in rejecting the likelihood of civilian deaths by crossfire during the attacks on Odek and Lukodi IDP camps.[1583] In relation to the attack on Odek IDP camp, the Trial Chamber noted the arguments raised by the Defence and explained its understanding of the meaning of "killing of civilians in crossfire".[1584] In its view, this means "the death of civilians in an exchange of gunfire between government soldiers and LRA fighters in which it is not possible to ascertain which party actually shot the victim".[1585]

754. The Trial Chamber considered the evidence of the four witnesses referred to by the Defence (P-0372, P-0309, P-0085 and P-0233).[1586] With respect to the evidence of P-0372 that some civilians were "caught in the fire",[1587] the Trial Chamber considered that it was "clear that the witness was speaking of what could happen in a general manner and in so far as he speaks specifically, the witness indicates that he was stating that civilians were not specifically targeted and not speaking of death by crossfire as the Chamber understands it".[1588] The Trial Chamber also noted "that P-0372 does not testify to actually seeing a civilian struck by crossfire" and "does not indicate that such a 'stray' bullet would have come from being fired by government soldiers".[1589]

755. The Appeals Chamber notes that the Defence does not raise any specific argument challenging the above assessment of P-0372's evidence by the Trial Chamber.

[1582] Conviction Decision, para. 1407.
[1583] Appeal Brief, para. 720.
[1584] Conviction Decision, para. 1476.
[1585] Conviction Decision, para. 1476.
[1586] Appeal Brief, para. 720.
[1587] P-0372: T-148, p. 46, line 22 to p.47, line 1 ("that was by accident, they were not targeted. You know, when there is exchange of gunfire and you are trying to flee, you can be a victim of a stray bullet.").
[1588] Conviction Decision, para. 1478.
[1589] Conviction Decision, para. 1478.

756. With respect to P-0309, a Sinia fighter, the Trial Chamber noted that he "testified that his group found soldiers amongst the civilians and so they started shooting at the soldiers" and "the soldiers also shot back and fled".[1590] The Trial Chamber observed that "[i]n P-0309's view he did not see anyone shooting directly at civilians, rather the LRA fighters shot their 'guns, aiming at the soldiers who were mixed up with the civilians'".[1591] Furthermore, the Trial Chamber noted "that he saw five of these civilians who were mixed up with the soldiers who were being shot by the LRA", indicating "that he did not know whether the civilians were alive or dead, but he 'can confirm that they were wounded'".[1592] According to the Trial Chamber, "[th]is is further evidence that the LRA fighters failed to distinguish between civilians and soldiers".[1593]

757. Contrary to the Defence's argument,[1594] it is clear from the testimony of P-0309, relied upon by the Trial Chamber, that the witness did not testify that the five civilians were killed in the crossfire between the LRA soldiers and the government forces. Rather, P-0309 testified that the civilians that were mixed up with the government forces were killed by the LRA soldiers. The Defence does not identify any error in the Trial Chamber's finding that "[i]n all the evidence heard by the Chamber, not one witness testified of a specific incident where a civilian was shot by government soldiers or of a civilian actually killed in alleged crossfire".[1595]

758. As to P-0085, who had been told by Mr Ongwen "that the civilians shot in Odek IDP camp were killed in the crossfire", the Trial Chamber noted that given that "neither [Mr] Ongwen nor P-0085 were present at the Odek IDP camp attack", their conversation "is not reliable evidence of what actually occurred in the camp".[1596] The Trial Chamber further recalled "its findings that [Mr] Ongwen ordered armed LRA fighters to attack Odek IDP camp and to target everyone they find at Odek IDP camp, including civilians".[1597]

[1590] Conviction Decision, para. 1482.
[1591] Conviction Decision, para. 1482.
[1592] Conviction Decision, para. 1482.
[1593] Conviction Decision, para. 1482.
[1594] Appeal Brief, para. 720.
[1595] Conviction Decision, para. 1492.
[1596] Conviction Decision, para. 1484.
[1597] Conviction Decision, para. 1484.

759. In relation to P-0233, the Trial Chamber noted that he "did not participate in the attack on Odek IDP camp" but "was told that the LRA went to attack Odek".[1598] The Trial Chamber found that P-0233's comments that "the bullets cannot bypass the civilians" and that "in Odek, civilians will be killed" "were general in nature and not tied to anything he stated he was told about the Odek attack".[1599] On this basis, the Trial Chamber did "not put weight on his testimony".[1600]

760. The Defence does not raise any specific argument challenging the above assessments by the Trial Chamber of the evidence elicited from P-0085 and P-0233. Finally, the Trial Chamber's finding that during the attack on the Odek IDP camp, "LRA fighters fired their weapons at civilians" and "[a]t least 52 civilians died as a result of the injuries sustained in the camp or in the course of the retreat, while at least ten were the victims of attempted killings"[1601] is supported by a wealth of evidence,[1602] to which the Defence makes no reference in its submissions. In these circumstances, the Defence's arguments are rejected.

761. As to the attack on the Lukodi IDP camp, the Defence submits that based on the evidence of P-0142, P-0205, P-0172, D-0072 and P-0101, it was possible that civilian deaths were caused by crossfire.[1603] In addressing the Defence's argument that persons were killed in crossfire, the Trial Chamber noted that "there is no evidence of persons killed in crossfire".[1604] Rather, the Trial Chamber held that "the evidence shows that 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".[1605] It found in this regard that "it is theoretically possible that civilians could die caught in that exchange, but based on the evidence before the Chamber this is no more than theoretical speculation".[1606]

[1598] Conviction Decision, para. 1485.
[1599] Conviction Decision, para. 1485.
[1600] Conviction Decision, para. 1485.
[1601] Conviction Decision, p. 517.
[1602] Conviction Decision, paras 1494-1550.
[1603] Appeal Brief, para. 721.
[1604] Conviction Decision, para. 1733.
[1605] Conviction Decision, para. 1733.
[1606] Conviction Decision, para. 1733.

762. The Trial Chamber also considered the evidence of P-0142,[1607] P-0172,[1608] P-0205[1609] and D-0072.[1610] The Trial Chamber found "that both P-0205 and Okello Michael Tookwaro testified about the presence of a mamba [a semi-automatic pistol], which fired on the LRA fighters" but that P-0205 "states that the mamba arrived when the LRA fighters had crossed the Unyama River, some distance from the camp".[1611] It held in this regard, that "his evidence does not support the contention that the mamba fired in the camp and could have been responsible for the deaths of civilians within the camp".[1612] In addition, the Trial Chamber found that P-0205 "did not see any civilians killed in the course of the attack" and recalled that D-0072's "testimony regarding what happened during the Lukodi attack is unreliable".[1613]

763. The Trial Chamber noted that the testimony provided by P-0205, P-0172 and P-0142 "is purely speculative".[1614] Furthermore, it found that "[n]one of these witnesses testified to seeing any civilian die in the attack" and that "[i]nstead, many other witnesses offered credible, eyewitness accounts of what happened in Lukodi IDP camp and none of them testified to seeing a government soldier kill a camp resident, or described circumstances that would establish death in crossfire as a reasonable possibility".[1615]

[1607] Conviction Decision, para. 1734 (P-0142 "did not go into the camp and claimed to not have personally witnessed anything that occurred in the camp or any civilian killed" and "when asked how the civilians died in the camp, he testified that it would be 'really difficult' for him to say exactly how the civilians died but thought they could have died in the crossfire between the LRA soldiers and government soldiers who fled and went into the civilian area.").
[1608] Conviction Decision, para. 1735 (P-0172, an LRA fighter "also did not go to the attack" but "testified that the LRA fighters who returned from the camp told him that it was a 'fierce battle, because they found the soldiers who were guarding the civilians, you needed to first attack the soldiers before reaching the civilians, and the soldiers also had civilians in the crossfire" and that "he was told that government soldiers ran away from the battlefront, went behind civilians and started shooting their guns from behind civilians and the civilians were caught in the middle.").
[1609] Conviction Decision, para. 1736 (P-0205, one of Mr Ongwen's Sinia fighters, "testified that it was possible that during the crossfire, some civilians died, but he did not see any deaths personally.").
[1610] Conviction Decision, para. 1736 (D-0072, an LDU soldier, "also raised the possibility of civilian deaths by crossfire or from government soldiers.").
[1611] Conviction Decision, para. 1736.
[1612] Conviction Decision, para. 1736.
[1613] Conviction Decision, para. 1736.
[1614] Conviction Decision, para. 1737.
[1615] Conviction Decision, para. 1737.

764. As the Prosecutor noted,[1616] besides its broad submission that the Trial Chamber "fails to acknowledge the reasonable doubt raised" by the evidence it relied upon,[1617] the Defence does not raise any specific argument challenging the above assessments by the Trial Chamber. Furthermore, the Defence does not explain the relevance of the evidence of P-0205 and P-0101 concerning whether LRA fighters reported the attack on the Lukodi IDP camp to Mr Ongwen,[1618] and how this evidence relates to the issue of whether civilians were killed during crossfire between LRA and government forces at the Lukodi IDP camp.

765. The Trial Chamber found that during the attack on the Lukodi IDP camp "LRA fighters killed civilians in Lukodi IDP camp: men, women and children", "[a]t least 48 civilians died as a result of injuries sustained in the attack" and that "[c]ivilians were shot, burnt and beaten to death".[1619] The Appeals Chamber notes that these findings are supported by the testimony of several witnesses and other relevant evidence,[1620] to which the Defence makes no reference in its submissions. In these circumstances, the Defence's arguments are rejected.

766. Concerning the attack on the Abok IDP camp, the Defence submits that "despite no testimony detailing this specific instruction", the Trial Chamber reached the conclusion that Mr Ongwen's instruction "logically included targeting civilians".[1621] The Appeals Chamber notes that the Trial Chamber's conclusion, challenged by the

[1616] Prosecutor's Response, para. 399.
[1617] Appeal Brief, para. 721.
[1618] Appeal Brief, para. 721.
[1619] Conviction Decision, p. 617.
[1620] Conviction Decision, paras 1747-1779.
[1621] Appeal Brief, para. 722.

Defence, was reached after considering the evidence of several witnesses, including P-0406,[1622] P-0205,[1623] P-0054,[1624] P-0252[1625] and P-0330.[1626]

767. Based on the content of their testimony, the Trial Chamber did "not find that the witnesses' evidence is inconsistent".[1627] Rather, the Trial Chamber found that "[t]he witnesses expressed their recollection in their own terms, describing or emphasising their particular perspective in line with their particular role or location".[1628] It considered "that the evidence before it justifies and necessitates its finding that [Mr] Ongwen ordered the attack on Abok IDP camp, giving instructions that his fighters attack the camp, collect food, abduct people, attack the barracks and burn down the camp and barracks" and that "[b]ased on the terms of this order as established on the basis of the evidence, […] it logically included targeting civilians".[1629]

768. Considering the content of the witnesses' evidence and the Trial Chamber's assessment thereof, the Appeals Chamber does not find that the Trial Chamber's determination that "[b]ased on the terms of this order […], it logically included targeting civilians"[1630] was unreasonable. The Defence fails to identify an error in this regard and its submissions are therefore rejected.

[1622] Conviction Decision, para. 1865 (P-0406 is a Sinia fighter who testified that "he was present when [Mr] Ongwen issued the orders for the Abok IDP camp attack" and that "[Mr] Ongwen told the attackers to go and collect food, abduct people, attack the barracks and burn down the camp and the barracks").
[1623] Conviction Decision, para. 1866 (P-0205 "testified that [Mr] Ongwen told him that he had sent people to Abok and that they went and attacked").
[1624] Conviction Decision, para. 1867 (While P-0054 "did not actually see [Mr] Ongwen select the fighters going to Abok, he participated in the attack and testified that while Sinia was based under Atoo hills, [Mr] Ongwen selected people and instructed them to go to Abok", indicating "that the instruction passed down to the soldiers was to 'go and work at Abok'" and clarifying "that what he understood by the term 'work' was fighting and collecting food". The witness also testified that "he knows this because his commander was present when the selection took place. The Chamber finds that the witness's explanation of how he obtained the hearsay evidence is plausible and convincing").
[1625] Conviction Decision, para. 1868 (P-0252 "stated that the soldiers selected to go to Abok were selected from amongst the soldiers who were under Atoo hills, and that [Mr] Ongwen would be the person to issue the orders to attack Abok" and "that [Mr] Ongwen would issue orders to his subordinates and those orders would be communicated to the attackers", having been this way "how the orders were communicated for the attack on Abok IDP camp").
[1626] Conviction Decision, para. 1869 (P-0330 "did not hear the orders but testified that there was no overall commander other than 'Odomi' and 'Odomi' had all the authority and 'Odomi' was the overall commander who ordered the attack on Abok").
[1627] Conviction Decision, para. 1870.
[1628] Conviction Decision, para. 1870.
[1629] Conviction Decision, para. 1870.
[1630] Conviction Decision, para. 1870.

(h) Conclusion

769. In light of the above considerations, grounds of appeal 60 and 70 are rejected.

(ii) Grounds of appeal 74 (in part), 75 (in part) and 76 (in part): Alleged errors regarding the Trial Chamber's findings on the attack on Pajule IDP camp

770. The Appeals Chamber recalls that Mr Ongwen was convicted, on 8 counts, as an indirect co-perpetrator in relation to the attack on the Pajule IDP camp: (i) attack against the civilian population as such as a war crime pursuant to article 8(2)(e)(i) of the Statute (count 1); (ii) murder as a crime against humanity, pursuant to article 7(1)(a) of the Statute (count 2); (iii) murder as a war crime, pursuant to article 8(2)(c)(i) of the Statute (count 3); (iv) torture as a crime against humanity, pursuant to article 7(1)(f) of the Statute (count 4); (v) torture as a war crime, pursuant to article 8(2)(c)(i) of the Statute (count 5); (vi) enslavement as a crime against humanity, pursuant to article 7(1)(c) of the Statute (count 8); (vii) pillaging as a war crime, pursuant to article 8(2)(e)(v) of the Statute (count 9); and (viii) persecution as a crime against humanity, pursuant to article 7(1)(h) of the Statute (count 10).[1631]

771. At the outset, the Appeals Chamber recalls that the Defence's arguments regarding an alleged violation of Mr Ongwen's right under article 67(1)(a) of the Statute[1632] have been addressed and, for the reasons set out in that ground, rejected on their merits under ground of appeal 5.[1633] Therefore, these arguments will not be considered further in this section. Similarly, the Defence's argument concerning an alleged inconsistency between Mr Ongwen's conviction for crimes committed in the context of the attack on the Pajule IDP camp and the Trial Chamber's findings on the structure of the LRA,[1634] and its submission that the Trial Chamber failed to enter findings on the contributions of the co-perpetrators,[1635] have been addressed and rejected when determining ground of appeal 65.[1636] The same applies to the Defence's

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[1631] Conviction Decision, para. 2874.
[1632] Appeal Brief, para. 828.
[1633] *See* section VI.B.4 (Ground of appeal 5: Alleged error in proceeding to trial and in entering a conviction on the basis of a defective Confirmation Decision, in violation of the right to notice under article 67(1)(a) of the Statute) above.
[1634] Appeal Brief, paras 803-806.
[1635] Appeal Brief, para. 808.
[1636] *See* sections VI.D.1(c)(iii)(a) (Alleged inconsistency in the Trial Chamber's finding about the LRA structure) and VI.D.1(c)(iii)(b) (Mr Ongwen's control over the crimes) above.

argument that the Trial Chamber failed to analyse and establish the *mens rea* of the physical perpetrators,[1637] which was also addressed and rejected in ground of appeal 65.[1638] In addition, the Appeals Chamber has already considered the argument that Mr Ongwen "functioned as a tool of Kony from his abduction, initiation, indoctrination and subjection to the mentally constraining LRA structure from the age of nine to the age of adolescence".[1639] This argument was addressed and rejected when determining grounds of appeal 68 and 28 (in part).[1640]

772. Apart from these arguments, the Defence's core argument under grounds of appeal 74 to 76 is that the Trial Chamber erred in holding Mr Ongwen criminally responsible as an indirect co-perpetrator for crimes committed during the attack on Pajule IDP camp. In support of its position, the Defence submits that the Trial Chamber erred in its findings on: (i) Mr Ongwen and his group of fighters joining Vincent Otti days before the attack on Pajule IDP camp;[1641] and (ii) the *mens rea*.[1642]

773. The Appeals Chamber will address these arguments in turn.

(a) Alleged erroneous finding that Mr Ongwen and his fighters joined Vincent Otti before the attack

774. The Defence challenges the Trial Chamber's finding that "[s]everal days before the attack on Pajule IDP camp, Vincent Otti summoned a number of LRA units to join him. Around that time, [Mr] Ongwen and his group of fighters joined Vincent Otti".[1643] The Trial Chamber relied on this finding when determining that "the attack on Pajule took place pursuant to an agreement involving [Mr] Ongwen, Vincent Otti, Raska Lukwiya, Okot Odhiambo and other LRA commanders".[1644]

[1637] Appeal Brief, para. 827.
[1638] *See* section VI.D.1(c)(iii)(d) (Absence of findings establishing the mens rea of the physical perpetrators) above.
[1639] Appeal Brief, para. 807.
[1640] *See* section VI.D.1(c)(iv) (Grounds of appeal 68 and 28 (in part): Alleged errors regarding evidence of Mr Ongwen's abduction, initiation, training, and service in the LRA) above.
[1641] Appeal Brief, paras 811-824.
[1642] Appeal Brief, paras 825-827.
[1643] Appeal Brief, paras 811-820; Conviction Decision, p. 401.
[1644] Conviction Decision, para. 2851.

775. The Defence argues that "other available inferences" were "reasonable and open" to the Trial Chamber.[1645] In this regard, the Defence refers to the possibility that Vincent Otti indicated that Mr Ongwen was with him in the days preceding the attack on Pajule IDP camp given Joseph Kony's interest in arresting and detaining Mr Ongwen.[1646] According to the Defence, Mr Ongwen was in sickbay and detained in Control Altar at the relevant time.[1647]

776. The Trial Chamber found that Mr Ongwen joined Vincent Otti with his troops, meaning that Mr Onwgen "was not moving with Vincent Otti's unit as an individual, but had a Sinia unit under him"[1648] several days before the attack on the Pajule IDP camp,[1649] on the basis of a wealth of evidence, including the evidence of several witnesses, namely D-0032,[1650] P-0070,[1651] P-0209,[1652] P-0144,[1653] P-0045,[1654] P-

[1645] Appeal Brief, para. 813.
[1646] Appeal Brief, para. 812.
[1647] Appeal Brief, paras 813-815.
[1648] Conviction Decision, para. 1185.
[1649] Conviction Decision, para. 145.
[1650] Conviction Decision, para. 1179 ("D-0032 was asked by the Presiding Judge if the name of [Mr] Ongwen was mentioned among the people being summoned by Vincent Otti, and testified that '[l]ater on', when Vincent Otti was mentioning the names, Joseph Kony asked about [Mr] Ongwen, and Vincent Otti responded that [Mr] Ongwen was also with him. D-0032's evidence indicates that Vincent Otti reported [Mr] Ongwen's presence 'when he was referring to the commanders who had joined him', and therefore that this was before the attack itself.").
[1651] Conviction Decision, para. 1181 ("P0070 testified that at the time of the Pajule attack Sinia brigade was 'moving together' with Control Altar and that this explained his prior testimony to the effect that [Mr] Ongwen was in Control Altar at the time.").
[1652] Conviction Decision, para. 1181 ("P-0209 also testified that [Mr] Ongwen was with Vincent Otti in Control Altar at the time".).
[1653] Conviction Decision, para. 1181 ("P-0144 and P-0045 testified that at the time of the attack on Pajule IDP camp [Mr] Ongwen was 'in Control Altar at the headquarters'.").
[1654] Conviction Decision, para. 1181 ("P-0144 and P-0045 testified that at the time of the attack on Pajule IDP camp [Mr] Ongwen was 'in Control Altar at the headquarters'.").

0209,[1655] P-0144,[1656] P-0309,[1657] P-0330,[1658] P-0101,[1659] and P-0379,[1660] and six logbook entries.[1661] The Trial Chamber provided a detailed analysis of the relevant evidence.[1662] In these circumstances, the Appeals Chamber finds no merit in the Defence's broad argument that the Trial Chamber "provided no reasoned opinion" in

[1655] Conviction Decision, para. 1182 ("The Chamber notes that P-0209 did not know why [Mr] Ongwen was in Control Altar and stated that it is possible to go there as a prisoner or to be transferred. Asked by the Presiding Judge about whether it was possible to determine which possibility was the correct one, P-0209 observed that he saw that [Mr] Ongwen was not 'being mistreated or taken badly'.").
[1656] Conviction Decision, para. 1182 ("Very similarly, P-0144 mentioned tentatively that 'it was a kind of detention or an imprisonment', but immediately added that he did not understand the reasons for this arrangement. Later in the discussion, however, P-0144 reasoned that he thought that at the time of the Pajule attack [Mr] Ongwen was no longer in detention.").
[1657] Conviction Decision, para. 1185 ("Sinia members P-0309 and P-0330 as well as [Mr] Ongwen's so-called 'wife' P-0101 testified to being present with [Mr] Ongwen and his group at the time of the attack on Pajule IDP camp. P-0309 in particular named several individuals who went for the attack on Pajule IDP camp, who are otherwise well attested in the evidence as [Mr] Ongwen's subordinates in Sinia.").
[1658] Conviction Decision, para. 1185 ("Sinia members P-0309 and P-0330 as well as [Mr] Ongwen's so-called 'wife' P-0101 testified to being present with [Mr] Ongwen and his group at the time of the attack on Pajule IDP camp. […] P-0330 also named individual Sinia members who participated in the attack.").
[1659] Conviction Decision, para. 1185 ("Sinia members P-0309 and P-0330 as well as [Mr] Ongwen's so-called 'wife' P-0101 testified to being present with [Mr] Ongwen and his group at the time of the attack on Pajule IDP camp.").
[1660] Conviction Decision, para. 1186 ("the Chamber notes the testimony of P-0379 who had previously been abducted by the LRA, was in captivity for eight months in Sinia's Oka battalion, and had escaped and returned to Pajule IDP camp around August 2003. During the attack on 10 October 2003, while trying to hide from the LRA, he saw an LRA fighter whom he recognised as Okello Tango, a member of Oka Battalion whom P-0379 had known while still in the bush. The Chamber recalls its finding that at the time of the Pajule IDP camp attack, [Mr] Ongwen was commander of Oka battalion. The presence of an Oka battalion fighter in the camp corroborates the evidence that [Mr] Ongwen's subordinates were present in the course of the Pajule IDP camp attack.").
[1661] Conviction Decision, paras 1180 ("there is evidence indicating that [Mr] Ongwen had joined Vincent Otti and was moving with him from sometime after 20 September 2003, when an ISO logbook recorded Vincent Otti as summoning a number of LRA commanders to join him, including Bogi and [Mr] Ongwen. That [Mr] Ongwen was moving with or in close proximity of Vincent Otti is also corroborated by a 30 September 2003 entry in the same logbook, indicating that Joseph Kony issued an order for the LRA to move to Teso, with the exception of the groups of Vincent Otti and Opiro Livingstone, and specifically adding that 'Dominic should remain behind with Otti b[ecau]se he has good plans which can help Otti'."), 1187 ("A Soroti UPDF logbook records an intercepted communication on 5 October 2003 between 13:00 and 14:00, wherein Vincent Otti informed Joseph Kony that he has joined with 'Abudema's grps', while Okot Odhiambo, Ayoli, [Mr] Ongwen and Michael reported to Charles Tabuley that they had reached the RV with Vincent Otti. At 16:00, the same logbook noted: 'While Otii V., Michael, Odyambo/Angola, Abudema and Dominic they are in the same RV together but they have camped separately with some distance among them'."), 1888 ("On 7 October 2003 between 8:00 and 9:00, according to the Soroti UPDF logbook, Vincent Otti informed Joseph Kony that he had divided the commanders, and that Angola was moving with 'Bogi Coach', [Mr] Ongwen was moving with him (*i.e.* Vincent Otti), and that Buk Abudema had separated from him and left for Teso following Charles Tabuley, who was 'combined with' Ocan Bunia. On the same day at 11:00, the logbook records Joseph Kony asking Vincent Otti whether 'Mama Dominic' was accompanying him, and Vincent Otti responding that 'Mama Dominic' was with him and that he (Vincent Otti) was moving together with [Mr] Ongwen, Raska Lukwiya and Caesar Acellam.").
[1662] Conviction Decision, paras 1178-1188.

finding that Mr Ongwen was in Control Altar with Vincent Otti "as a commander of his unit with soldiers and not as an individual".[1663]

777. As to the Defence's suggestion that Mr Ongwen was in sickbay and detained in Control Altar at the relevant time,[1664] the Appeals Chamber notes that the Trial Chamber found that the attack on Pajule IDP camp took place on 10 October 2003.[1665] The Trial Chamber addressed the issue of timing and similar arguments raised by the Defence as follows:

> 1182. […] Contrary to the Defence submission, P-0045's evidence on the reason why [Mr] Ongwen was in Control Altar was entirely hypothetical, and she did not testify that [Mr] Ongwen was in LRA prison at the time. In any case, the Chamber refers to its conclusions above that the brief arrest of [Mr] Ongwen by Vincent Otti took place in April 2003 and that it did not affect [Mr] Ongwen's position and authority in the organisation for any significant period of time.
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> 1183. The Chamber also refers to its analysis above in relation to the argument of the Defence that at the time of the attack on Pajule IDP camp [Mr] Ongwen was injured and in sickbay. In particular, the Chamber recalls its finding that at least from December 2002, *i.e.* nine months before the attack on Pajule IDP camp, [Mr] Ongwen exercised his authority as commander. This is entirely compatible with the evidence that in 2003, including at the time of the Pajule attack, [Mr] Ongwen still suffered from some physical limitations as a result of the injury.[1666]

778. It is clear from the above that the fact that Mr Ongwen was in sickbay as a result of an injury sustained during combat and that he was arrested by Vincent Otti is uncontentious. According to the Defence, though, the Trial Chamber "minimised" the effect these incidents had on Mr Ongwen's ability to command his troops and lead them in active operational combat.[1667] The Defence does not, however, specify which "evidence of Prosecution witnesses that favoured [Mr Ongwen] or raised reasonable doubt" was disregarded.[1668]

779. Furthermore, the Appeals Chamber notes that, in relation to the attack on Pajule IDP camp, the Trial Chamber found that: (i) "[Mr] Ongwen and his group of fighters

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[1663] Appeal Brief, para. 820. *See also* para. 819.
[1664] Appeal Brief, paras 812-815, 821-824; T-265, p. 68, lines 10-25.
[1665] Conviction Decision, para. 144.
[1666] Conviction Decision, paras 1182-1183 (footnotes omitted).
[1667] Appeal Brief, para. 822.
[1668] Appeal Brief, para. 822.

joined Vincent Otti" several days before the attack;[1669] (ii) Mr Ongwen participated in a meeting that took place the day before the attack between LRA commanders;[1670] (iii) the day of the attack Mr Ongwen "led a group of attackers to fight at the barracks, before directing them to attack the trading centre within the camp";[1671] and (iv) "[d]uring the attack, LRA attackers, some of them led by [Mr] Ongwen, broke into homes and shops and looted food and other property from them" and Mr Ongwen "personally ordered LRA attackers to loot within the trading centre, ordering them to loot items from shops and homes within the camp".[1672] The Appeals Chamber observes that each of these factual findings was reached on the basis of a detailed evidentiary assessment by the Trial Chamber[1673] and that the Defence does not appear to take issue with any particular aspect thereof.

780. Elsewhere, the Trial Chamber addressed whether the amount of time spent by Mr Ongwen in sickbay and in detention impacted the exercise of his authority. It found in this regard that

> In October or November 2002 [Mr] Ongwen was injured and placed in sickbay until around mid-2003. From at least December 2002 onwards, he again exercised his authority as battalion commander. In April 2003, [Mr] Ongwen was briefly arrested by Vincent Otti. The arrest did not interrupt the exercise of his authority for any significant period.[1674]

781. The above finding was based on a large volume of evidence, assessed in detail by the Trial Chamber.[1675] The Trial Chamber found that Mr Ongwen participated in person in the planning and execution of the attack on the Pajule IDP camp, and that the time spent in sickbay and in detention was prior to the attack on Pajule IDP camp. In any event, the Trial Chamber found that this period of time did not interrupt the exercise of his authority for any significant length. As such, in the absence of any specific challenge to these findings or to the reasoning in support thereof, the Appeals Chamber rejects

[1669] Conviction Decision, para. 145.
[1670] Conviction Decision, para. 146.
[1671] Conviction Decision, para. 149.
[1672] Conviction Decision, para. 150.
[1673] Conviction Decision, paras 1176-1203, 1264-1300.
[1674] Conviction Decision, para. 135.
[1675] *See* Conviction Decision, paras 1017-1070.

the Defence's proposition that Mr Ongwen was in sickbay and detained in Control Altar at the relevant time.[1676]

782. Furthermore, the above conclusion is unaffected by the remaining arguments raised by the Defence. While it is correct that the Trial Chamber found that part of the Oka battalion remained with Mr Ongwen during his time in sickbay,[1677] given the immateriality of this circumstance to Mr Ongwen's participation in the attack on the Pajule IDP camp, the Appeals Chamber finds that the Defence's submissions are misplaced. The same applies to the Defence's observation that "a larger contingent were under the command of another commander", an assertion that is supported by a footnote entirely unrelated to the submission.[1678] The Defence also fails to identify the relevance, if any, of its submission that "[n]o reasonable trier of fact would have found that the reason [Mr Ongwen] was in Control Altar was not clear".[1679] Although the Trial Chamber noted that the reason for Mr Ongwen's assignment to Control Altar for a period of time in mid-2003 was not clear, it found that "the evidence does not indicate that it meant that [Mr] Ongwen was deprived of his authority as LRA commander".[1680]

783. The Appeals Chamber turns now to the Defence's more specific challenges to the Trial Chamber's evidentiary assessment supporting its conclusion that Mr Ongwen joined Vincent Otti with his fighters group as a commander, and not as an individual.[1681]

784. By reference to the evidence of P-0330, the Defence argues that the Trial Chamber erred in relying on the presence of one Sinia brigade soldier during the attack to establish that Mr Ongwen participated in it as a commander of his group.[1682] The Trial Chamber considered the testimony of P-0330, a former Sinia member, who was present with Mr Ongwen at the time of the attack on Pajule IDP camp, and who named individual Sinia members that participated in the attack.[1683] The Appeals Chamber notes that the testimony of P-0330 is consistent with the other evidence relied upon by

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[1676] Appeal Brief, paras 812-815, 821-824.
[1677] Appeal Brief, para. 813, *referring to* Conviction Decision, para. 1034.
[1678] Appeal Brief, para. 813, fn. 1056.
[1679] Appeal Brief, para. 823.
[1680] Conviction Decision, para. 1065.
[1681] Appeal Brief, paras 816-820.
[1682] Appeal Brief, paras 813, 816.
[1683] Conviction Decision, para. 1185.

the Trial Chamber to determine that Mr Ongwen joined Vincent Otti with his troops, and not as an individual.[1684]

785. Furthermore, the Trial Chamber found that the execution of the material elements of the crimes committed in the context of the attack on the Pajule IDP camp occurred through Sinia members and that Mr Ongwen retained control over the crimes. As the Prosecutor correctly indicated,[1685] these findings were reached on the basis of a wealth of evidence.[1686] In these circumstances, and due to the vague and broad nature of the Defence's submissions, this argument is rejected.

786. Furthermore, the Defence challenges the Trial Chamber's interpretation of the evidence of D-0032,[1687] who "testified that he overheard some messages in relation to the attack on Pajule IDP camp on the LRA radio communication system", and that "when Vincent Otti was mentioning the names [of the people being summoned by him], Joseph Kony asked about [Mr] Ongwen, and Vincent Otti responded that [Mr] Ongwen was also with him".[1688] According to the Trial Chamber, "D-0032's evidence indicates that Vincent Otti reported [Mr] Ongwen's presence 'when he was referring to the commanders who had joined him', and therefore that this was before the attack itself".[1689]

787. In light of the Trial Chamber's reasoning above, as well as the evidence relied upon to find that Mr Ongwen and his group of fighters joined Vincent Otti several days before the attack on Pajule IDP camp, the Appeals Chamber finds no merit in the Defence's unsubstantiated submission that the evidence of D-0032 was erroneously assessed by the Trial Chamber.[1690]

788. The Defence further avers that the Trial Chamber's conclusion that Mr Ongwen joined Vincent Otti as a commander, and not as an individual, "is contradicted by the logbook information which recorded Vincent Otti informing Kony that Buk Abudema"

[1684] Conviction Decision, paras 1185-1188.
[1685] Prosecutor's Response, para. 495.
[1686] Conviction Decision, paras 2855-2864. *See also* paras 1185-1188 directly addressing the question of whether Mr Ongwen joined Vincent Otti as an individual or with a Sinia unit under him.
[1687] Appeal Brief, para. 817.
[1688] Conviction Decision, paras 1178-1179.
[1689] Conviction Decision, para. 1179.
[1690] Appeal Brief, para. 817.

had joined him and other commanders on the ground.[1691] In its evidentiary assessment, the Trial Chamber considered the logbook evidence referred to by the Defence to conclude that several days before the attack on Pajule IDP camp, Vincent Otti summoned LRA units to join him and, around that time, Mr Ongwen and his group joined Vincent Otti.[1692]

789. Contrary to the Defence's argument, it is clear from its content that there is no contradiction between the logbook entry and the Trial Chamber's finding. In these circumstances, the Defence's submission that the Sinia fighters in Pajule "may have been deployed by Abudema and not by [Mr Ongwen]",[1693] finds no basis in the evidentiary record and is, as such, speculative. Furthermore, as the Prosecutor noted,[1694] even assuming that Abudema participated in the attack, this would not automatically exclude Mr Ongwen's individual criminal responsibility for crimes committed in the course of it.

790. Finally, the Defence contends that the evidence of P-0209 and P-0144 demonstrates that Mr Ongwen was in Control Altar days before the attack on Pajule IDP camp.[1695] The Appeals Chamber notes that the fact that Mr Ongwen was in Control Altar with Vincent Otti several days prior to the attack on Pajule IDP camp is uncontested.[1696] However, while the Defence seems to contest the reason for Mr Ongwen's presence there, its submissions on this point are unclear. Having rejected the Defence's challenge to the Trial Chamber's finding that Mr Ongwen's time in sickbay and in detention in Control Altar did not interrupt the exercise of his authority for any significant period of time, the Appeals Chamber rejects this argument by the Defence as well.[1697]

[1691] Appeal Brief, para. 818.
[1692] Conviction Decision, para. 1187 (a Soroti UPDF logbook that "records an intercepted communication on 5 October 2003 between 13:00 and 14:00, wherein Vincent Otti informed Joseph Kony that he has joined with 'Abudema's grps', while Okot Odhiambo, Ayoli, [Mr] Ongwen and Michael reported to Charles Tabuley that they had reached the RV with Vincent Otti", and which also notes that "[w]hile Otii V., Michael, Odyambo/Angola, Abudema and Dominic they are in the same RV together but they have camped separately with some distance among them").
[1693] Appeal Brief, para. 819.
[1694] Prosecutor's Response, para. 495.
[1695] Appeal Brief, para. 820.
[1696] Conviction Decision, paras 1181-1182.
[1697] Appeal Brief, para. 820.

(b) Alleged erroneous finding on the *mens rea*

791. The Defence further seeks to impugn the Trial Chamber's finding on Mr Ongwen's *mens rea*.[1698] Although its submissions are not entirely clear, the Appeals Chamber understands the Defence to raise two core arguments: (i) the Trial Chamber erred by not finding "it necessary to analyse and make separate findings on the *mens rea* of each of the crimes";[1699] and (ii) the Trial Chamber failed to analyse and establish the *mens rea* of the physical perpetrators.[1700]

792. In relation to the first argument, the Appeals Chamber notes that, contrary to the Defence's submissions, the Trial Chamber assessed Mr Ongwen's *mens rea* underlying the crimes committed in the context of the attack on the Pajule IDP camp. The Trial Chamber found that Mr Ongwen meant for (i) civilians to be attacked; (ii) civilians to be abducted and forced to carry away looted goods; and (iii) food items and other property to be looted.[1701] It reached this conclusion after considering:

> that [Mr] Ongwen took part in the attack on Pajule IDP attack on the ground after having participated in a prior meeting with Vincent Otti, Raska Lukwiya, Okot Odhiambo, and after being present on location where the LRA soldiers were selected for the attack, briefed about the attack and instructed to attack the UPDF at the barracks, as well as civilian areas of the camp in order to loot radio equipment, food and other items, and also told to abduct civilians. He led a group of attackers to attack the trading centre within the camp and ordered them to pillage food items and supplies from shops and homes within the camp. He also ordered a subordinate to abduct civilians. He led a group of abductees and ordered abductees to carry looted goods and instructed them not to drop items. After the fighters returned from the camp, some abductees were distributed among [Mr] Ongwen's group.[1702]

793. Furthermore, in order to conclude that Mr Ongwen "meant for civilian residents of Pajule IDP camp to be severely deprived of their rights by reason of their identity as perceived as associated with the Government of Uganda", the Trial Chamber noted:

> that the LRA perceived the civilians living in Northern Uganda, in particular those who lived in government-established IDP camps in Northern Uganda as associated with the Government of Uganda, and thus as the enemy. LRA commanders routinely declared that civilians were failing to support the LRA in

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[1698] Appeal Brief, paras 825-827.
[1699] Appeal Brief, para. 826.
[1700] Appeal Brief, para. 827.
[1701] Conviction Decision, para. 2867.
[1702] Conviction Decision, para. 2866 (footnotes omitted). *See also* Prosecutor's Response, para. 497.

> its effort against the government and should be killed by the LRA. [Mr] Ongwen knew that the LRA perceived, and also himself perceived, the civilians living in Northern Uganda as associated with the Government of Uganda – and thus as the enemy.[1703]

794. Moreover, the Trial Chamber found that Mr Ongwen "was aware that the execution of the attack on Pajule IDP camp as planned and with the instructions that were given to LRA fighters, would lead to, in the ordinary course of events, (i) the killings of civilians; and (ii) forcing abducted civilians to carry heavy loads for long distances, beatings of civilians, and threats of beatings or death".[1704] In this regard, the Trial Chamber considered that:

> as an LRA commander, [Mr] Ongwen was necessarily aware of the features of the organisation, including that recruits were not taught, as part of their training which included training in military discipline, to distinguish between civilians and combatants, or between civilian objects and military objectives. He was also aware, at the time of the attack on Pajule IDP camp, that the LRA in Northern Uganda had already killed, injured and enslaved a large number of civilians in numerous attacks on individual civilians, IDP camps and other civilian locations.[1705]

795. The Trial Chamber further assessed the evidence related to the additional mental elements imposed for some of the crimes.[1706] In these circumstances, the Appeals Chamber finds no merit in the Defence's suggestion that the Trial Chamber did not "make separate findings on the *mens rea* element of each of the crimes".[1707]

796. In relation to the second argument, the Appeals Chamber notes that the Defence's reference to the mental elements required for the responsibility of superiors is inapposite given that Mr Ongwen was charged and convicted for the crimes committed during the attack on the Pajule IDP camp as an indirect co-perpetrator. This argument is therefore dismissed

(c) Conclusion

797. Having rejected each of the remainder of the arguments raised by the Defence under grounds of appeal 74, 75 and 76, these grounds are rejected.

[1703] Conviction Decision, para. 2868 (footnotes omitted).
[1704] Conviction Decision, para. 2869.
[1705] Conviction Decision, para. 2869 (footnotes omitted).
[1706] Conviction Decision, paras 2870-2873.
[1707] Appeal Brief, para. 826.

(iii) Grounds of appeal 77, 78 and 79: Alleged errors regarding the Trial Chamber's findings on the attack on Odek IDP camp

798. The Appeals Chamber recalls that Mr Ongwen was convicted as an indirect co-perpetrator for 11 counts in relation to the attack on Odek IDP camp: (i) attack against the civilian population as such as a war crime pursuant to article 8(2)(e)(i) of the Statute (count 11); (ii) murder as a crime against humanity, pursuant to article 7(1)(a) of the Statute (count 12); (iii) murder as a war crime, pursuant to article 8(2)(c)(i) of the Statute (count 13); (iv) attempted murder as a crime against humanity, pursuant to article 7(1)(a) of the Statute, in conjunction with article 25(3)(f) of the Statute (count 14); (v) attempted murder as a war crime, pursuant to article 8(2)(c)(i) of the Statute, in conjunction with article 25(3)(f) of the Statute (count 15); (vi) torture as a crime against humanity, pursuant to article 7(1)(f) of the Statute (count 16); (vii) torture as a war crime, pursuant to article 8(2)(c)(i) of the Statute (count 17); (viii) enslavement as a crime against humanity, pursuant to article 7(1)(c) of the Statute (count 20); (ix) pillaging as a war crime, pursuant to article 8(2)(e)(v) of the Statute (count 21); (x) outrages upon personal dignity as a war crime, pursuant to article 8(2)(c)(ii) of the Statute (count 22); and (xi) persecution as a crime against humanity, pursuant to article 7(1)(h) of the Statute (count 23).[1708]

799. At the outset, the Appeals Chamber recalls that, under grounds of appeal 65, 68, 74, 75 and 76, it has rejected several arguments of the Defence that were based on a misinterpretation of the law applicable to indirect perpetration and co-perpetration.[1709] To the extent that the Defence merely repeats the same arguments under the present grounds of appeal,[1710] they will not be considered further. The same applies to the Defence's argument that Mr Ongwen's rights under article 67(1)(a) of the Statute were

[1708] Conviction Decision, para. 2927.
[1709] *See* generally section VI.D.1(c)(iii) (Grounds of appeal 65 (in part), 74 (in part), 75 (in part) and 76 (in part): Alleged errors in the Trial Chamber's findings regarding the structure of the LRA and Mr Ongwen's role) above.
[1710] Appeal Brief, paras 830, 833, 845, 858.

violated.[1711] This argument was addressed and, for the reasons set out in that ground, rejected on its merits in the determination of ground of appeal 5.[1712]

800. The Defence argues that since the Trial Chamber found "the evidence of Prosecution witnesses inconsistent and contradictory about the role played by [Mr Ongwen] in the attack on Odek" and the witnesses "unreliable", it should have found "reasonable doubt and [enter] an acquittal on all the crimes charged on the attack on Odek".[1713] However, the Appeals Chamber notes that, contrary to the Defence's suggestion, the Trial Chamber did not find the testimony underpinning this factual finding "to have been unreliable".[1714] Accordingly, the Defence's argument in this regard is rejected.

801. Apart from these arguments, the Defence's core argument under grounds of appeal 77, 78 and 79 is that the Trial Chamber erred in holding him criminally responsible as an indirect co-perpetrator for crimes committed during the attack on Odek IDP camp. In support of its position, the Defence submits that the Trial Chamber erred: (i) in assessing the evidence elicited from P-0410, P-0205 and P-0054;[1715] (ii) in rejecting "direction-finding" evidence;[1716] and (iii) in its findings on the *mens rea*.[1717]

(a) Alleged erroneous assessment of evidence by P-0410, P-0205 and P-0054

802. The Defence avers that the Trial Chamber failed to provide reasons for its reliance on the evidence of witness P-0410, despite finding that he was "not credible on central issues in the case".[1718] The Appeals Chamber recalls that the Trial Chamber relied upon, *inter alia*, the evidence of P-0410 to conclude that Mr Ongwen ordered the attack on the Odek IDP camp.[1719] This factual finding was, in turn, relied upon, together with other relevant evidence, to find that: (i) Mr Ongwen entered into an agreement with

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[1711] Appeal Brief, para. 857.
[1712] *See* section VI.B.4 (Ground of appeal 5: Alleged error in proceeding to trial and in entering a conviction on the basis of a defective Confirmation Decision, in violation of the right to notice under article 67(1)(a) of the Statute) above.
[1713] Appeal Brief, para. 855. *See also* paras 852-854.
[1714] Appeal Brief, para. 854.
[1715] Appeal Brief, paras 831-845.
[1716] Appeal Brief, paras 848-850.
[1717] Appeal Brief, para. 856.
[1718] Appeal Brief, paras 831-832. *See also* paras 839, 842, 855.
[1719] Conviction Decision, paras 1394-1395.

other LRA commanders to attack the Odek IDP camp;[1720] (ii) LRA fighters executed the material elements of crimes committed in the context of this attack;[1721] (iii) Mr Ongwen retained control over the crimes committed;[1722] and (iv) Mr Ongwen acted with the requisite *mens rea*.[1723]

803. Both in its assessment of the witness's general credibility and in its assessment of the witness's evidence relating to the order given by Mr Ongwen, the Trial Chamber noted the Defence's objections to relying on P-0410's evidence given his testimony that Buk Abudema participated in the attack on Odek IDP camp which, according to the Trial Chamber, is inconsistent "with the testimony of other reliable witnesses".[1724] Accordingly, the Trial Chamber concluded that "this part of P-0410's evidence [was] not reliable."[1725] However, considering that "P-0410's placing of Buk Abudema and Vincent Otti at the planning locations of both Odek and Lukodi attacks is a transparent, easily detectable error that is separable from the rest of his testimony" and "noting that his testimony was generally consistent with that of other witnesses", the Trial Chamber concluded that while it would not rely on the witness evidence "to the extent that it implicates Vincent Otti and Buk Abudema in the attacks on Odek and Lukodi IDP camps, […] this issue has no bearing on P-0410's general credibility".[1726]

804. Elsewhere in the Conviction Decision, when assessing P-0410's evidence that Mr Ongwen issued orders to attack the Odek IDP camp, the Trial Chamber recalled its earlier finding "that P-0410's testimony that Vincent Otti and Buk Abudema were present for the Odek attack is not reliable, but that the issue does not have a general

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[1720] Conviction Decision, para. 2910.
[1721] Conviction Decision, para. 2913.
[1722] Conviction Decision, paras 2916-2917.
[1723] Conviction Decision, paras 2920, 2924, 2926.
[1724] Conviction Decision, paras 365, 1394.
[1725] Conviction Decision, para. 372 ("On the face of this evidence, with the exception of the statement that he saw 'Buk' on the ground at Odek, which the Chamber finds dubious in light of the conflicting prior statement and in light of the following, it appears that the witness when discussing the presence of senior commanders, rather than recounting facts as observed, was stating what he deduced or believed to be the case. In addition to the witness himself saying as much in one instance, this is strongly indicating by the repeated reference to 'all' commanders, and to how an attack was usually conducted. Also, beyond mentioning Vincent Otti and Buk Abudema as just laid out, P-0410 did not attribute to them any specific actions during the preparation for the attacks on Odek and Lukodi, or during the attacks themselves. In light of this, and in light of the fact that there is no independent corroboration of Buk Abudema's and Vincent Otti's presence on the ground for the Odek or Lukodi attacks, the Chamber concludes that this part of P-0410's evidence is not reliable".).
[1726] Conviction Decision, para. 373.

impact on the reliability of the evidence of P-0410".[1727] Additionally, the Trial Chamber noted that "[i]n any case, in relation to [Mr] Ongwen, the evidence of P-0410 is detailed and specific", as "he got to know [Mr] Ongwen at the assembly, when he introduced himself".[1728] Furthermore, the Trial Chamber found that P-0410 "heard [Mr] Ongwen say that there would be an operation in Odek, and that the intention was 'to exterminate everything, everything in Odek'" and "[Mr] Ongwen explained where people were going to go, how the attack was going to be done, and ordered to bring food from the camp".[1729]

805. It is clear from the above passages that the Trial Chamber addressed the arguments raised by the Defence regarding the evidence of P-0410 and provided reasons for rejecting them. Regarding the Defence's suggestion that the witness was unreliable given the lack of credibility of his testimony implicating Buk Abudema and Vincent Otti,[1730] the Trial Chamber explained that despite finding the witness's testimony that Buk Abudema and Vincent Otti were present on the ground for the Odek or Lukodi attacks unreliable,[1731] the evidence of the witness was generally found to be credible.[1732] Similarly, in relation to the Defence's suggestion that P-0410's evidence should not be relied upon given his testimony that "most groups participated and all the senior commanders went" to the attack on Odek IDP camp,[1733] the Trial Chamber explained the basis for not relying on this evidence.[1734] In this regard, the Appeals Chamber recalls that a Trial Chamber may rely on certain aspects of a witness's evidence and consider other aspects unreliable provided that it explains why it considers the remainder of the testimony to be reliable.[1735] The Defence fails to identify an error and its arguments are therefore rejected.

[1727] Conviction Decision, para. 1394.
[1728] Conviction Decision, para. 1395.
[1729] Conviction Decision, para. 1395.
[1730] Appeal Brief, para. 840.
[1731] Conviction Decision, para. 372.
[1732] Conviction Decision, para. 373.
[1733] Appeal Brief, para. 853.
[1734] Conviction Decision, para. 1411, fn. 3274 ("The Chamber also notes that P-0410 is the only witness to testify to the presence of these other commanders and groups. In the Chamber's view, the witness's testimony is not reliable in this regard".).
[1735] *Ngudjolo* Appeal Judgment, para. 168.

806. The Trial Chamber relied on the evidence of P-0205 to find that Mr Ongwen ordered the attack on Odek IDP camp. The Defence challenges this finding given that P-0205 "concealed his criminal involvement in [this] attack".[1736] In the Conviction Decision, the Trial Chamber recounted the evidence of P-0205 "who stated that after crossing the Aswa River, [Mr] Ongwen planned the attack on Odek".[1737] Additionally, as recalled above, P-0205 testified "that he was present when [Mr] Ongwen addressed the soldiers who were to go to Odek, and that he heard [Mr] Ongwen issue the order to 'go and destroy Odek completely' and to 'only leave bare ground'", and "that [Mr] Ongwen asked to abduct 'good girls' and boys, and said that those who were not fit to be in the army should be killed instead".[1738]

807. The Trial Chamber then noted that P-0205's testimony "that he remained behind and did not go to Odek for the attack" was [REDACTED].[1739] However, as recalled above,[1740] the Trial Chamber did "not deem it necessary for the present purposes to resolve this discrepancy in the evidence", considering that "[d]ue to P-0205's in Court testimony, the manner of recounting the events, as well as the corroboration by other witnesses, […] it is without bearing on the reliability of P-0205's evidence as to the preparations for the attack".[1741]

808. The Appeals Chamber notes that in its submissions under this ground of appeal, the Defence once again fails to identify, and the Appeals Chamber cannot discern any error in the Trial Chamber's above reasoning and determination. The argument is therefore rejected.

809. The Defence further questions the Trial Chamber's reliance on the evidence elicited from P-0054 given that there was, according to the Defence, an inconsistency between his prior recorded statement and his in-court testimony.[1742] In its view, the witness initially did not indicate that Mr Ongwen had ordered to attack civilians and

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[1736] Appeal Brief, para. 833.
[1737] Conviction Decision, para. 1396.
[1738] Conviction Decision, para. 1396.
[1739] Conviction Decision, para. 1396.
[1740] *See* section VI.D.2(c)(i)(a) (Alleged erroneous assessment of the evidence provided by P-0205, P-0070, P-0142 and P-0231) above.
[1741] Conviction Decision, para. 1396.
[1742] Appeal Brief, para. 834.

this was only added later.[1743] In the Conviction Decision, the Trial Chamber noted the inconsistencies between the different accounts provided by P-0054 as follows:

> Further corroboration of the fact that [Mr] Ongwen ordered the attack on Odek IDP camp is provided by P-0054, who stated that 'when people were at a place called Orapwoyo, [Mr] Ongwen instructed people to go and collect food from Odek'. P-0054 specified that '[a]t that time there was a big problem of hunger so he invited Kalalang and other commanding officers and instructed them that since we do not have food people should go to Odek'. While P-0054 initially stated that he did not remember any further order by [Mr] Ongwen, he did confirm as truthful his prior testimony to the effect that [Mr] Ongwen also ordered to 'attack the civilians'. P-0054 stated that he was present when [Mr] Ongwen gave this instruction.[1744]

810. As recalled above, a "trial chamber has the primary responsibility to determine the reliability and credibility of the evidence received in the course of the trial and then comprehensively assess the weight of the evidence",[1745] And "to evaluate the connections and fairly resolve any inconsistencies between the items of evidence received at trial".[1746] Indeed, a "trial chamber's function of conducting the trial warrants the presumption that this function has been properly performed, unless and until the contrary is shown".[1747] In light of these principles and considering the Trial Chamber's reasoning for relying on the evidence of P-0054, the Appeals Chamber considers that the Defence has not identified an error in the Trial Chamber's assessment of this witness's evidence.

811. Furthermore, the Defence asserts that "P-0054 falsely incriminated the [Mr Ongwen] regarding [his] presence and actions in the attack on Odek IDP camp".[1748] In this regard, the Appeals Chamber notes that the Trial Chamber considered P-0054's evidence when determining that "Mr Ongwen moved with the attackers in the direction of Odek IDP" but "did not enter Odek IDP camp with the fighters sent to attack".[1749] In particular, the Trial Chamber noted that "[Mr] Ongwen commanded a group of LRA fighters into the centre of Odek IDP camp during the attack", "that a recruit […]

[1743] Appeal Brief, para. 834.
[1744] Conviction Decision, para. 1397 (footnotes omitted).
[1745] *Ntaganda* Appeal Judgment, para. 40; *Gbagbo and Blé Goudé* Appeal Judgment, para. 69.
[1746] *Ntaganda* Appeal Judgment, para. 40; *Gbagbo and Blé Goudé* Appeal Judgment, para. 69.
[1747] *Ntaganda* Appeal Judgment, para. 40; *Gbagbo and Blé Goudé* Appeal Judgment, para. 69.
[1748] Appeal Brief, para. 834. *See also* para. 844.
[1749] Conviction Decision, p. 496.

accompanied him to Odek and went to the centre to loot food with [Mr] Ongwen's group of attackers while P-0054 himself went to attack the barracks with other fighters and did not go to the centre" and that P-0054 "testified to seeing [Mr] Ongwen in the group as they were retreating from Odek IDP camp".[1750] The Trial Chamber also noted that the source of the witness information about Mr Ongwen's movements was not clear, considering it "significant […] that the witness does not testify to seeing [Mr] Ongwen within the camp himself".[1751]

812. In light of the testimony of other witnesses, the Trial Chamber "consider[ed] it significant that although certain witnesses testified to seeing [Mr] Ongwen outside of the camp before the attack, none of them testified that they actually saw him within the camp during the attack".[1752] As a result, the Appeals Chamber considers that the Defence's assertion that P-0054 falsely incriminated Mr Ongwen "regarding his presence and actions in the attack on Odek IPD camp"[1753] is misplaced and without merit. This argument is therefore rejected.

813. The Defence further argues that the testimony of P-0205 and P-0410 in relation to Mr Ongwen's order to attack Odek IDP camp were not mutually corroborative given that they provided different locations for the gathering that took place prior to the attack.[1754] The Appeals Chamber notes that, after recounting the evidence of numerous witnesses, including that provided by P-0410 and P-0205,[1755] the Trial Chamber deemed the witnesses' evidence on the location of the gathering "compatible" for the following reason:

> every witness described in their own words the location of the above events. Some witnesses understandably stated that they were not able to tell the precise location, because they were unfamiliar with the area or due to the LRA's practice of meandering movement, while others gave more or less precise geographical references. Considering that the gathering took place in the bush, which is confirmed by all witnesses, the Chamber finds their inability to provide a precise description of the location natural and expected. Bearing this in mind, the Chamber deems the witness evidence on this point compatible, and finds, taking

[1750] Conviction Decision, para. 1416.
[1751] Conviction Decision, para. 1416.
[1752] Conviction Decision, para. 1427.
[1753] Appeal Brief, para. 834. *See also* para. 844.
[1754] Appeal Brief, paras 835-838, 841, 845, 848.
[1755] Conviction Decision, paras 1394-1396.

> into account the various geographical references given by the witnesses, that the gathering took place at a location in the bush, west of the Aswa River and northwest of Odek, at a distance of several walking hours. Accordingly, the argument of the Defence to the effect that the evidence of witnesses called by the Prosecution is inconsistent as to the location of the RV prior to the Odek attack is rejected.[1756]

814. As the Defence correctly noted,[1757] P-0410 was one of the witnesses who was unable to provide "a precise description of the location".[1758] However, it is clear from the above passage of the Conviction Decision that the Trial Chamber considered the various accounts provided by the witnesses and gave them the appropriate weight. The Defence fails to identify any error in the Trial Chamber's decision to rely on the evidence of witnesses P-0410 and P-0205. The arguments of the Defence in this regard are therefore rejected.

815. As to the argument that "[n]one of the witnesses testified about the presence or the involvement of Kony or Okwonga Alero",[1759] the Defence fails to identify the relevance of this point to the Trial Chamber's finding that Mr Ongwen ordered the attack on Odek IDP camp.[1760] Accordingly, the Defence's argument is rejected.

816. The remaining challenges of the Defence regarding the Trial Chamber's assessment of the evidence of P-0410, P-0205 and P-0054 (that Mr Ongwen ordered the attack on Odek IDP camp, including the interpretation of the meaning of the instruction to "collect food" and the alleged inconsistency with the testimony of witnesses P-0264, P-0314, P-0340, P-0352[1761]), have been addressed and rejected

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[1756] Conviction Decision, para. 1406 (footnotes omitted).
[1757] Appeal Brief, para. 841.
[1758] Conviction Decision, para. 1394, fn. 3205 ("P-0410 also testified that he had difficulty pinpointing the direction of Odek from the gathering place: 'It's difficult to point because at that time we were in the bush and it would be very difficult to even point the direction of your home. You will keep meandering while walking and you will not know which direction it was. It was difficult for me to point out which direction Odek was when we were at the riverbanks because the rebels do not move in a straight kind of movement. They can walk for about one or two hours, and you will not know the direction of your home. They don't move in a straight movement. So at that time it was difficult for me to point out the direction of Odek. Whenever you're moving, you keep on meandering. Sometimes you move ahead and then move backwards, and all that will confuse. You will not know how you have arrived in a certain place. So it's difficult for me to point out.' P-0410: T-152, p. 33, lines 4-16".).
[1759] Appeal Brief, para. 845.
[1760] Conviction Decision, para. 161.
[1761] Appeal Brief, paras 844-848. The Defence also refers to P-0320 (Appeal Brief, para. 847). However, when making the impugned finding, the Trial Chamber did not rely on the evidence of this witness and the paragraph numbers footnoted by the Defence are incorrect (*see* Appeal Brief, fn. 1099).

above in the Appeals Chamber's determination of grounds of appeal 60 and 70.[1762] The Defence does not raise any new arguments in this regard that would warrant a re-examination of this determination. These arguments are therefore rejected.

(b) Alleged erroneous rejection of "direction-finding" evidence

817. The Defence further seeks to impugn the Trial Chamber's finding that Mr Ongwen ordered the attack on Odek IDP camp given its erroneous rejection of "direction-finding" evidence.[1763] It submits that the Trial Chamber's rejection of this evidence is in contradiction with the evidence of P-0003 who "testified that directional findings were very effective in identifying the location of LRA commanders".[1764]

818. The Trial Chamber explained that "direction-finding" evidence is "a specific category of information produced by the UPDF in the course of its particular operation to determine the location of LRA commanders by intercepting and analysing their radio communications with special equipment".[1765] It noted that this information "is contained in several UPDF intelligence reports".[1766]

819. As noted above,[1767] the Trial Chamber found the testimonial evidence of witnesses who described in their own words the location where Mr Ongwen ordered and gave instructions to attack Odek "compatible".[1768] In this context, the Trial Chamber recalled that it rejected as unreliable "all direction-finding evidence".[1769]

820. Based on its assessment of the available information, the Trial Chamber found "that the reliability of information gathered through direction-finding cannot sufficiently be established".[1770] To support its finding, the Trial Chamber noted, *inter alia*, that: (i) P-0029, the person who supervised the operation, the UPDF direction-

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[1762] *See* section VI.D.2(c)(i)(f) (Alleged erroneous finding that Mr Ongwen ordered the attack on Odek IDP camp) above.
[1763] Appeal Brief, paras 848-850.
[1764] Appeal Brief, para. 849.
[1765] Conviction Decision, para. 811.
[1766] Conviction Decision, para. 811.
[1767] *See* paragraph 813 above.
[1768] Conviction Decision, para. 1406.
[1769] Conviction Decision, para. 1406.
[1770] Conviction Decision, para. 837.

finding operation "was disbanded in mid-2005 *inter alia* due to technical failures";[1771] (ii) "[b]y design, precision was limited as the results came with a range of accuracy, sometimes up to five kilometres";[1772] (iii) "distance from the target was a crucial factor for accuracy" but "UPDF intelligence reports including direction-finding results do not specify if a given result was collected at under 30 kilometres distance to the target or any other distance" and it was "equally unclear in which way it was determined whether a specific target could be found at a certain distance";[1773] (iv) it was not possible "to determine whether the data in fact provides general areas in which a target could have been or if a target may have moved";[1774] and (v) "some reports at times indicate the same location for the second mention of a commander or also a different commander while, however, at the same time providing slightly different geographical coordinates".[1775]

821. The Appeals Chamber notes that the Trial Chamber identified "important issues affecting the reliability of information gathered through direction-finding and of its derivative location data in this particular case".[1776] It concluded that:

> it is not possible to ultimately determine the range of accuracy and that this range of accuracy may well have been in the range of several kilometres, which renders the direction-finding evidence inconclusive for purposes of the Chamber in the sense that it merely represents another estimate. Further, it must be recalled that according to the supervisor of the operation, it was not possible to produce reliable direction-finding results until after 2004 and that, at the same time, the commanding officer of that operation stated that it was disbanded in mid-2005 *inter alia* due to technical failures. In light of the information before the Chamber, the Chamber does not consider that the reliability of direction-finding evidence has been established to the extent that it would be possible to rely on it, in particular as concerns the whereabouts of [Mr] Ongwen at the time of the attacks on the Odek, Lukodi and Abok IDP camps. For this reason, the Chamber does not rely on direction-finding evidence.[1777]

822. In its submissions, the Defence refers to P-0003 testimony that "once their commanders 'have read the information from the notebooks, they would compare the

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[1771] Conviction Decision, para. 838.
[1772] Conviction Decision, para. 839.
[1773] Conviction Decision, paras 839-840.
[1774] Conviction Decision, para. 842.
[1775] Conviction Decision, para. 844.
[1776] Conviction Decision, para. 846.
[1777] Conviction Decision, para. 846 (footnotes omitted).

information with the directional findings groups or the team and then they world [*sic*] use the same information that he intercepted and they would use this information to follow the LRA or to set up an ambush or to deal with the LRA'".[1778] The Appeals Chamber fails to see how this part of P-0003's testimony can be interpreted as him testifying "that directional findings were very effective in identifying the location of LRA commanders".[1779]

823. It is also not apparent to the Appeals Chamber, and the Defence fails to explain, how this aspect of P-0003's evidence would contradict the Trial Chamber's ultimate conclusion that important issues affected the reliability of information obtained through "direction-finding" evidence. This argument is therefore rejected.

(c) Alleged erroneous finding on the *mens rea*

824. The Defence further submits that the Trial Chamber's findings on Mr Ongwen's *mens rea* contained in paragraphs 2919 and 2920 of the Conviction Decision "relating to [Mr Ongwen] and his subordinates as opposed to the co-perpetrators alleged pointed to command responsibility".[1780] According to the Defence, "[t]he inferences made are impermissible and legally unjustified".[1781]

825. Paragraphs 2919 and 2920 of the Conviction Decision read as follows:

> 2919. The conduct which [Mr] Ongwen undertook in relation to the crimes committed during the attack on Odek IDP camp, *i.e.* his participation in the planning and in the execution of the attack, is such that, by its nature, it could only have been undertaken intentionally. Thus, the Chamber considers that the conduct-related requirement of Article 30(2) of the Statute is met.
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> 2920. Furthermore, the Chamber reiterates, also in relation to the required mental elements, that [Mr] Ongwen decided that LRA soldiers under his command would attack Odek IDP camp. He coordinated with subordinate commanders and appointed them to lead the attack on the ground. [Mr] Ongwen and his subordinate commanders ordered LRA soldiers to target everyone they find at Odek IDP camp, including civilians, and also instructed them to loot food and abduct civilians. [Mr] Ongwen ordered the selection of soldiers for the attack, and participated in a ritual and prayer before they set out. He encouraged the soldiers and repeated the orders to target everyone, including civilians, to loot and to

[1778] Appeal Brief, para. 850.
[1779] Appeal Brief, para. 849.
[1780] Appeal Brief, para. 856.
[1781] Appeal Brief, para. 856.

> abduct civilians. After the attack, the returning attackers briefed [Mr] Ongwen, and [Mr] Ongwen thanked them. [Mr] Ongwen communicated the results of the attack on military radio to other LRA commanders and to Joseph Kony, reporting that his fighters successfully carried out an attack on Odek IDP camp, shooting people, abducting civilians and looting in the camp.[1782]

826. In its brief and vague submissions the Defence fails to identify any "impermissible" or "legally unjustified" inferences. Furthermore, in relation to the Defence's suggestion that the Trial Chamber failed to establish the *mens rea* of Mr Ongwen's co-perpetrators,[1783] the Appeals Chamber fails to see the relevance, if any, of any such determination to establish Mr Ongwen's requisite *mens rea*. Furthermore, the Defence's reference to the mental elements required for the responsibility of superiors is inapposite, given that, as noted above, Mr Ongwen was charged and convicted as an indirect co-perpetrator for the crimes committed during the attack on Odek IDP camp. On this basis, the Defence's arguments are rejected.

(d) Conclusion on grounds of appeal 77 to 79

827. Having rejected the totality of the arguments raised by the Defence, grounds of appeal 77, 78 and 79 are rejected.

(iv) Ground of appeal 80: Alleged errors regarding the Trial Chamber's findings on the attack on Abok IDP camp

828. The Appeals Chamber recalls that Mr Ongwen was convicted as an indirect perpetrator for 11 counts in relation to the attack on Abok IDP camp: (i) attack against the civilian population as such as a war crime pursuant to article 8(2)(e)(i) of the Statute (count 37); (ii) murder as a crime against humanity, pursuant to article 7(1)(a) of the Statute (count 38); (iii) murder as a war crime, pursuant to article 8(2)(c)(i) of the Statute (count 39); (iv) attempted murder as a crime against humanity, pursuant to article 7(1)(a) of the Statute, in conjunction with article 25(3)(f) of the Statute (count 40); (v) attempted murder as a war crime, pursuant to Article 8(2)(c)(i) of the Statute, in conjunction with article 25(3)(f) of the Statute (count 41); (vi) torture as a crime against humanity, pursuant to article 7(1)(f) of the Statute (count 42); (vii) torture as a war crime, pursuant to article 8(2)(c)(i) of the Statute (count 43); (viii) enslavement as a crime against humanity, pursuant to article 7(1)(c) of the Statute (count 46);

[1782] Conviction Decision, paras 2919-2920 (footnotes omitted).
[1783] Appeal Brief, para. 856.

(ix) pillaging as a war crime, pursuant to article 8(2)(e)(v) of the Statute (count 47); (x) destruction of property as a war crime, pursuant to article 8(2)(e)(xii) of the Statute (count 48) and (xi) persecution as a crime against humanity, pursuant to article 7(1)(h) of the Statute (count 49).[1784]

829. At the outset, the Appeals Chamber notes that several of the arguments under this ground of appeal have already been addressed and rejected elsewhere in the judgment. The arguments concerning an alleged violation to Mr Ongwen's right under article 67(1)(a) of the Statute[1785] have been addressed and rejected when determining the ground of appeal 5.[1786] Those arguments that are premised on a misinterpretation of indirect perpetration as a mode of liability[1787] have been addressed and rejected when determining grounds of appeal 65 and 68.[1788]

830. Apart from these arguments, the Defence's core argument is that the Trial Chamber erred in holding him criminally responsible as an indirect perpetrator for crimes committed during the attack on Abok IDP camp. In support of its position, the Defence raises the following arguments: (i) Mr Ongwen "was not provided notice" of the order issued by "Kony and Vincent Otti for civilians in IDP camps to be attacked"[1789] and there is no "proof beyond a reasonable doubt that [Mr Ongwen] attacked Abok IDP camp with the required special intention to execute the persecutory policies of Kony and Vincent Otti";[1790] and (ii) in finding Mr Ongwen criminally responsible as an indirect perpetrator, the Trial Chamber "made impermissibly wrong inferences from the logbook communications and orders by Kony, Vincent Otti to LRA commanders".[1791]

[1784] Conviction Decision, para. 3020.
[1785] Appeal Brief, paras 860-862.
[1786] *See* section VI.B.4 (Ground of appeal 5: Alleged error in proceeding to trial and in entering a conviction on the basis of a defective Confirmation Decision, in violation of the right to notice under article 67(1)(a) of the Statute) above.
[1787] Appeal Brief, paras 863, 869.
[1788] *See* generally sections VI.D.1(c)(iii) (Grounds of appeal 65 (in part), 74 (in part), 75 (in part) and 76 (in part): Alleged errors in the Trial Chamber's findings regarding the structure of the LRA and Mr Ongwen's role) and VI.D.1(c)(iv) (Grounds of appeal 68 and 28 (in part): Alleged errors regarding evidence of Mr Ongwen's abduction, initiation, training, and service in the LRA) above.
[1789] Appeal Brief, para. 864.
[1790] Appeal Brief, para. 865.
[1791] Appeal Brief, paras 866-868.

831. The Appeals Chamber will address these arguments in turn.

(a) Alleged erroneous findings regarding the order to attack civilians

832. The Defence submits that Mr Ongwen was not "provided notice" of the order issued by Kony and Vincent Otti to attack civilians in relation to the attack on Abok.[1792] As a preliminary issue, the Appeals Chamber notes that the Defence's argument may be understood in two different ways. It could be understood as arguing that Mr Ongwen's right to notice under article 67(1)(a) of the Statute was violated or that Mr Ongwen was not on notice of the order issued by Joseph Kony and Vincent Otti at the time of the events. In the event that the Defence's argument relates to an alleged violation of Mr Ongwen's rights under article 67(1)(a) of the Statute, its related submissions have been addressed and rejected in the determination of ground of appeal 5.[1793]

833. If, on the other hand, the Defence is challenging the Trial Chamber's factual finding that "[i]n the days and weeks preceding the attack, Joseph Kony and Vincent Otti instructed [Mr] Ongwen to continue to attack civilians in IDP camps",[1794] the Appeals Chamber notes that this finding was based on the assessment of contemporary UPDF and ISO logbook records.[1795]

834. These logbook entries indicate that Vicent Otti advised Mr Ongwen to "continue with attacking [civilians] in the [IDP] camps till the […] camps remain empty",[1796] and that Joseph Kony ordered Mr Ongwen "to continue 'killing the civilians in the [IDP] camps as he want' and if 'one LRA soldier are in the contact at least over 50 civilians must [lose] their lives'".[1797] The Trial Chamber further referred to a logbook recording Joseph Kony directing LRA commanders, including Mr Ongwen "to 'uplift the standard of massacre against the [IDP camps] like someone who was sweeping white

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[1792] Appeal Brief, para. 864.
[1793] *See* section VI.B.4 (Ground of appeal 5: Alleged error in proceeding to trial and in entering a conviction on the basis of a defective Confirmation Decision, in violation of the right to notice under article 67(1)(a) of the Statute) above.
[1794] Conviction Decision, para. 191.
[1795] Conviction Decision, paras 1861-1863.
[1796] Conviction Decision, para. 1861.
[1797] Conviction Decision, para. 1862.

ants during the night'".[1798] In addition, the Trial Chamber referenced a recording of Buk Abudema instructing Mr Ongwen "to 'wake up and begin serious operations against the [IDP camps] and maximum death rate be maintained… [and] to deploy his forces in various directions targeting [IDP camps]'".[1799] Finally, the Trial Chamber also relied upon a logbook recording of Mr Ongwen telling LRA commander Abudema "that '[Mr Ongwen] was going to kill many [civilians] and he will send the result to Kony where by Kony will be happy about it'".[1800] The Defence fails to identify any error in the Trial Chamber's assessment.

835. In addition, the Appeals Chamber notes that the factual finding challenged by the Defence[1801] was not relied upon to establish Mr Ongwen's individual criminal responsibility for the crimes committed in the course of the attack on Abok IDP camp.[1802] In this regard, the Defence fails to identify the material effect of any alleged error.

836. Furthermore, the Appeals Chamber notes the Trial Chamber's finding that:

> [Mr] Ongwen chose to attack Abok IDP camp. Prior to the attack, [Mr] Ongwen ordered LRA fighters subordinate to him to attack this camp, including civilians. At a gathering in the foothills of Atoo, [Mr] Ongwen addressed the troops before the attack and gave instructions to go and collect food, abduct people, attack the barracks and burn down the camp and the barracks.[1803]

837. As noted by the Prosecutor,[1804] the above finding is, in turn, supported by a detailed assessment of the evidence of several witnesses.[1805] In these circumstances, and in the absence of any indication on the part of the Defence as to which aspects of the above assessments would be affected by errors, the Appeals Chamber rejects the Defence's argument that "[t]here was no proof beyond a reasonable doubt that [Mr

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[1798] Conviction Decision, para. 1863.
[1799] Conviction Decision, para. 1863.
[1800] Conviction Decision, para. 1863.
[1801] Appeal Brief, para. 864; Conviction Decision, p. 674, paras 1861-1863.
[1802] *See* Conviction Decision, paras 3010-3020 where no reference is made to paragraph 191 of the Conviction Decision containing the factual finding reached on the basis of logbook evidence.
[1803] Conviction Decision, para. 192.
[1804] Prosecutor's Response, para. 524.
[1805] Conviction Decision, paras 1864-1876.

Ongwen] attacked Abok IDP camp with the required special intention to execute the persecutory policies of Kony and Vincent Otti against civilians in the IDP camp".[1806]

(b) Alleged erroneous assessment of logbook communications evidence

838. In relation to the second point raised by the Defence concerning the Trial Chamber's alleged "wrong inferences from the logbook communications and orders by Kony, Vincent Otti to LRA commanders",[1807] the Appeals Chamber notes that the Defence's submission is vague and unclear.[1808] As explained in the preceding section, the Trial Chamber did not rely only on the logbook evidence to establish Mr Ongwen's individual criminal responsibility for the crimes committed in the context of the attack on Abok IDP camp.

839. As noted above, on the basis of the evidence, including witness testimony and intercepted radio communications, the Trial Chamber found that Mr Ongwen ordered the LRA fighters subordinate to him to attack the camp, including civilians, giving "instructions to go and collect food, abduct people, attack the barracks and burn down the camp and the barracks".[1809] It also found that it was Mr Ongwen who "appointed Okello Kalalang to command the attackers on the ground according to his instructions".[1810]

840. In its legal findings, the Trial Chamber further established that Mr Ongwen committed the crimes through other persons and that he acted with the requisite *mens rea* on the basis of, *inter alia*: (i) the orders he issued prior to the attack to the LRA fighters subordinate to him; (ii) the fact that he appointed Okello Kalalang to command the attackers on the ground according to his instructions; (iii) the fact that the LRA fighters executed Mr Ongwen's orders; and (iv) the fact that he communicated the results of the attack to other LRA commanders.[1811]

841. In these circumstances, the Appeals Chamber finds that the Defence fails to identify the impact that the Trial Chamber's reliance on logbook communications had

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[1806] Appeal Brief, para. 865.
[1807] Appeal Brief, para. 866.
[1808] Appeal Brief, para. 868.
[1809] Conviction Decision, paras 192, 1864-1876
[1810] Conviction Decision, para. 192.
[1811] Conviction Decision, paras 3010, 3013.

on its findings that Mr Ongwen was responsible as an indirect perpetrator for the crimes committed in the context of the attack on Abok IDP camp. Since the Defence fails to identify any error, its arguments are dismissed.

(c) Conclusion on ground of appeal 80

842. Having rejected the totality of the arguments raised by the Defence, ground of appeal 80 is rejected.

(v) Grounds of appeal 81 and 82: Alleged errors regarding the Trial Chamber's findings on the attack on Lukodi IDP camp

843. The Appeals Chamber recalls that Mr Ongwen was convicted, on 11 counts, as an indirect perpetrator in relation to the attack on Lukodi IDP camp: (i) attack against the civilian population as such as a war crime pursuant to article 8(2)(e)(i) of the Statute (count 24); (ii) murder as a crime against humanity, pursuant to article 7(1)(a) of the Statute (count 25); (iii) murder as a war crime, pursuant to article 8(2)(c)(i) of the Statute (count 26); (iv) attempted murder as a crime against humanity, pursuant to article 7(1)(a) of the Statute, in conjunction with article 25(3)(f) of the Statute (count 27); (v) attempted murder as a war crime, pursuant to article 8(2)(c)(i) of the Statute, in conjunction with article 25(3)(f) of the Statute (count 28); (vi) torture as a crime against humanity, pursuant to article 7(1)(f) of the Statute (count 29); (vii) torture as a war crime, pursuant to article 8(2)(c)(i) of the Statute (count 30); (viii) enslavement as a crime against humanity, pursuant to article 7(1)(c) of the Statute (count 33); (ix) pillaging as a war crime, pursuant to article 8(2)(e)(v) of the Statute (count 34); (x) destruction of property as a war crime, pursuant to article 8(2)(e)(xii) of the Statute (count 35) and (xi) persecution as a crime against humanity, pursuant to article 7(1)(h) of the Statute (count 36).[1812]

844. At the outset, the Appeals Chamber notes that several of the arguments under these grounds of appeal have already been addressed and rejected elsewhere in the judgment. The argument that Mr Ongwen's rights under article 67(1)(a) of the Statute were violated,[1813] has been addressed and rejected when determining ground of

[1812] Conviction Decision, para. 2973.
[1813] Appeal Brief, para. 892.

appeal 5.[1814] Those arguments that are premised on a misinterpretation of indirect perpetration as a mode of liability[1815] have been addressed and rejected when determining grounds of appeal 65 and 68.[1816] Finally, the Defence's argument concerning an alleged lack of reasoning on the Trial Chamber's finding on the mental element[1817] has been addressed and rejected in the determination of ground of appeal 64.[1818]

845. Apart from these arguments, the Defence's core argument is that the Trial Chamber erred in holding Mr Ongwen criminally responsible as an indirect perpetrator for crimes committed during the attack on Lukodi IDP camp. In support of its position, the Defence submits that the Trial Chamber: (i) erred in finding that "the location of the gathering where [Mr Ongwen] and the fighters assembled and were given instructions and deployed for the attack by [him] was precise";[1819] (ii) erred in its assessment of P-0205;[1820] and (iii) made findings on *mens rea* that "were declaratory only and no reasoned statement was provided".[1821]

(a) Alleged erroneous finding on the location of the meeting

846. The Defence challenges the Trial Chamber's finding about the location of the gathering where Mr Ongwen gave instructions to his subordinates concerning the attack on Lukodi IDP camp.[1822] In the Conviction Decision, the Trial Chamber considered the same argument raised by the Defence and while noting that witnesses who were present

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[1814] *See* section VI.B.4 above (Ground of appeal 5: Alleged error in proceeding to trial and in entering a conviction on the basis of a defective Confirmation Decision, in violation of the right to notice under article 67(1)(a) of the Statute) above.
[1815] Appeal Brief, paras 871, 884 ("The Chamber made no specific decision relating to any of these commanders providing evidence of functioning as tools of [Mr Ongwen]. The Chamber made no finding about the *mens rea* of these physical perpetrators.").
[1816] *See* generally sections VI.D.1(c)(iii) above (Grounds of appeal 65 (in part), 74 (in part), 75 (in part) and 76 (in part): Alleged errors in the Trial Chamber's findings regarding the structure of the LRA and Mr Ongwen's role) and VI.D.1(c)(iv) above (Grounds of appeal 68 and 28 (in part): Alleged errors regarding evidence of Mr Ongwen's abduction, initiation, training, and service in the LRA) above.
[1817] Appeal Brief, para. 892.
[1818] *See* section VI.D.1(c)(ii) above (Grounds of appeal 64, 65 (in part), 81 (in part) and 82 (in part): Alleged lack of reasoning in the Trial Chamber's findings on Mr Ongwen's individual criminal responsibility).
[1819] Appeal Brief, paras 874-875.
[1820] Appeal Brief, paras 876-890.
[1821] Appeal Brief, para. 892.
[1822] Appeal Brief, paras 874-875.

at LRA gatherings in the bush could not name the location due to their "unfamiliarity with the area, the meandering movements of LRA units or any other reason", it noted that in fact the witnesses' testimony, in this particular instance, pointed to a "relatively precise area".[1823]

847. The Trial Chamber went on to address the Defence's related arguments concerning the location of the gathering and rejected them based on its assessment of the relevant evidence.[1824] Contrary to the Defence's allegation that there are inconsistencies between the witnesses' testimony, the Trial Chamber found that the evidence was compatible and consistent.[1825] Besides making broad statements,[1826] the Defence fails to identify any error in the Trial Chamber's reasoning and assessment of the evidence. This argument is therefore rejected.

(b) Alleged erroneous assessment of P-0205's evidence

848. The Defence further challenges the Trial Chamber's reliance on P-0205's evidence that Mr Ongwen ordered his subordinates to "kill civilians in Lukodi".[1827] In its determination of grounds of appeal 60 and 70, the Appeals Chamber has addressed

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[1823] Conviction Decision, para. 1667 ("In addition to P-0142's and P-0205's testimony on the point as referred to above, the Chamber notes that P-0410, while not providing a precise indication of the location where the gathering took place, and explaining that it was not easy to situate oneself with directions in the bush, indicated that moving towards Lukodi they reached the Awach road and turned west in the direction of Gulu. This indicates that the 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'.").

[1824] Conviction Decision, paras 1668-1671("P-0101, who also referred to the gathering, testified that the selection took place in Lalogi, while also stating that she was not conversant with the area. In any case, her indication as to the location of the event is compatible with the rest of the evidence. The Defence emphasised P-0406's evidence as that most irreconcilable with the rest of the evidence. The Chamber notes P-0406's testimony that he was not familiar with the area, and that generally in the bush 'you keep meandering about and it becomes very difficult for you to know where exactly you are going'. P-0406 does testify that his unit was in Koch Goma before going to Lukodi. However, contrary to the Defence's submission, this was not an indication of the location of the gathering prior to the attack on the Lukodi IDP camp. In fact, the witness testified that they walked from Koch Goma, where they reached a place and settled, and where the next day people were selected for the attack and [Mr] Ongwen gave his instructions. The Chamber notes that the Defence in its submissions on the location of the gathering also refers to the evidence of P-0018 and P-0145 relating not to the gathering at issue but to the location of the Gilva sickbay. Finally on the topic of location, in light of specific submissions by the Defence in relation to the attack on Lukodi IDP camp, the Chamber reiterates that it does not rely for its conclusions on the direction-finding evidence.") (Footnotes omitted).

[1825] Conviction Decision, paras 1667-1668.

[1826] Appeal Brief, para. 875 ("witnesses did not provide consistent evidence about the location of the gathering"; "[t]he Chamber failed to apply the correct legal standard"; the finding "was not based on the evidence on the record"; "[t]he decision of the Chamber was prejudicial and unfair"; "[t]he location was not identified or proved with the statutory certainty required by law.").

[1827] Appeal Brief, para. 877.

and rejected the Defence's general challenge to the Trial Chamber's credibility assessment of P-0205. In doing so, the Appeals Chamber referenced several instances in which the Trial Chamber relied upon P-0205, including for the purpose of finding that Mr Ongwen instructed LRA fighters to attack Lukodi IDP camp and everyone present at the location, including civilians, and to take food from the camp.[1828] In these grounds of appeal, the Defence specifically challenges the reasons provided by the Trial Chamber to justify its reliance on P-0205's in-court testimony rather than on his prior recorded statement that "the orders given by [Mr] Ongwen was [*sic*] to target the soldiers for attack in Lukodi and that the mission was not to kill civilians".[1829]

849. In the Defence's view, in light of the evidence provided by P-0205, which the Trial Chamber found to be inconsistent, "it was no longer reasonably open for the Chamber to revise its decision to find the witness credible and to rely on his inculpatory statement to support the conviction of [Mr Ongwen]".[1830]

850. In support of its finding that "[a]t a gathering the morning of the day before the attack, [Mr] Ongwen instructed LRA fighters to attack Lukodi IDP camp and everyone present at that location, including civilians, and to take food from the camp",[1831] the Trial Chamber relied, *inter alia*, on the evidence provided by P-0205 that Mr Ongwen's order was:

> You standby, you are going to attack Lukodi. When you arrive at Lukodi, there are few soldiers. Shoot the soldiers. Do not leave the camp. Anybody you find in the camp, no matter – no matter how the person is, don't leave them. Nobody should be left behind. Everybody should be killed.[1832]

851. As already discussed in grounds of appeal 60 and 70, the Trial Chamber noted the Defence's submission that P-0205's testimony should be disregarded since it had "drastically changed" from his statement made to the Prosecution in 2015 to the effect that "[Mr] Ongwen's order was to attack only the military at Lukodi, that the order was to attack at 18:00 hours at the latest so as to still be able to distinguish between soldiers

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[1828] *See* section VI.D.2(c)(i)(a) (Alleged erroneous assessment of the evidence provided by P-0205, P-0070, P-0142 and P-0231) above.
[1829] Appeal Brief, paras 878-879.
[1830] Appeal Brief, para. 880. *See also* paras 881-882.
[1831] Conviction Decision, para. 179.
[1832] Conviction Decision, para. 1674 (footnotes omitted).

and others, and that 'the mission was not to kill civilians'".[1833] The Trial Chamber initially found that the explanation provided by P-0205 for the discrepancy was "not entirely satisfactory" considering that the witness "insisted on his in-court testimony […] even though the statement he gave to the Prosecution in 2015 was decidedly more favourable to him than his in-court statement".[1834] However, the Trial Chamber ultimately accepted "P-0205's testimony in court as truthful".[1835]

852. The Appeals Chamber is not persuaded by the Defence's argument that it was unreasonable for the Trial Chamber to rely on the in-court testimony provided by P-0205,[1836] after finding that the explanation for his differing accounts was "not entirely satisfactory".[1837] The Trial Chamber explained the basis for its decision to rely on the evidence provided by P-0205 in court. In particular, the Trial Chamber noted the witness's insistence on his in-court testimony, even though his prior recorded statement "was decidedly more favourable to him".[1838] It further noted that his prior statement was "at odds with the rest of the evidence on the order given, the events on the ground, and on the way the attack was reported" while his account in the courtroom was "in accord with other reliable evidence", and that P-0205 testified under oath, after having been given assurances against self-incrimination.[1839]

853. As mentioned above, "trial chambers have 'the main responsibility to resolve any inconsistencies that may arise within and/or amongst witnesses' testimonies'" and that it is within their discretion "to evaluate any inconsistencies, to consider whether the evidence taken as a whole is reliable and credible and to accept or reject the 'fundamental features' of the evidence'".[1840] Thus, contrary to the Defence's suggestion, the Trial Chamber, acting within its discretion, did not find that witness P-

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[1833] Conviction Decision, para. 1675.
[1834] Conviction Decision, para. 1675.
[1835] Conviction Decision, para. 1675. The Trial Chamber accepted "P-0205's testimony in court as truthful" due to the fact that "[h]is statement of 2015 is at odds with the rest of the evidence on the order given, the events on the ground, and on the way the attack was reported, whereas his account in the courtroom is in accord with other reliable evidence" and "the fact that P-0205 testified before it under oath, and did so after having been given assurances against self-incrimination under Rule 74 of the Rules".
[1836] Appeal Brief, para. 880.
[1837] Conviction Decision, para. 1675.
[1838] Conviction Decision, para. 1675.
[1839] Conviction Decision, para. 1675.
[1840] *Ntaganda* Appeal Judgment, para. 806 (footnotes omitted).

0205 committed perjury and that he changed his in-court testimony "to incriminate the [Mr Ongwen]".[1841] Finally, considering that the Trial Chamber reasonably explained its reliance on P-0205's in-court testimony, the Appeals Chamber finds no merit in the Defence's submission that "[t]he Chamber disregarded the evidence of P-0205 which raised reasonable doubt or favoured [Mr Ongwen] and gave credit [*sic*] P-0205's perjured evidence".[1842]

854. Furthermore, the Appeals Chamber notes that, in addition to the evidence provided by P-0205, the Trial Chamber relied on the evidence provided by P-0018, P-0142, P-0145, P-0406 and P-0410 to support its finding that Mr Ongwen ordered the killing of civilians prior to the attack on Lukodi IDP camp.[1843] Therefore, even assuming that the Trial Chamber erred in relying on the evidence of P-0205, it relied on other evidence to reach its conclusion. These arguments are therefore rejected.

855. The Defence also challenges the Trial Chamber's determination that the contradiction between P-0205's testimony and [REDACTED] regarding the question of whether P-0205 went to Odek for the attack, was "without bearing on the reliability of P-0205's evidence as to the preparations for the attack".[1844] The Appeals Chamber notes that the argument relates to the attack on Odek IDP camp. The Defence fails to explain, and it is not apparent to the Appeals Chamber, how its argument regarding Mr Ongwen's individual criminal responsibility for the crimes that occurred in the context of the attack on Lukodi IDP camp is relevant to the attack on Odek IDP camp. Furthermore, in relation to the Defence's argument that the Trial Chamber could have elicited "evidence from the witness whether he functioned as a [tool] of the [Mr Ongwen]",[1845] the Appeals Chamber considers that, in any event, the Defence had the opportunity to question the witness on this point, if considered it relevant to its case. Its argument is therefore rejected.

[1841] Appeal Brief, para. 881.
[1842] Appeal Brief, para. 882.
[1843] Conviction Decision, paras 1676-1680. *See also* Prosecutor's Response, para. 533.
[1844] Appeal Brief, para. 883, *referring to* Conviction Decision, para. 1396.
[1845] Appeal Brief, para. 883.

856. The Defence further challenges the Trial Chamber's assessment of P-0205's evidence.[1846] The Defence submits, albeit in an unclear manner, that because the witness indicated that there were no civilian casualties, and "did not provide information to [Mr Ongwen] regarding civilian casualties", "the conduct of P-0205 negates the fact that [Mr Ongwen] instructed him and other commanders […] to kill civilians".[1847] The Appeals Chamber recalls that similar arguments raised by the Defence in its grounds of appeal 60 and 70 were addressed and rejected in the determination of those grounds. In particular, the Appeals Chamber rejected the Defence's submission that it was possible that civilian deaths during the attack were caused by crossfire. In any event, the Appeals Chamber recalls that the Trial Chamber's findings that during the attack on the Lukodi IDP camp "LRA fighters killed civilians in Lukodi IDP camp: men, women and children", that "[a]t least 48 civilians died as a result of injuries sustained in the attack" and that "[c]ivilians were shot, burnt and beaten to death"[1848] are supported by a wealth of evidence,[1849] to which the Defence does not refer in its submissions.

857. The Defence also appears to submit that the fact that P-0205 did not see civilian casualties and did not report any civilian casualties to Mr Ongwen contradicts the Trial Chamber's finding that Mr Ongwen ordered P-0205 and other subordinates to attack Lukodi IDP camp and kill civilians. The Appeals Chamber finds no merit in this argument, noting that there is no apparent contradiction between P-0205's statement and the Trial Chamber's finding. As noted above, the Trial Chamber explained the basis for its reliance on P-0205 in-court testimony that Mr Ongwen ordered his subordinates to attack Lukodi IDP camp and kill civilians.[1850]

858. Furthermore, as noted above, in addition to the evidence provided by P-0205, the Trial Chamber relied on other relevant evidence to support its finding that Mr Ongwen ordered the killing of civilians prior to the attack on Lukodi IDP camp.[1851] The Defence does not raise any specific argument in relation to the Trial Chamber's assessment of

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[1846] Appeal Brief, paras 886, 888. *See also* para. 889.
[1847] Appeal Brief, paras 886, 888. *See also* para. 889.
[1848] Conviction Decision, p. 617.
[1849] Conviction Decision, paras 1747-1779.
[1850] *See* paragraphs 852-853 above.
[1851] Conviction Decision, paras 1676-1680.

the other evidence relied upon. Moreover, the Appeals Chamber deems it relevant to note that in its assessment of the evidence supporting its finding that "[Mr] Ongwen also reported his soldiers' attack on Lukodi IDP camp to other LRA commanders [and] took responsibility for the attack",[1852] the Trial Chamber, after recounting all relevant evidence, stated:

> In conclusion on this issue, the evidence shows that in intercepted radio communications, [Mr] Ongwen, in his own words, took responsibility for the May 2004 attack on Lukodi IDP camp, including specifically for harm done to civilians. Other high-ranking members of the LRA leadership noted his work and commended him for it. *This evidence is in line with the witness testimony discussed above as to [Mr] Ongwen's ordering of the attack and the course of the attack.*[1853]

859. As to the Defence's reference to the evidence of P-0101 to argue that Mr Ongwen "did not give orders for civilians to be targeted in Lukodi",[1854] the Appeals Chamber notes that the Defence's challenge to the Trial Chamber's assessment of the witness's evidence has been addressed and rejected above in its determination of ground of appeal 65.[1855]

860. Accordingly, the arguments advanced by the Defence are rejected.

(c) Conclusion

861. Having rejected the totality of the arguments raised by the Defence, the Appeals Chamber rejects grounds of appeal 81 and 82.

3. Grounds of appeal 69, 83, 84, 85, 86: Alleged errors concerning Mr Ongwen's individual criminal responsibility for the conscription and use in hostilities of children below the age of 15

(a) Summary of the submissions

862. Under these grounds of appeal, the Defence submits that the Trial Chamber erred in law and in fact when finding Mr Ongwen criminally responsible as an indirect co-perpetrator for the conscription and use in hostilities of children under the age of

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[1852] Conviction Decision, para. 189.
[1853] Conviction Decision, para. 1857 (emphasis added).
[1854] Appeal Brief, para. 890.
[1855] *See* section VI.D.1(c)(iii)(e) (Alleged incorrect assessment of evidence related to the attacks on Odek and Lukodi IDP camps) above.

15 years.[1856] Under ground of appeal 69, the Defence contends that the Trial Chamber erred in law and fact when it found that there was a common plan between Mr Ongwen and other LRA leaders to conscript children below the age of 15 and use them in hostilities.[1857] In grounds of appeal 83, 84, 85 and 86, the Defence alleges "errors of law, procedure and fact" in the Trial Chamber's findings relevant to Mr Ongwen's individual criminal responsibility as an indirect co-perpetrator for the conscription and use in hostilities of children under the age of 15 years.[1858]

863. In his response, the Prosecutor submits that some of the arguments advanced by the Defence in grounds of appeal 83, 84, 85 and 86 should be dismissed *in limine* due to lack of substantiation while other arguments should be rejected, considering that the Defence fails to "accurately describe" the Conviction Decision and given the "ample reliable evidence" relied upon by the Trial Chamber.[1859]

864. Victims Group 1 contend that the Defence's arguments are "a disagreement with the findings of the Chamber" and that the Defence fails to identify any error of law or fact.[1860]

(b) Relevant parts of the Conviction Decision

865. The Trial Chamber carried out an assessment of Mr Ongwen's individual criminal responsibility as an indirect co-perpetrator for the conscription and use in hostilities of children under the age of 15 years.[1861] Its assessment addressed: (i) the existence of an agreement or a common plan;[1862] (ii) the execution of the material elements of the crimes through other persons;[1863] (iii) Mr Ongwen's control over the crime;[1864] and (iv) the mental element.[1865]

[1856] Appeal Brief, paras 703-708, 893-917.
[1857] Appeal Brief, paras 703-708.
[1858] Appeal Brief, para. 893.
[1859] Prosecutor's Response, paras 446, 538.
[1860] Observations of Victims Groups 1, para. 254. *See also* paras 199, 255-262.
[1861] Conviction Decision, paras 3105-3115.
[1862] Conviction Decision, para. 3106.
[1863] Conviction Decision, paras 3107-3108.
[1864] Conviction Decision, paras 3109-3111.
[1865] Conviction Decision, paras 3112-3114.

(c) Determination by the Appeals Chamber

866. The Appeals Chamber recalls that Mr Ongwen was convicted on two counts as an indirect co-perpetrator for the conscription and use in hostilities of children under the age of 15 years as a war crime, pursuant to article 8(2)(e)(vii) of the Statute (counts 69-70).[1866]

867. At the outset, the Appeals Chamber notes that several of the arguments under these grounds of appeal have already been addressed and rejected elsewhere in the judgment. The argument concerning an alleged violation of Mr Ongwen's rights under article 67(1)(a) of the Statute[1867] has been addressed and rejected in the analysis relating to ground of appeal 5.[1868] Those arguments that are premised on a misinterpretation of indirect perpetration as a mode of liability[1869] have been addressed and rejected when determining grounds of appeal 65 and 68.[1870] Furthermore, the Appeals Chamber dismisses *in limine*, due to a lack of substantiation,[1871] arguments that broadly assert that the Trial Chamber "did not apply the appropriate standard of proof", "reversed the burden of proof", and "disregarded evidence that raised reasonable doubt",[1872] as well as arguments that fail to identify an impugned finding, in particular the Defence's argument that the charges against Mr Ongwen concerning the conscription and use in hostilities of children under the age of 15 years "were only confirmed […] due to the Prosecution's inability to bring Kony to justice".[1873]

868. Apart from the above, the core argument made by the Defence is that the Trial Chamber erred in holding Mr Ongwen criminally responsible as an indirect co-perpetrator for the conscription and use in hostilities of children under the age of 15 years. In support of its position, the Defence submits that the Trial Chamber erred:

[1866] Conviction Decision, para. 3115.
[1867] Appeal Brief, paras 705, 894, 904, 907, 910.
[1868] *See* section VI.B.4 (Ground of appeal 5: Alleged error in proceeding to trial and in entering a conviction on the basis of a defective Confirmation Decision, in violation of the right to notice under article 67(1)(a) of the Statute) above.
[1869] Appeal Brief, paras 894, 911-912.
[1870] *See* generally sections VI.D.1(c)(iii) (Grounds of appeal 65 (in part), 74 (in part), 75 (in part) and 76 (in part): Alleged errors in the Trial Chamber's findings regarding the structure of the LRA and Mr Ongwen's role) and VI.D.1(c)(iv) (Grounds of appeal 68 and 28 (in part): Alleged errors regarding evidence of Mr Ongwen's abduction, initiation, training, and service in the LRA) above.
[1871] *See* paragraph 97. *See also* section V.D (Substantiation of arguments) above.
[1872] Appeal Brief, para. 895.
[1873] Appeal Brief, paras 703-704. *See also* T-265, p. 37, line 22 to p. 38, line 4.

(i) in finding that Mr Ongwen was part of a common plan regarding the conscription of children;[1874] (ii) in its age determination of soldiers;[1875] and (iii) in finding Mr Ongwen responsible given that he only became brigade commander of Sinia on 4 March 2004.[1876]

869. The Appeals Chamber will address these arguments in turn.

(i) Alleged error in the finding that Mr Ongwen was part of a common plan

870. The Defence submits that the policy of conscripting children below the age of 15 years predates the timeframe relevant to the charges and even Mr Ongwen's own abduction.[1877] It submits that Mr Ongwen was "abducted and subjugated to Kony's control and command"[1878] and therefore, Mr Ongwen was "merely another victim" of the policy implemented by Joseph Kony.[1879] The Defence refers in this regard to the brutality that characterised obedience in the LRA.[1880]

871. The Appeals Chamber recalls that, in finding that Mr Ongwen was criminally responsible as an indirect co-perpetrator for the conscription and use in hostilities of children under the age of 15 years, the Trial Chamber determined: (i) the existence of an agreement or common plan between Mr Ongwen, Joseph Kony and the Sinia brigade leadership pursuant to which children were abducted and used in armed hostilities;[1881] (ii) the execution of the material elements of the crime through Sinia soldiers;[1882] (iii) Mr Ongwen's control over the crime;[1883] and (iv) the mental element.[1884] In so doing, the Trial Chamber referred extensively to its factual findings reached on the basis of detailed evidentiary assessments.

[1874] Appeal Brief, paras 706-708.
[1875] Appeal Brief, paras 896-909, 913-915.
[1876] Appeal Brief, paras 916-917.
[1877] Appeal Brief, para. 706.
[1878] Appeal Brief, para. 706.
[1879] Appeal Brief, para. 707.
[1880] Appeal Brief, para. 708.
[1881] Conviction Decision, para. 3106.
[1882] Conviction Decision, paras 3107-3108.
[1883] Conviction Decision, paras 3109-3111.
[1884] Conviction Decision, paras 3112-3114.

872. The Defence argues that the LRA policy of abduction and recruitment of children under the age of 15 years had been conceived and enforced by Joseph Kony before the period relevant to the charges, that the orders came from Joseph Kony, and that whoever dared to contradict Joseph Kony would face dire consequences.[1885] These arguments do not, in themselves, demonstrate an error in, and are irrelevant to, the Trial Chamber's conclusions on Mr Ongwen's responsibility for these crimes. In order to hold Mr Ongwen responsible for these crimes as an indirect co-perpetrator, it was sufficient for the Trial Chamber to conclude that Mr Ongwen, Joseph Kony and others shared the above-mentioned common plan during the period relevant to the charges, that Mr Ongwen executed the material elements of the crime through other persons, that he had control over the crimes, and that he acted with the requisite intent and knowledge.

873. Specifically, in relation to the existence of an agreement or common plan between Mr Ongwen, Joseph Kony and the Sinia brigade leadership pursuant to which children were abducted and used in armed hostilities, the Trial Chamber relied upon its factual finding that "[Mr] Ongwen, Joseph Kony and the Sinia brigade leadership engaged in a coordinated and methodical effort, relying on the LRA soldiers under their control, to abduct children under 15 years of age in Northern Uganda and force them to serve as Sinia fighters".[1886] In support of this factual finding, the Trial Chamber carried out an extensive evidentiary assessment.[1887] It provided the following introductory notes to this assessment:

> 2312. The coordinated and methodical nature of the abductions of boys and girls and the reliance by [Mr] Ongwen, Joseph Kony and the Sinia brigade leadership on the LRA soldiers for the execution of the abductions are demonstrated by the factual analysis in the sections that follow, in particular as concerns evidence of orders for abductions and the evidence of abductions which occurred.
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> 2313. In the present section, the Chamber provides its analysis of the evidence which demonstrates that the LRA focused specifically on abducting children. Indeed, as demonstrated by the evidence, the recruitment of children as soldiers into the LRA was not incidental or a result of disregard for the age of the recruits, but was a specific and methodically pursued organisation-wide policy. As a further introductory note, the Chamber observes that the evidence includes various estimates of the age targeted for abduction by the LRA, sometimes also merely referring to 'young children' or children. In fact, whereas several

[1885] Appeal Brief, paras 706-708.
[1886] Conviction Decision, para. 3106, *referring to* para. 222.
[1887] Conviction Decision, paras 2312-2328.

> witnesses provided estimates of the minimum age which was suitable for abduction in the view of the LRA, these appear to be estimates based on practice. It may therefore be noted that even though the LRA practice of abducting children was discussed with a number of witnesses, including insiders, evidence of any mandatory minimum age for abduction, or of any form of a screening system based on age, did not transpire. Bearing this in mind, and on the basis of the evidence discussed hereunder, the Chamber has no doubt that the LRA leadership, including [Mr] Ongwen, Joseph Kony and the Sinia brigade leadership, specifically targeted children under 15 years of age for abduction.[1888]

874. By way of example, the Appeals Chamber notes the following considerations of the Trial Chamber: (i) "P-0233 testified that persons '[f]rom the age 15, 14, even 13 years would be taken', reasoning that this was because such persons could still be 'mentored' and 'influenced to do what you want the person to do'";[1889] (ii) P-0330 "stated that he heard [Mr] Ongwen give an order not to abduct any 'elderly person', because such persons 'are really mature and they know their way back home, they will be able to escape, but the young people will not be able to escape an go back home'";[1890] (iii) in relation to the orders issued by Mr Ongwen concerning the attack on Odek IDP camp, "P-0205 stated that [Mr] Ongwen gave the instruction that '[b]oys should also be abducted when found', and that '[t]hose who were not fit to be in the army, those who were above 18 should not be brought, they should be killed instead'" – "P-0314 corroborated P-0205's evidence, testifying that [Mr] Ongwen's order before the attack on Odek IDP camp was to 'go and abduct some children'";[1891] (iv) "[a]s concerns [Mr] Ongwen's orders for abduction, the Chamber notes that P-0231 testified in general terms about orders for abduction being passed by [Mr] Ongwen onto the junior officers";[1892] (v) the Trial Chamber further referred to its factual findings and evidentiary discussion concerning "specific abductions".[1893]

875. Also of relevance, in its legal findings concerning Mr Ongwen's control over the crimes of conscription and use of children below 15 years in hostilities, the Trial Chamber recalled that

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[1888] Conviction Decision, paras 2312-2313.
[1889] Conviction Decision, para. 2316.
[1890] Conviction Decision, para. 2318.
[1891] Conviction Decision, para. 2319.
[1892] Conviction Decision, para. 2339.
[1893] Conviction Decision, para. 2339.

> [Mr] Ongwen ordered Sinia soldiers to abduct children to serve as Sinia soldiers. [Mr] Ongwen also abducted children himself. In some cases, [Mr] Ongwen himself assigned abducted children to service within the Sinia brigade. The children served as escorts in Sinia brigade in general and specifically in [Mr] Ongwen's household.[1894]

876. All of the above factual findings were, in turn, supported by detailed evidentiary assessments by the Trial Chamber.[1895]

877. Based on the above, it is clear that the Trial Chamber entered all the necessary findings to determine that Mr Ongwen was criminally responsible as an indirect co-perpetrator for the conscription and use in hostilities of children under the age of 15 years. Specifically, the Trial Chamber found that Mr Ongwen engaged in a coordinated and methodical effort, relying on the LRA soldiers under their control, to abduct children under 15 years of age in Northern Uganda and force them to serve as Sinia fighters. This was the basis of the Trial Chamber's determination on the existence of a common plan pursuant to which children were abducted and used in armed hostilities. Therefore, whether the policy was designed or conceived before the time period relevant to the charges, the fact remains that Mr Ongwen actively engaged in the implementation of said policy.

878. The Defence fails to demonstrate that the Trial Chamber's findings were unreasonable. To the extent that the Defence suggests that Mr Ongwen had no control over the crimes because he was a tool at the disposal of Joseph Kony, its identical arguments have been addressed and rejected in the determination of ground of appeal 65.[1896]

879. Accordingly, the Defence's arguments are rejected.

(ii) Alleged erroneous findings on the age determination of soldiers

880. The Defence submits that the Trial Chamber "failed to establish a discernible, credible criterion" for the determination of age in general and "ages below 15 years in

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[1894] Conviction Decision, para. 3110 (footnotes omitted).
[1895] Conviction Decision, paras 2340-2414.
[1896] *See* section VI.D.1(c)(iii) (Grounds of appeal 65 (in part), 74 (in part), 75 (in part) and 76 (in part): Alleged errors in the Trial Chamber's findings regarding the structure of the LRA and Mr Ongwen's role) above.

particular".[1897] The Defence further highlights the importance of birth certificates "to ascertain the age of a child",[1898] faults the Prosecutor for failing "to pursue information about the ages of the children from the Ugandan authorities",[1899] and challenges the Trial Chamber's reliance on a witness estimation of a person's age when the person has not appeared before the Court.[1900] It also notes that "a majority [of the persons allegedly conscripted and used in armed hostilities] did not appear before the Court and were not identified to the Court by any legally permissible manner or procedure".[1901]

(a) General considerations

881. At the outset, the Defence appears to challenge the fact that the Trial Chamber "failed to establish a discernible, credible criterion" to determine the age of the conscripts.[1902] As fully developed below, the Appeals Chamber notes that the determination of a person's age is a *factual matter*. In this regard, the task of a chamber is to assess the credibility and reliability of the evidence presented by the parties and participants in order to establish whether the fact that soldiers were below the age of 15 years has been proven beyond reasonable doubt. Thus, the question for the Appeals Chamber is to determine whether the Trial Chamber reached a reasonable conclusion when making such determinations.

882. The Appeals Chamber recalls that "it is not *per se* impermissible to make a finding on the age element of the crimes in circumstances where the identity of the victim is unknown".[1903] The Appeals Chamber has also determined that the relevant legal framework applicable to the crime of conscripting children under the age of 15 years into armed forces or groups and using them to participate actively in hostilities does "not require that the exact age of a victim of the crime be established".[1904] Rather, what needs to be established is "that the victim is under the age of fifteen years".[1905] Since a determination of the exact age of those children is, as a matter of law, not

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[1897] Appeal Brief, para. 896.
[1898] Appeal Brief, para. 898.
[1899] Appeal Brief, para. 900.
[1900] Appeal Brief, paras 903-904.
[1901] Appeal Brief, para. 901.
[1902] Appeal Brief, para. 896.
[1903] *Lubanga* Appeal Judgment, para. 197.
[1904] *Lubanga* Appeal Judgment, para. 198.
[1905] *Lubanga* Appeal Judgment, para. 198.

required, the Appeals Chamber will not address arguments of the Defence that refer to the Trial Chamber's purported failure to make such determination.[1906] For the same reasons, the Appeals Chamber finds no merit in the Defence's general challenge to the Trial Chamber relying on "estimates".[1907]

883. The Trial 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".[1908] Furthermore, the Trial Chamber added 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".[1909]

884. The Appeals Chamber notes that this approach is consistent with the approach adopted by other trial chambers,[1910] which was confirmed by the Appeals Chamber.[1911] Indeed, it is well established that generally "it is feasible for non-expert witnesses to differentiate between a child who is undoubtedly less than 15 years old and a child who is undoubtedly over 15",[1912] and that a chamber is competent to assess the age of individuals on the basis of the evidence before it. As long as the estimates are such that they are capable of establishing beyond reasonable doubt the age element of the crime set out in article 8(2)(e)(vii) of the Statute, it is permissible to rely thereon. In these circumstances, the focus of the Appeals Chamber's review will be on the Defence's challenges to the Trial Chamber's factual determination that children below the age of 15 years were conscripted and used in armed hostilities.

885. In addition, the Appeals Chamber has held that whether a chamber can establish beyond reasonable doubt that a person was below the age of 15 years "in circumstances where the identity and exact date of birth of the victim are unknown is a question of

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[1906] *See e.g.* Appeal Brief, para. 896
[1907] *See e.g.* Appeal Brief, paras 896, 901-902.
[1908] Conviction Decision, para. 2314.
[1909] Conviction Decision, para. 2314.
[1910] *Lubanga* Conviction Decision, paras 641 *et seq*; *Ntaganda* Conviction Decision, *see e.g.* paras 77-88, 1125-1132.
[1911] *Lubanga* Appeal Judgment, para. 198; *Ntaganda* Appeal Judgment, paras 799-821.
[1912] *Lubanga* Conviction Decision, para. 643.

fact and must be decided on a case-by-case basis taking into account the specific facts and circumstances of the case and individual at issue".[1913] In reaching such a factual determination, a chamber may rely on various types of evidence.[1914]

886. The Defence submits that "[i]n a strong dissenting opinion", Judge Anita Ušacka "strongly rejected [the use of hearsay evidence] as credible and reliable factors to establish the ages of children below the age of 15".[1915] According to the Defence, in her dissenting opinion in the *Lubanga* Case Judge Ušacka accepted that "it may be considered reasonable, in the absence of any other reliable method of verifying age, to rely on a video excerpt or a witness's assessment of the age of a particular child in circumstances where the witness comprehensively describes the factors informing his or her evaluation".[1916] In relation to the testimony of a witness, the Judge noted that

> the testimony of a witness, for example, about the age of an individual he or she personally knew, or about a child that was so young that it was manifest from their appearance that they were under the age of fifteen, could similarly be given some weight and probative value in order to establish the age element of the crimes to the standard of beyond reasonable doubt.[1917]

887. As is clear from the above, the Defence fails to appreciate that Judge Ušacka did not disagree with the evidentiary approach to the age determination of child soldiers. Her dissent concerned the fundamental question of whether the evidence presented in the *Lubanga* Case was sufficient to establish the age element beyond reasonable doubt.[1918] The Appeals Chamber further notes that, when referring to the reasoning underlying the factual findings reached in the *Lubanga* Case, it is important to bear in mind the fundamental differences as to the type of evidence relied upon in that case as opposed to the type of evidence relied upon in the present case. As explained in detail below, the Defence challenges the Trial Chamber's factual determination that children below the age of 15 years were conscripted and used in armed hostilities. Contrary to the proceedings in the *Lubanga* Case, in the case at hand, the Trial Chamber relied,

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[1913] *Lubanga* Appeal Judgment, para. 198.
[1914] *See* *Lubanga* Appeal Judgment, paras 218-220.
[1915] Appeal Brief, para. 904.
[1916] Appeal Brief, para. 904, *referring to* *Lubanga* Dissenting Opinion of Judge Ušacka, para. 41.
[1917] *Lubanga* Dissenting Opinion of Judge Ušacka, para. 41.
[1918] *Lubanga* Dissenting Opinion of Judge Ušacka, para. 44.

inter alia, on the evidence provided by witnesses who were themselves conscripted and used in armed hostilities when under 15 years of age.

(b) Alleged errors regarding the Trial Chamber's approach to age determination

888. The Defence submits that the Trial Chamber's approach to evidence on age was inconsistent with its assessment of Mr Ongwen's birthdate.[1919] Since the age determination of an individual can only be assessed on a case-by-case basis, in light of the specific evidence submitted, the Defence's reference to the Trial Chamber's assessment of Mr Ongwen's birthdate is inapposite. Furthermore, the Defence's reference is irrelevant to the question of whether the evidence presented by the Prosecutor is sufficient to establish beyond reasonable doubt that children below the age of 15 years were conscripted and used in armed hostilities.

889. The Appeals Chamber now turns to the more specific challenges concerning the Trial Chamber's factual determination that persons below the age of 15 years were conscripted and used in armed hostilities in the present case. In this regard, the Defence: (i) faults the Prosecutor for "fail[ing] to pursue information about the ages of the children from the Ugandan authorities";[1920] (ii) challenges the Trial Chamber's assessment of the evidence provided by a number of witnesses;[1921] (iii) questions the Trial Chamber's reliance "on impermissible hearsay evidence, untested logbook summaries of LRA radio intercepts without the corresponding originals of audio recordings";[1922] and (iv) avers that the findings relied upon by the Trial Chamber to convict Mr Ongwen "were general in nature", and "not specific in terms of evidence, time frames, geographic parameters, locations, persons, and the specific actions of [Mr Ongwen]".[1923]

890. In order to address the arguments raised by the Defence, the Appeals Chamber deems it appropriate to recall the relevant factual findings reached by the Trial Chamber, namely

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[1919] Appeal Brief, para. 902. *See also* para. 901.
[1920] Appeal Brief, paras 898, 900.
[1921] Appeal Brief, paras 899, 901, 905-906, 914.
[1922] Appeal Brief, paras 895, 904, 908, 913.
[1923] Appeal Brief, para. 907. *See also* paras 908-909, 914-915.

> 222. [Mr] Ongwen, Joseph Kony and the Sinia brigade leadership engaged in a coordinated and methodical effort relying on the LRA soldiers under their control, to abduct children under 15 years of age in Northern Uganda and force them to serve as Sinia fighters.
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> 223. Sinia soldiers, in execution of orders of Joseph Kony, [Mr] Ongwen and the Sinia brigade leadership, abducted a large number of children under 15 years of age in Northern Uganda between 1 July 2002 and 31 December 2005. Children under the age of 15 were also abducted during the four attacks relevant to the charges. [Mr] Ongwen also abducted children himself.[1924]

891. To reach the above factual finding, the Trial Chamber relied upon the testimony of witnesses who were themselves child soldiers in the Sinia brigade during the time relevant to the charges and who stated that other boys and girls were abducted (P-0097,[1925] P-0264,[1926] P-0309,[1927] P-0307,[1928] P-0314,[1929] P-0252,[1930] P-0275,[1931] P-0330,[1932] P-0410[1933]); the testimony of other former LRA fighters (P-0142,[1934] P-0406,[1935] P-0205,[1936] P-0144,[1937] P-0138,[1938] P-0054,[1939] P-0372,[1940] P-0379,[1941] P-0233,[1942] P-0070,[1943] P-0231[1944]); the testimony of victims of LRA attacks and other persons who testified about the presence of children under 15 years in the LRA (P-0015,[1945] P-0286,[1946] P-0284,[1947] P-0249,[1948] P-0006,[1949] P-0047,[1950] P-0293[1951]) and

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[1924] Conviction Decision, paras 222-223.
[1925] Conviction Decision, paras 2341-2342, 2375-2376.
[1926] Conviction Decision, paras 2314, 2343-2344, 2371, 2384, 2395, 2423-2424, 2432.
[1927] Conviction Decision, paras 2345-2346, 2352-2353, 2398, 2413, 2433.
[1928] Conviction Decision, paras 2347-2348, 2377, 2388, 2422.
[1929] Conviction Decision, paras 2319, 2350, 2399.
[1930] Conviction Decision, paras 2358, 2396-2397, 2418, 2430, 2444.
[1931] Conviction Decision, para. 2360.
[1932] Conviction Decision, paras 2318, 2378.
[1933] Conviction Decision, paras 2431, 2439.
[1934] Conviction Decision, paras 2347, 2366, 2437.
[1935] Conviction Decision, paras 2349, 2359, 2361, 2364, 2380, 2438, 2446.
[1936] Conviction Decision, paras 2319, 2351.
[1937] Conviction Decision, paras 2355, 2427.
[1938] Conviction Decision, para. 2356.
[1939] Conviction Decision, paras 2314, 2367, 2391, 2434.
[1940] Conviction Decision, paras 2369-2370, 2392, 2426.
[1941] Conviction Decision, paras 2372, 2387.
[1942] Conviction Decision, paras 2315-2316.
[1943] Conviction Decision, para. 2317.
[1944] Conviction Decision, para. 2320.
[1945] Conviction Decision, para. 2354.
[1946] Conviction Decision, para. 2363.
[1947] Conviction Decision, para. 2365.
[1948] Conviction Decision, para. 2428.
[1949] Conviction Decision, para. 2428.
[1950] Conviction Decision, para. 2428.
[1951] Conviction Decision, para. 2447.

the testimony of "so-called wives" in the LRA (P-0226,[1952] P-0396[1953]). The Trial Chamber also referred to various records of intercepted radio communications that "corroborate the witness testimony".[1954] As illustrated further below, in assessing the age estimates provided by the witnesses, the Trial Chamber considered the explanations given by them about their estimations and the basis of their knowledge.

(i) Alleged failure to obtain information from the Ugandan authorities

892. The Defence submits that "[t]he official record to ascertain the age of a child is a birth certificate" and that the Prosecutor "failed to pursue information about the age of the children from the Ugandan authorities".[1955] The Appeals Chamber considers that, given that the age determination is factual in nature, it can be established through different evidentiary means, including by, but not limited to, information provided by the relevant authorities. In this regard, there is no exhaustive catalogue of evidentiary means.

893. In these circumstances, it is unclear how the Defence's submission would render unreasonable the Trial Chamber's conclusion on the age determination, which was based on other evidence submitted by the Prosecutor. The Appeals Chamber also recalls the Trial Chamber's finding that the "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".[1956] It also notes the Trial Chamber's finding that "[g]iven the circumstances in which civilians abandoned their dwelling places and lived in camps that were burnt down in the conflict, it is reasonable that they received official government documents, such as birth certificates, that were issued recently and contain information the government obtained from the civilians' themselves".[1957]

894. The Defence's argument is therefore rejected.

[1952] Conviction Decision, para. 2400.
[1953] Conviction Decision, para. 2414.
[1954] Conviction Decision, para. 2322. *See also* paras 2323-2327.
[1955] Appeal Brief, paras 898, 900.
[1956] Conviction Decision, para. 337.
[1957] Conviction Decision, para. 374.

(ii) Alleged erroneous assessment of witness evidence

895. The Defence argues that "[s]ome of the witnesses produced their hospital birth records which contradicted the ages they provided to the Court" and, the Trial Chamber should have found "reasonable doubts based on the discrepancies in age".[1958] The Defence refers to witnesses P-0097, P-0252, P-0307, P-0399 and P-0410.[1959] As noted by the Prosecutor,[1960] the Trial Chamber addressed possible contradictions and consistently explained the basis for its conclusions.

896. In relation to P-0097, the Trial Chamber noted the discrepancies between the age indicated by the witness during his testimony and that appearing on his birth certificate, his national ID, his baptism document, two school identity cards, an "immunisation card" and a "school progress card".[1961] Noting that "the evidence indicates that the witness was born at the earliest on [REDACTED] 1990 and was therefore at the most 14 years old in February 2005", it found "that P-0097 was under the age of 15 at the time of his abduction".[1962]

897. In relation to P-0252, the Trial Chamber noted the discrepancies in the different age and birthdates provided by the witness during his testimony and appearing in various official documents produced as evidence.[1963] It noted "the questions by Defence counsel with regard to the procedure of obtaining the birth certificate and the fact that the date '[REDACTED] 1993' is probably an estimation".[1964] Furthermore, the Trial Chamber took into consideration the witness's testimony as to "how the certificate was obtained" and the witness's response "that it was not him who provided the date".[1965] The Trial Chamber also found "that all documents but one consistently indicate 1993 as the year of birth" and on this basis, it did "not doubt the veracity of the document".[1966] The Trial Chamber further noted that "'[REDACTED]' as a date of birth is probably

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[1958] Appeal Brief, para. 899.
[1959] Appeal Brief, para. 899, fn. 1143.
[1960] Prosecutor's Response, para. 542.
[1961] Conviction Decision, para. 299.
[1962] Conviction Decision, para. 299.
[1963] Conviction Decision, paras 322-323.
[1964] Conviction Decision, para. 323 (footnotes omitted).
[1965] Conviction Decision, para. 323.
[1966] Conviction Decision, para. 323.

an estimation" but found that "this does not apply to the year indicated, 1993".[1967] It concluded that "[s]hould P-0252 have been born later than [REDACTED] 1993, this would mean that he would be even younger, which is irrelevant for the charges", noting that "[t]he same holds true for the one document indicating that the witness was born either in 1993 or 1994".[1968] On this basis, the Trial Chamber found "that the witness was 11 years old at the time of the attack on Odek IDP camp".[1969]

898. As to witness P-0307, the Trial Chamber noted "the diverging evidence as to the witness's age", referring to the witness's prior recorded statement, his testimony, an "immunisation card", national ID card and a document from "World Vision".[1970] The Trial Chamber examined these differences and, based on the content of the documents, as well as the testimony provided by the witness, found that P-0307 was born on the date indicated in the "immunisation card".[1971] It also found "that the witness's explanation regarding the different dates of birth does not undermine his general credibility", considering that

> in his prior recorded statement, the witness readily admitted that he did know of the health immunisation card and always indicated 1990 as his year of birth, because he was given this information by his mother. But after he was in possession of the immunisation card, he readily accepted that he was born in 1989 and not 1990.[1972]

899. With respect to witness P-0309, the Trial Chamber considered the Defence's arguments challenging the credibility of the witness "especially regarding his true age".[1973] In relation to the discrepancies identified in the testimony of the witness and in the documents presented, the Trial Chamber "did not find that the different dates of birth indicated make him generally not credible".[1974] The Trial Chamber found that "the witness readily admitted that he initially did not know his date of birth" and noting that this was "also the case when he told his age to the LRA fighters at the time of his

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[1967] Conviction Decision, para. 323.
[1968] Conviction Decision, para. 323.
[1969] Conviction Decision, para. 323.
[1970] Conviction Decision, para. 334.
[1971] Conviction Decision, paras 335-338.
[1972] Conviction Decision, para. 338 (footnotes omitted).
[1973] Conviction Decision, para. 344.
[1974] Conviction Decision, para. 346.

abduction".[1975] The Trial Chamber further considered that it was "not incredible that P-0309 did not know his exact date of birth" and observed that "[o]nce he was told by his mother that it was [REDACTED] 1988, he seems to have consistently indicated this date as his date of birth – as he did during his testimony".[1976] It noted that the witness's explanation was "also consistent with part of the documentary evidence" and, on the basis of all of these considerations, it found "the explanation provided by the witness believable and [did] not consider that the different dates of birth, provided at different times by the witness, affect his credibility in general or specifically, when he testified that his date of birth is [REDACTED] 1988".[1977]

900. Finally, concerning P-0410's date of birth, the Trial Chamber noted that "the witness testified that he was born on [REDACTED] 1989 which is also indicated on [REDACTED] birth certificate".[1978] The Defence challenges the probative value of the birth certificate because it was issued after the commencement of the case against Mr Ongwen. However, the Trial Chamber did "not find that the point in time when the document was requested (after the opening of the case) influences its probative value" and noted that "there is no indication that the witness requested the document with the intention to mislead the Chamber".[1979] Considering "the circumstances in which civilians abandoned their dwelling places and lived in camps that were burnt down in the conflict", the Trial Chamber deemed it "reasonable that they received official government documents, such as birth certificates, that were issued recently and contain information the government obtained from the civilians' themselves".[1980] The Trial Chamber found "the witness's testimony in relation to his age credible and reliable" and noted that "[a]bsent other evidence undermining the reliability of the document", it would "not make negative inferences as to the credibility of witnesses and their reliability of their information merely because governmental records such as birth certificates were recently issued".[1981]

[1975] Conviction Decision, para. 346.
[1976] Conviction Decision, para. 346.
[1977] Conviction Decision, para. 346.
[1978] Conviction Decision, para. 374.
[1979] Conviction Decision, para. 374.
[1980] Conviction Decision, para. 374.
[1981] Conviction Decision, para. 374.

901. The Defence does not explain, and it is not apparent to the Appeals Chamber, the basis upon which the above findings and conclusions by the Trial Chamber would be unreasonable. This argument is therefore rejected.

902. The Defence further argues that the Trial Chamber "relied on 'mere estimates' and variable conjectures to find that [persons] were below the age of 15 years"[1982] and refers to alleged "discrepancies and inconsistencies in the evidence of ages provided by witnesses", submitting that "[a] reasonable trier of fact would have found reasonable doubt".[1983] However, besides claiming that the Trial Chamber relied on estimates, which the Appeals Chamber has determined above that this is permissible, or broadly referring to alleged inconsistencies, the Defence fails to identify an error that would render the Trial Chamber's age determination of P-0264 and P-0307 unreasonable.

903. The Appeals Chamber has already found that the Trial Chamber's determination of the age of P-0307 was reasonable.[1984] In relation to P-0264, the Trial Chamber noted the witness testimony "that he was abducted in 2002 at the age of 11" and that "his national ID card indicates that he was born in 1989, which would have made him 12 or 13 at the time of his abduction in 2002".[1985] The Trial Chamber found that this inconsistency in relation to the witness's age did not "undermine the Chamber's view of his credibility".[1986] To support its finding, the Trial Chamber noted the witness's explanation "that other records indicating his age were destroyed in the course of the conflict and that government authorities erroneously estimated the age noted in his national ID card after his return from the LRA" and found "no reason to doubt the witness's explanation" which considered to be "reasonable".[1987] In addition, the Trial Chamber found "the witness's explanation of why he remembers his age at abduction credible".[1988]

[1982] Appeal Brief, para. 901. *See also* para. 905.
[1983] Appeal Brief, para. 914.
[1984] *See* paragraph 898 above.
[1985] Conviction Decision, para. 330.
[1986] Conviction Decision, para. 330.
[1987] Conviction Decision, para. 330.
[1988] Conviction Decision, para. 330 ("In his explanation of why he recalled that he was 11 years old when he was abducted, P-0264 explained: '[t]he reason why I said I was 11, because while I was still in primary 4 […] that's how I would write my age that I have 11 – I am 11 years old […] And even when I was captured, the people who captured me asked me "How old are you?" I told them "I am 11 years old"'.") (Footnote omitted).

904. Elsewhere in the Conviction Decision, the Trial Chamber recalled its assessment of the witness' credibility, specifically concerning his age at the time of abduction.[1989] It further noted that "[s]ince the Chamber is unable to establish the witness's precise date of abduction in 2002 it cannot determine whether it occurred after 1 July 2002".[1990] However, the Trial Chamber found "that the fact whether the witness was 11, 12 or 13 is immaterial, since in any case he was under the age of 15 at the time of his abduction".[1991]

905. The Trial Chamber also provided reasons to explain its reliance on the estimates of P-0307 and P-0264 regarding the age of other conscripts.[1992]

906. As noted above, "trial chambers have 'the main responsibility to resolve any inconsistencies that may arise within and/or amongst witnesses' testimonies'" and it is within their discretion "to evaluate any inconsistencies, to consider whether the evidence taken as a whole is reliable and credible and to accept or reject the 'fundamental features' of the evidence'".[1993] Given the Trial Chamber's reasoning, and in the absence of any specific arguments identifying an error therein, the Appeals Chamber does not find that the Trial Chamber's reliance on the evidence provided by P-0264 and P-0307 was unreasonable. Accordingly, it rejects the Defence's argument.

907. Furthermore, the Defence's reference to the testimony of P-0340[1994] is misplaced. In the impugned paragraph, the Trial Chamber noted "that the witness had difficulty

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[1989] Conviction Decision, para. 2343.
[1990] Conviction Decision, para. 2343.
[1991] Conviction Decision, para. 2343.
[1992] Conviction Decision, paras 2344 ("P-0264 testified that he was abducted by a soldier belonging to the Oka battalion and became an escort to [REDACTED]. During his initiation ceremony, P-0264 saw many other people of his age – that is to say, other abductees under the age of 15."), 2348: ("Further, P-0307 – who was an escort to one of [Mr] Ongwen's officers – testified that in the context of an attack on Pajule IDP camp in which he participated the LRA abducted 'many males and females including young people', some of whom were even younger than him or slightly older. He explained that the elderly ones were released after the attack once they had carried away the booty and the young ones were kept in the LRA. In his live-testimony before the Chamber, the witness specified that he could not recall the exact age of the young abductees, but stated that some 'were almost my size'. The Chamber takes this to mean that the children were younger than P-0307.").
[1993] *Ntaganda* Appeal Judgment, para. 806 (footnotes omitted).
[1994] Appeal Brief, para. 901, fn. 1145.

assessing time and ages" and did "not rely on his testimony to assess the ages of other captives".[1995]

908. Similarly, the Defence fails to identify an error in the impugned paragraphs 2314-2316 where the Trial Chamber addressed its general argument challenging the estimation of age of persons who had not appeared in person before the Court. In particular, the Trial Chamber found 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".[1996] The Trial Chamber further pointed out that "witnesses routinely provided an explanation on what they based their estimate", citing the testimony of P-0054 and P-0264 as examples.[1997] As to the case of P-0309,[1998] although the Trial Chamber did not explicitly explain the basis of the witness's estimate of age of some of the abducted young people, as noted by the Prosecutor,[1999] it is clear from the Conviction Decision that the knowledge was based on the witness's comparison with his own age.[2000]

909. As to witness P-0054,[2001] the Trial Chamber explained in explicit terms the basis of the witness's age estimation.[2002] In relation to P-0352,[2003] the Trial Chamber explained its reasons for not relying on the part of the witness's testimony concerning her age estimate of other recruits.[2004] Finally, while it is correct that in the case of P-

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[1995] Conviction Decision, para. 357.
[1996] Conviction Decision, para. 2314.
[1997] Conviction Decision, para. 2314.
[1998] Appeal Brief, para. 901, fn. 1145.
[1999] Prosecutor's Response, para. 541, fn. 2052.
[2000] Conviction Decision, para. 2352 ("He stated that there were abducted children that were younger than him.").
[2001] Appeal Brief, para. 901, fn. 1145.
[2002] Conviction Decision, para. 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.").
[2003] Appeal Brief, para. 901, fn. 1145.
[2004] Conviction Decision, paras 2401 ("It does not find that P-0352 testified untruthfully when saying that the youngest of [Mr] Ongwen's escorts was 15. However, considering the witness's position in the LRA and length of time spent with the LRA, the fact that she did see persons younger than 15, but did not consider them to be escorts and – most importantly – the abundance of direct evidence cited above which indicates the contrary, the Chamber does not consider that P-0352's statement is credible in this regard and does not affect the Chamber's conclusion that children under the age of 15 served as escorts for [Mr] Ongwen."), 2425 ("The Chamber further takes note of the testimony of P-0352 who stated that the persons who were sent to fight were about 20 years old and that the 14, 15 year old would only be escorts […] regarding this aspect of her testimony, the Chamber does not conclude from this evidence that no person under the age of 15 participated in attacks. Notably, the witness makes a differentiation between 'fighters' and 'escorts' or 'kadogos' who, in her opinion, would not fight. However, considering

0233 the Trial Chamber did not set out the basis of the witness' age estimation,[2005] as noted above, the Trial Chamber relied on a wealth of evidence to reach the factual determination that persons below the age of 15 years were conscripted and used in armed hostilities. In these circumstances, the Appeals Chamber does not consider that the Trial Chamber's incidental failure to explain the basis of P-0233's age estimation renders its factual finding unreasonable.

910. Based on the foregoing, the Defence's broad and unfocused submission that the Trial Chamber relied on "speculative attributions of ages of the persons based on physical features and variable features allegedly observed during unspecified moments and events"[2006] is equally without merit.

(iii) Alleged erroneous reliance on logbook records

911. The Appeals Chamber finds no merit in the Defence's general argument that the Trial Chamber "relied on impermissibly […] untested logbook summaries of LRA radio intercepts without the corresponding originals of audio recordings".[2007] As noted above, in support of its finding that children below the age of 15 years were conscripted and used in armed hostilities, the Trial Chamber relied primarily on testimonial evidence.[2008] The records of intercepted radio communications were relied upon by the Trial Chamber to "corroborate the witness testimony on this issue".[2009]

912. Furthermore, in relying on these records, the Trial Chamber recalled "its discussion of the reliability of the 2002 ISO logbooks".[2010] When discussing the reliability of the logbooks, the Trial Chamber noted the Defence's argument "that logbook entries may discuss conversation topics out of order or may have inaccurately interpreted proverbs or coded messages" but considered "that much of the value of these logbooks comes precisely from their providing a plain language summary of an

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the evidence above the Chamber finds that there are numerous examples of escorts under the age of 15 actively participating in attacks. Given the plentiful, consistent and corroborative evidence on this matter, the Chamber does not follow P-0352's testimony in this aspect.").

[2005] Conviction Decision, paras 2315-2316.
[2006] Appeal Brief, para. 904.
[2007] Appeal Brief, para. 904. *See also* paras 908, 913.
[2008] Conviction Decision, paras 2315-2321, 2340-2365.
[2009] Conviction Decision, para. 2322.
[2010] Conviction Decision, para. 2322, *referring to* para. 666.

otherwise indecipherable conversation".[2011] It further held that "[i]n principle in its evidentiary discussion, [it took] care to verify the meaning of any LRA conversation sourced from a single logbook, relying on available audio recording transcripts, witness testimonies or other logbooks to corroborate their accuracy".[2012] However, the Trial Chamber held "that in certain instances, it has not been possible to match the details of conversations as recorded in specific logbooks to other available evidence".[2013] The Trial Chamber found this to particularly be the case, "when looking at the logbooks produced by ISO in 2002, time for which the Chamber was not provided with logbooks from other intercepting agencies".[2014]

913. In relation to the foregoing, the Trial Chamber explained that in such cases, while it "may be referencing the content of LRA communications sourced from a single logbook, [it considered] such logbook entries sufficiently reliable in the context of its evidentiary discussion and in light of the evidence received on how the logbooks were produced".[2015] Noting "that witnesses corroborated summaries in logbooks when played the corresponding sound recordings, as well as that for years subsequent 2002, for which logbooks from other intercepting agencies are available, in many cases the logbook entries across agencies match to an extent which allow[ed] the Chamber to conclude sufficiently on the reliability of the ISO logbooks from 2002".[2016]

914. The Defence's challenges to the Trial Chamber's overall assessment of intercept evidence have been addressed and rejected in the determination of grounds of appeal 60, 72 and 73.[2017] The Defence's argument is therefore rejected.

(iv) Alleged reliance on general evidence and inferences

915. The Defence argues that the Trial Chamber attributed responsibility to Mr Ongwen "by inference and by association" in light of "the presence of children in

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[2011] Conviction Decision, para. 666.
[2012] Conviction Decision, para. 666.
[2013] Conviction Decision, para. 666.
[2014] Conviction Decision, para. 666.
[2015] Conviction Decision, para. 666.
[2016] Conviction Decision, para. 666.
[2017] *See* generally sections VI.C.2 (Ground of appeal 72: Alleged errors in the Trial Chamber's assessment of intercept evidence) and VI.C.3 (Grounds of appeal 73 and 60: Alleged erroneous findings based on chains of inferences drawn from the intercept evidence) above.

Sinia brigade between 1 July 2002 and 31 December 2005".[2018] The Appeals Chamber notes that the paragraph of the Conviction Decision referred to by the Defence[2019] concerns part of the evidentiary assessment supporting the Trial Chamber's factual finding that "[a]fter the fighters returned from [Pajule IDP camp], some abductees remained in the LRA and were distributed to various units, including among [Mr] Ongwen's group".[2020] The impugned paragraph reads as follows:

> Witnesses reported that there were children younger than 15 years old among the abductees that remained with the LRA. P-0144 testified that younger abductees, from 11 to about 15 to 17 years old, were taken in as newly recruited members of the LRA. P-0006 testified that the youngest abductees she saw were about twelve years old. Richard Otim testified that the youngest civilian abductee from Pajule that he saw kept by the LRA was between 12 and 13. P-0138 testified that he saw young people between the ages of 10 and 17 years old among the boys and girls abducted from Pajule who stayed behind. P-0138 stated that he could identify the ages of the abducted because he was able to identify when somebody was a child and some of them stayed with his group and he spoke to them and asked questions to determine their ages. P-0330 offered testimony consistent with these accounts, testifying that a 12 or 13 year old girl was one of the abductees not released by the LRA.[2021]

916. The Appeals Chamber recalls that in order to conclude that children below the age of 15 years were conscripted and used in armed hostilities, the Trial Chamber relied upon a wealth of evidence. In particular, this evidence included the testimony of witnesses who were themselves child soldiers in the Sinia brigade during the time relevant to the charges and who stated that other boys and girls were abducted, the testimony of other former LRA fighters, the testimony of victims of LRA attacks and other persons who testified about the presence of children under 15 years in the LRA, the testimony of "forced wives" in the LRA, and various records of intercepted radio communications that "corroborate the witness testimony".[2022] On the basis of this evidence, the Trial Chamber entered all the required findings to hold Mr Ongwen criminally responsible as an indirect co-perpetrator for these crimes.

[2018] Appeal Brief, para. 909. *See also* para. 908.
[2019] Appeal Brief, para. 908, fn. 1155.
[2020] Conviction Decision, para. 157.
[2021] Conviction Decision, para. 1369 (footnotes omitted).
[2022] *See* paragraph 891 above.

917. The Defence fails to explain how the reference to a paragraph in the Conviction Decision (setting out the evidence supporting its conclusion that after the attack on Pajule IDP camp some abductees remained in the LRA and some were distributed to various units, including among Mr Ongwen's group) would render unreasonable the Trial Chamber's determination of his individual criminal responsibility, let alone result in "a miscarriage of justice".[2023] This argument is accordingly rejected.

918. The Defence further submits that the Trial Chamber "relied on general evidence on the attacks […] to make impermissible incriminating inferences" against Mr Ongwen.[2024] It refers in particular to the Trial Chamber's finding that "several witnesses testified that children under the age of 15 were also abducted during the attack on Abok" for which, in the Defence's view, the Trial Chamber did not provide "a reasoned statement on the 'several witnesses' and their accounts or evidence of the abductions".[2025] The Appeals Chamber notes that the Defence refers to certain paragraphs of the Conviction Decision.[2026] However, only paragraph 2362 concerns the Abok attack and contains the finding impugned by the Defence. Said paragraph appears as a sub-title in the section containing the evidentiary assessment in support of the Trial Chamber's factual finding which reads as follows:

> Sinia soldiers, in execution of orders of Joseph Kony, [Mr] Ongwen and the Sinia brigade leadership, abducted a large number of children under 15 years of age in Northern Uganda between 1 July 2002 and 31 December 2005. Children under the age of 15 were also abducted during the four attacks relevant to the charges. [Mr] Ongwen also abducted children himself.[2027]

919. At paragraph 2362 of the Conviction Decision, the Trial Chamber stated: "[l]astly, the Chamber also recalls its findings with regard to the attack on Abok IDP camp. Several witnesses testified that children under the age of 15 were also abducted during this attack".[2028] In the three following paragraphs, the Trial Chamber referred to the evidence provided by P-0286 ("a camp resident who was abducted during the

[2023] Appeal Brief, para. 909.
[2024] Appeal Brief, para. 914.
[2025] Appeal Brief, para. 914.
[2026] Appeal Brief, para. 914, fn. 1162.
[2027] Conviction Decision, para. 223, pp. 837-838.
[2028] Conviction Decision, para. 2362.

attack"),[2029] P-0406 ("who participated in the attack"),[2030] and P-0284 (a victim of the attack).[2031] The Trial Chamber noted that these witnesses provided evidence supporting the finding that during the attack on Abok IDP camp, children under the age of 15 were abducted.[2032] Contrary to the Defence's argument,[2033] it is clear that the Trial Chamber referred to the specific witnesses and their evidence on abduction of children under the age of 15 years during the attack on Abok IDP camp. This argument is accordingly rejected.

920. Finally, the Defence submits that the Trial Chamber "found that children below the age of 15 were present in all parts of the LRA and inferred that they were also in Sinia brigade".[2034] The Appeals Chamber notes that the Defence's argument is misplaced and without merit. After noting that children under the age of 15 were present within the entire LRA, including in the Sinia brigade, the Trial Chamber referred to evidence relating specifically on the presence of children under 15 in the Sinia brigade. This included reference to the testimony of witnesses P-0142, P-0054, P-0233, P-0372, P-0264 and P-0379.[2035] The Defence's argument is therefore rejected.

(iii) Allegation that Mr Ongwen became brigade commander of Sinia only on 4 March 2004

921. The Defence seems to argue that Mr Ongwen cannot be held criminally responsible for the conscription and use in hostilities of children under the age of 15 years given that he only became brigade commander of Sinia on 4 March 2004.[2036] It further refers to the time that Mr Ongwen was placed in sickbay and arrested by Vincent Otti as circumstances that prevented him from entering into a common plan with Joseph Kony and others to abduct and distribute children below the age of 15 for their use in hostilities.[2037]

[2029] Conviction Decision, para. 2363.
[2030] Conviction Decision, para. 2364.
[2031] Conviction Decision, para. 2365.
[2032] Conviction Decision, paras 2363-2365.
[2033] Appeal Brief, para. 914.
[2034] Appeal Brief, para. 915.
[2035] Conviction Decision, paras 2366-2372.
[2036] Appeal Brief, para. 916.
[2037] Appeal Brief, paras 916-917.

922. As explained above, the Trial Chamber's legal findings on Mr Ongwen's criminal responsibility as an indirect co-perpetrator for the conscription and use in hostilities of children under the age of 15 years during the period relevant to the charges addressed: (i) the existence of an agreement or a common plan;[2038] (ii) the execution of the material elements of the crimes through other persons;[2039] (iii) Mr Ongwen's control over the crime;[2040] and (iv) the mental element.[2041] When making these findings, including on Mr Ongwen's control over the crime and his participation in the common plan, the Trial Chamber relied on its factual findings which were based on a detailed evidentiary assessment.

923. Furthermore, the Trial Chamber considered Mr Ongwen's different formal positions within the Sinia brigade when assessing his criminal responsibility.[2042] Prior to becoming the brigade commander of the Sinia brigade, Mr Ongwen was the battalion commander of the Oka Battalion until 17 September 2003, when he was appointed second-in-command of the Sinia Brigade.[2043] The Defence does not challenge these findings on appeal.

924. Moreover, the Trial Chamber addressed in detail the Defence's argument concerning the impact that Mr Ongwen's time spent in sickbay and in detention had on the exercise of his authority. Following a detailed evidentiary assessment,[2044] the Trial Chamber determined that

> In October or November 2002 [Mr] Ongwen was injured and placed in sickbay until around mid-2003. From at least December 2002 onwards, he again exercised his authority as battalion commander. In April 2003, [Mr] Ongwen was briefly arrested by Vincent Otti. The arrest did not interrupt the exercise of his authority for any significant period.[2045]

925. In light of the foregoing, and in the absence of more specific arguments on the part of the Defence, these arguments are rejected.

[2038] Conviction Decision, para. 3106.
[2039] Conviction Decision, paras 3107-3108.
[2040] Conviction Decision, paras 3109-3111.
[2041] Conviction Decision, paras 3112-3114.
[2042] Conviction Decision, paras 1013-1083.
[2043] Conviction Decision, paras 134-136. *See also* Victims Group 2, T-265, p. 58, lines 2-5
[2044] Conviction Decision, paras 1017-1070.
[2045] Conviction Decision, para. 135.

(iv) Conclusion on grounds of appeal 69 and 83, 84, 85 and 86

926. Having rejected the totality of the arguments raised by the Defence, grounds of appeal 69 and 83, 84, 85 and 86 are rejected.

4. Overall conclusion

927. Having rejected grounds of appeal 60, 64-65, 68, 28 (in part), 69-70, and 74-86, the Appeals Chamber concludes that the Defence has not demonstrated any error in the Trial Chamber's findings on Mr Ongwen's individual criminal responsibility as an indirect perpetrator and indirect co-perpetrator for crimes committed in the course of the attacks on the four IDP camps and for the conscription and use in hostilities of children below the age of 15 years.

E. Alleged errors concerning sexual and gender-based crimes

928. Under grounds of appeal 66, 87, 88, 89 and 90, the Defence challenges the Trial Chamber's findings underpinning Mr Ongwen's criminal responsibility, as a direct perpetrator and as an indirect co-perpetrator, for sexual and gender-based crimes.[2046]

929. The Appeals Chamber will first address grounds of appeal 87, 89 and 66 (in part), in which the Defence challenges the Trial Chamber's reliance on evidence of facts that occurred outside the scope of the charges, and its finding that Mr Ongwen was one of the commanders who developed and implemented the LRA policy of abduction and abuse of civilian women and girls. The Appeals Chamber will then address grounds of appeal 90 and 66 (in part), which relate to the Trial Chamber's findings on forced marriage as a form of other inhumane acts. Finally, the Appeals Chamber will address ground of appeal 88, which concerns the Trial Chamber's findings on forced pregnancy.

1. Grounds of appeal 87, 89 and 66 (in part): Alleged errors concerning the abduction and distribution of civilian women and girls in the LRA

930. Under grounds of appeal 87, 89 and 66 (in part), the Defence challenges the Trial Chamber's findings that Mr Ongwen, Joseph Kony and the Sinia brigade leadership engaged in a "coordinated and methodical effort" to abduct and distribute women and

[2046] Appeal Brief, paras 918-1000.

girls in Northern Uganda between 1 July 2002 and 31 December 2005.[2047] The Defence submits that the Trial Chamber: (i) erred in law by relying on evidence of facts that occurred outside of the temporal and geographic scope of the charges;[2048] and (ii) erred in law and in fact by finding that Mr Ongwen was one of the commanders who developed and implemented the LRA policy of abduction and abuse of women and girls.[2049]

931. The Appeals Chamber will address these arguments in turn.

(a) Alleged error in the Trial Chamber's reliance on evidence of facts outside the scope of the charges

(i) Summary of the submissions

932. The Defence argues that the Trial Chamber erred in law by relying on the evidence of facts outside the scope of the charges.[2050] In relation to sexual and gender-based crimes directly committed by Mr Ongwen, the Defence contests the Trial Chamber's reliance on the evidence of P-0235 and P-0236, who became Mr Ongwen's so-called "wives" after the time relevant to the charges.[2051] It argues that since P-0099, P-0101, P-0214, P-0226 and P-0227, who were Mr Ongwen's so-called "wives" during the charged period, gave testimony deemed credible by the Trial Chamber, "there is no justification for a reliance on additional incriminatory evidence for context or articulation of the facts".[2052]

933. The Defence further argues that in relation to sexual and gender-based crimes not directly committed by Mr Ongwen "the Chamber has applied by analogy the experiences of a small number of witnesses to all members of a much larger group" by relying on the evidence of P-0351, P-0352, P-0366, P-0374 and P-0396.[2053] The Defence also contests the Trial Chamber's reliance on evidence outside the scope of the

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[2047] Appeal Brief, para. 918. *See also* Conviction Decision, paras 212-213.
[2048] Appeal Brief, paras 920-924.
[2049] Appeal Brief, paras 925-934.
[2050] Appeal Brief, paras 921-924. *See also* para. 662.
[2051] Appeal Brief, para. 921.
[2052] Appeal Brief, para. 921.
[2053] Appeal Brief, para. 923, *referring to* Conviction Decision, para. 2097.

charges for corroboration of testimony concerning forced marriage and sexual violence.[2054]

934. The Prosecutor submits that the Trial Chamber was not prevented from relying on evidence outside the scope of the charges.[2055] He argues that the Trial Chamber "properly relied on evidence of acts against P-0235 and P-0236 as relevant evidence as context […] to demonstrate the exclusive conjugal relationship that Ongwen imposed on his so-called 'wives'".[2056]

935. The Prosecutor further submits that the Trial Chamber did not err by considering the evidence of P-0351, P-0352, P-0366, P-0374 and P-0396.[2057] He argues that the Trial Chamber "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".[2058] The Prosecutor also avers that the conviction was based on the events from 1 July 2002 until 31 December 2005 which occurred in the territory of Uganda and therefore was within the territorial and temporal scope of the charges.[2059]

936. Victims Group 1 submit that "[c]ourts consistently admitted evidence regarding the context and pattern of conduct even when it is outside the temporal scope of the charges".[2060] They argue that the Defence fails to demonstrate how such evidence has rendered Mr Ongwen's conviction unsafe, given that the Trial Chamber "cite[d] the credible evidence of numerous witnesses within the charged period" throughout the Conviction Decision.[2061]

(ii) Relevant part of the Conviction Decision

937. In assessing the evidence of sexual and gender-based crimes directly committed by Mr Ongwen, the Trial Chamber considered the testimony of seven witnesses (P-

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[2054] Appeal Brief, paras 923, *referring to* Conviction Decision, paras 2216-2221.
[2055] Prosecutor's Response, para. 558. *See also* T-264, p. 39, lines 19-23.
[2056] Prosecutor's Response, para. 558.
[2057] Prosecutor's Response, para. 559.
[2058] Prosecutor's Response, para. 559.
[2059] Prosecutor's Response, para. 424. *See also* T-264, p. 39, line 23 to p. 40, line 1.
[2060] Victims Group 1's Observations, para. 265.
[2061] Victims Group 1's Observations, para. 266.

0099, P-0101, P-0214, P-0226, P-0227, P-0235 and P-0236).[2062] The Trial Chamber noted in this regard that while recalling that pursuant to article 74(2) of the Statute its judgment cannot exceed the facts and circumstances described in the charges, "reference to certain events concerning one or more of the seven witnesses – even if outside the parameters of the charges as such – may still be of relevance" to establish these facts and circumstances, or "may otherwise be necessary to contextualise and fully articulate the facts of the charges".[2063]

938. On this basis, the Trial Chamber referred to the evidence of P-0099, P-0101, P-0214, P-0226 and P-0227, who were Mr Ongwen's so-called "wives" during the charged period. It also referred to the evidence of P-0235 and P-0236, who became Mr Ongwen's so-called "wives" after the charged period, when it addressed whether Mr Ongwen's so-called "wives" had to maintain an exclusive conjugal relationship with him until they escaped or were released from the LRA.[2064]

939. As for sexual and gender-based crimes not directly committed by Mr Ongwen, the Trial Chamber made reference to the testimony of a number of witnesses, including P-0351, P-0352, P-0366, P-0374 and P-0396, and relevant evidence.[2065] In this regard, the Trial Chamber noted as follows:

> In addition to other evidence, the Chamber heard five witnesses whose individual stories are of particular relevance to the charges at issue: P-0351, P-0352, P-0366, P-0374 and P-0396. The Prosecutor specified already before the commencement of the trial that these particular witnesses were to be considered as 'simply *examples* of a much *larger* group of women who are the victims of these crimes'. For the purpose of its analysis below, the Chamber is mindful of the difference between the individual facts related to each of those witnesses and the facts at issue of the charge under consideration, which is systemic in nature. At the same time, the Chamber agrees that the five witnesses are indeed particularly important for the determination of the charges and the Chamber's findings.[2066]

(iii) Determination by the Appeals Chamber

940. The Appeals Chamber recalls that Mr Ongwen faced ten charges of directly committing sexual and gender-based crimes against seven women (P-0099, P-0101, P-

[2062] Conviction Decision, paras 2009-2093.
[2063] Conviction Decision, para. 2009.
[2064] Conviction Decision, paras 2034-2040.
[2065] Conviction Decision, paras 2094-2309.
[2066] Conviction Decision, para. 2097 (emphasis in orginal; footnote omitted).

0214, P-0226, P-0227, P-0235 and P-0236).[2067] Mr Ongwen was charged with forced marriage as a form of other inhumane acts against five of them (P-0099, P-0101, P-0214, P-0226 and P-0227).[2068] As discussed in detail below,[2069] the Trial Chamber considered that the central element of forced marriage as a form of other inhumane acts is "the imposition of [marital] status on the victim", and more specifically, "the imposition, regardless of the will of the victim, of duties that are associated with marriage – including in terms of exclusivity of the (forced) conjugal union imposed on the victim – as well as the consequent social stigma".[2070]

941. As noted above, the Trial Chamber stated the following in relation to the relevance of evidence of conduct outside the parameters of the charges:

> In accordance with Article 74(2) of the Statute, the Chamber is bound by the text of the charges as confirmed, and the judgment shall not exceed the facts and circumstances described in the charges. At the same time, reference to certain events concerning one or more of the seven witnesses – even if outside the parameters of the charges as such – may still be of relevance, as circumstantial evidence, to establish facts and circumstances described in the charges, or may otherwise be necessary to contextualise and fully articulate the facts of the charges, in particular as concerns the beginning and the end of the temporal scope of the charges. It is in these instances that the Chamber refers to evidence of conduct outside the parameters of the charges and makes the necessary corresponding findings as part of its determination on the facts described in the charges as underlying the crimes with which [Mr] Ongwen is charged.[2071]

942. The Trial Chamber found that the seven women "testified to remarkably similar experiences which they all, at different times, were subjected to", namely that: they were all abducted either directly by Mr Ongwen or by LRA fighters; were distributed to Mr Ongwen's household; were not allowed to leave and placed under heavy guard; and were ultimately considered to be Mr Ongwen's so-called "wives" until they escaped or were released from the LRA.[2072]

[2067] Conviction Decision, para. 2009. *See also* Confirmation Decision, pp. 90-99.
[2068] Confirmation Decision, p. 97.
[2069] *See* section VI.E.2(d)(i) (Alleged errors in the Trial Chamber's legal interpretation of forced marriage and the principle of *nullum crimen sine lege*) below.
[2070] Conviction Decision, para. 2748.
[2071] Conviction Decision, para. 2009.
[2072] Conviction Decision, paras 2009-2036.

943. When assessing whether Mr Ongwen's so-called "wives" had to maintain an exclusive conjugal relationship with him until they escaped or were released from the LRA, the Trial Chamber referred not only to the evidence of P-0099, P-0101, P-0214, P-0226 and P-0227, but also to that of P-0235 and P-0236, who became Mr Ongwen's so-called "wives" after the charged period.[2073] In particular, the Trial Chamber referred to the flogging of P-0236, which occurred in 2007, after Mr Ongwen had found out that she had had a sexual relationship with Nyeko, who was "immediately arrested and shot dead".[2074] The Trial Chamber noted that this fact "supported" the exclusivity of Mr Ongwen's forced marriages.[2075]

944. The Defence argues that the Trial Chamber "excessively reli[ed]" on the evidence of P-0235 and P-0236, who became Mr Ongwen's so-called "wives" after the time relevant to the charges.[2076] The Appeals Chamber recalls its finding under ground of appeal 6 that the question of whether a trial chamber may rely on evidence of facts falling outside the temporal or geographic scope of the charges can only be answered, in particular, by reference to the specific evidence and the purpose for which it is sought to be used.[2077] In other words, a trial chamber is required to carefully consider the link between the evidence and the specific facts and/or circumstances described in the charges.[2078] Furthermore, in accordance with article 69(4) of the Statute and rule 63(2) of the Rules, due regard must be given to the relevance and probative value of the evidence in question, and whether the probative value of the evidence is outweighed by its prejudicial effect.[2079]

945. Concerning the specific incident challenged by the Defence, the Appeals Chamber observes that the Trial Chamber relied on the evidence of P-0235 and P-0236, who became Mr Ongwen's "wives" after the period relevant to the charges, to "further

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[2073] Conviction Decision, paras 2034-2040.
[2074] Conviction Decision, para. 2038.
[2075] Conviction Decision, para. 2038. While the Trial Chamber did not rely on the specific act against P-0235, it referred to the fact that she became Mr Ongwen's so-called "wife" after the time relevant to the charges. *See* Conviction Decision, para. 2036.
[2076] Appeal Brief, paras 921, 924.
[2077] *See* section VI.B.5(c)(ii) (Alleged erroneous reliance on evidence of facts falling outside the scope of the charges) above.
[2078] *See* section VI.B.5(c)(ii) (Alleged erroneous reliance on evidence of facts falling outside the scope of the charges) above.
[2079] *See* section VI.B.5(c)(ii) (Alleged erroneous reliance on evidence of facts falling outside the scope of the charges) above.

suppor[t]" the exclusivity of the conjugal relationship between Mr Ongwen and his five so-called "wives" (P-0099, P-0101, P-0214, P-0226, and P-0227). The Appeals Chamber considers that this element (*i.e.* the exclusivity of the conjugal relationship) was sufficiently established by the evidence regarding acts committed against the five so-called "wives". Thus, its additional reliance on the evidence of acts committed against P-0235 and P-0236 was not determinative for its finding. Accordingly, the Appeals Chamber finds that, contrary to the Defence's assertion, the Trial Chamber did not excessively rely on the evidence of uncharged acts.[2080] The Defence's argument is thus rejected.

946. The Defence also raises arguments in relation to the Trial Chamber's finding on the charges of sexual and gender-based crimes indirectly committed by Mr Ongwen. In this regard, the Defence refers to the following statement of the Trial Chamber:

> In its analysis and findings, the Chamber is guided by the specific scope of the charges. At the same time, it is natural that some evidence received during the trial speaks more generally of the LRA rather than being limited to the Sinia brigade. This is in particular the case with some of the evidence provided by insider witnesses. Part of this evidence, to the extent that it is relevant for the Chamber's findings, has been relied upon as explained below.[2081]

947. The Defence argues that such a "broad statement fails to uphold proper legal and evidentiary standards, with no outlined criteria governing what may be deemed as relevant".[2082]

948. The Appeals Chamber notes that this statement was premised on the Trial Chamber's understanding that "there [was] no clear dividing line between the systemic victimisation of women and girls in [the] Sinia brigade and that occurring in the LRA generally", and that "the limitation of the scope of the charges to the Sinia brigade finds its reasons in the scope of [Mr] Ongwen's authority rather than in any difference between Sinia and the LRA in general concerning this phenomenon".[2083] On this basis, the Appeals Chamber finds that the Trial Chamber simply explained its approach to the evidence. That is, while being "guided by the specific scope of the charges", *i.e.* sexual

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[2080] Appeal Brief, paras 921, 924.
[2081] Conviction Decision, para. 2096.
[2082] Appeal Brief, para. 922, *referring to* Conviction Decision, para. 2096.
[2083] Conviction Decision, para. 2095.

and gender-based crimes committed within the Sinia brigade, it had also relied on part of the evidence, "to the extent that it is relevant for [its] findings", "that speaks more generally of the LRA".[2084] This is because, as recalled above, the evidence did not show any difference between the victimisation of women and girls in the Sinia brigade and in the LRA in general.[2085] The Appeals Chamber finds no error in the Trial Chamber's approach and therefore rejects this argument.

949. In addition, the Defence argues that by referring to the evidence of P-0351, P-0352, P-0366, P-0374 and P-0396, who were so-called "wives" of other LRA members, the Trial Chamber "has applied by analogy the experiences of a small number of witnesses to all members of a much larger group".[2086] As noted above,[2087] the Trial Chamber observed that these witnesses were to be considered only as an example of a "much *larger* group of women who are the victims of these crimes".[2088] The Trial Chamber further stated that for the "purpose of its analysis," it would be "mindful of the difference between the individual facts related to each of those witnesses and the facts at issue of the charge under consideration, which is systemic in nature".[2089] The Trial Chamber was also of the view that these witnesses were "particularly important for the determination of the charges" and consequently its findings.[2090] The Trial Chamber therefore held in that regard that it would, as appropriate, make "reference to their testimonies and combine[] that with the evidence of other witnesses (in particular insiders and other women testifying about analogous personal experiences within the LRA, albeit outside one or more of the parameters of the charges as formulated) as well as with any other relevant evidence".[2091]

950. In light of the above, and given that the Trial Chamber indeed made reference not only to the evidence of the five above-mentioned witnesses but also to other witnesses

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[2084] Conviction Decision, para. 2096.
[2085] Conviction Decision, para. 2095.
[2086] Appeal Brief, para. 923.
[2087] *See* paragraph 939 above.
[2088] Conviction Decision, para. 2097 (emphasis in orginal; footnote omitted).
[2089] Conviction Decision, para. 2097.
[2090] Conviction Decision, para. 2097.
[2091] Conviction Decision, para. 2097 (emphasis in original).

and relevant evidence,[2092] including insider witnesses and intercept evidence, the Appeals Chamber is not persuaded by the Defence's argument.[2093]

951. Furthermore, the Defence argues that the Trial Chamber relied on evidence that exceeds the scope of this case for corroboration of testimony regarding forced marriage and sexual violence. The Appeals Chamber notes that the Defence does not identify which evidence the Trial Chamber allegedly relied on for corroboration in its assessment and which specific findings are concerned.[2094] Therefore, this argument is dismissed for lack of substantiation.

(b) Alleged error in finding that Mr Ongwen was one of the commanders who developed and implemented the LRA policy of abduction and abuse of civilian women and girls

952. In relation to sexual and gender-based crimes not directly committed by Mr Ongwen, the Defence submits that the Trial Chamber erred in law and in fact by finding that Mr Ongwen was one of the commanders who developed and implemented the LRA policy of abduction and abuse of civilian women and girls.[2095]

953. At the outset, the Appeals Chamber notes that the Defence's arguments under the present grounds of appeal largely overlap with certain arguments raised under grounds of appeal 46,[2096] 64[2097] and 90 and 66 in part.[2098] Where appropriate, the Appeals Chamber will address such arguments under the present grounds of appeal.

(i) Summary of the submissions

954. The Defence argues that Joseph Kony exercised "the ultimate authority" with respect to the abduction and distribution of women and girls, over which Mr Ongwen had no control, and that the positions held by him at the time "negate an attribution of individual criminal responsibility for said policy".[2099] It also argues that the Trial Chamber's finding as to Mr Ongwen's involvement in the creation of such system was unsupported by the Trial Chamber's reasoning and this "constitutes a finding of guilt

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[2092] *See* Conviction Decision, paras 2098-2309.
[2093] Appeal Brief, para. 923.
[2094] Appeal Brief, para. 923.
[2095] Appeal Brief, paras 925-934.
[2096] Appeal Brief, paras 514-532.
[2097] *See* Appeal Brief, paras 659-663.
[2098] *See* Appeal Brief, paras 979-983.
[2099] Appeal Brief, paras 926-929. *See also* paras 660-661, 980-981.

by association", which is "wholly inconsistent with other findings on Kony's system of abduction and abuse of women".[2100]

955. In addition, the Defence raises, *inter alia*, the following arguments: (i) the Trial Chamber failed to make specific evidentiary findings on Mr Ongwen's individual criminal responsibility with respect to each crime or on the alleged agreement and coordinated effort to abduct and victimise women and girls;[2101] (ii) the Trial Chamber failed to establish Mr Ongwen's *mens rea* beyond reasonable doubt "as specific and special intent were general and declaratory in nature and based on impermissible imputation";[2102] (iii) the Trial Chamber's finding that Mr Ongwen was involved in defining the system of abducting women and girls was "fundamentally flawed", as such policy took place even before his own abduction and continued long after the charged period;[2103] and (iv) the LRA commander's exercise of free will directly contradicts the attribution of criminal responsibility to Mr Ongwen.[2104]

956. The Prosecutor submits that "[t]he Trial Chamber correctly found that Ongwen, Kony and the Sinia brigade leadership engaged in a coordinated and methodical effort to abduct women and girls and force them to serve as so-called 'wives' of members of the Sinia brigade and as domestic servants".[2105] He argues that the Defence incorrectly insists that Joseph Kony exercised exclusive authority to abduct and distribute women and girls, "despite significant evidence to the contrary".[2106] The Prosecutor also avers that the Defence's assertion that the Trial Chamber did not explain Mr Ongwen's role in the creation of the LRA policy of abducting women and girls "overlooks significant evidence".[2107] During the hearing, the Prosecutor reiterated that the role of Joseph Kony was not necessarily incompatible with that of Mr Ongwen.[2108]

957. Furthermore, the Prosecutor submits that "merely because the LRA policy of abduction pre-dated Ongwen's own participation in it does not excuse or exclude [his

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[2100] Appeal Brief, paras 931, 982. *See also* paras 532, 660-661.
[2101] Appeal Brief, para. 932.
[2102] Appeal Brief, para. 932. *See also* paras 661-663.
[2103] Appeal Brief, para. 925.
[2104] Appeal Brief, para. 933.
[2105] Prosecutor's Response, para. 570.
[2106] Prosecutor's Response, para. 571.
[2107] Prosecutor's Response, para. 573.
[2108] T-264, p. 39, lines 15-18.

criminal responsibility]".[2109] He also argues that the Defence misinterprets the *mens rea* requirement for the crime of other inhumane acts, which does not require a specific and special intent, nor is it correct in its claims of "general and declaratory [decisions]", "impermissible inferences" or "guilt by association".[2110]

958. Victims Group 1 submit that the Defence merely disagrees with the Trial Chamber's findings and that this does not constitute an error of law or fact that materially affects the Conviction Decision.[2111] They argue that the Trial Chamber "did not rely on impermissible inferences and deductions", but relied on the evidence that satisfied the standard of proof and fell within the temporal scope of the charges.[2112]

(ii) Relevant part of the Conviction Decision

959. The Trial Chamber assessed Mr Ongwen's criminal responsibility as an indirect co-perpetrator in relation to sexual and gender-based crimes charged under counts 61 to 68.[2113] In particular, it assessed (i) the existence of an agreement or common plan;[2114] (ii) the execution of the material elements of the crime through other persons;[2115] (iii) Mr Ongwen's control over the crime;[2116] and (iv) the mental elements.[2117] Regarding Mr Ongwen's control over the crime, the Trial Chamber found, *inter alia*, that he "was among the persons who helped define and, through their actions over a protracted period, sustained the system of abduction and victimisation of civilian women and girls in the LRA" and that "his role [within Sinia] was crucial and indispensable".[2118]

(iii) Determination by the Appeals Chamber

960. The Appeals Chamber observes that the core argument made by the Defence is that the Trial Chamber erred by attributing criminal responsibility to Mr Ongwen for the LRA policy of abducting, distributing and abusing civilian women and girls, over

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[2109] Prosecutor's Response, para. 573.
[2110] Prosecutor's Response, para. 575.
[2111] Victims Group 1's Observations, para. 267.
[2112] Victims Group 1's Observations, para. 269.
[2113] Conviction Decision, paras 3088-3100.
[2114] Conviction Decision, para. 3089.
[2115] Conviction Decision, paras 3090-3091.
[2116] Conviction Decision, paras 3092-3095.
[2117] Conviction Decision, paras 3096-3099.
[2118] Conviction Decision, para. 3094.

which he allegedly had no control.[2119] According to the Defence, Joseph Kony was "the overall commander, chairman, or President of the LRA who exercised effective control over the organisation" and that even when he was geographically removed from the LRA units, he ensured that his orders were executed by monitoring the activities of commanders and establishing a disciplinary regime to punish those who failed to respect them.[2120] The Defence argues that "[d]espite this high degree of supervision, the Chamber concluded that Kony's role in the system of sexual and gender-based violence […] was of 'little relevance to the disposal of the charges'" and that it did not address "the critical question of who possessed the ultimate authority to order abduction or 'distribution'".[2121] Furthermore, it argues that the Trial Chamber disregarded evidence indicating that Joseph Kony was "the sole competent authority" and failed to explain how Mr Ongwen had a role in creating such policies or institutionalised rules.[2122]

961. The Appeals Chamber considers that the Defence's arguments are based on an incorrect understanding of indirect co-perpetration as a mode of liability. As found above in ground of appeal 65, the Appeals Chamber recalls that for co-perpetration "the decisive consideration is whether [the contributions of the co-perpetrator] as a whole amounted to an essential contribution to the crimes within the framework of the common plan, such that without it, 'the crime could not have been committed or would have been committed in a significantly different way'".[2123] As for indirect co-perpetration through an apparatus of power, the indirect co-perpetrators use the organisation to execute the crimes envisaged within the framework of the common plan through replaceable physical perpetrators.[2124]

962. The Appeals Chamber notes that the Trial Chamber referred to its factual findings, reached on the basis of a detailed evidentiary assessment, throughout the

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[2119] Appeal Brief, paras 926-932.
[2120] Appeal Brief, paras 926-927.
[2121] Appeal Brief, para. 928, *referring to* Conviction Decision, para. 2157.
[2122] Appeal Brief, paras 929, 931.
[2123] *See* section VI.D.1(c)(iii)(a) (Alleged inconsistency in the Trial Chamber's finding about the LRA structure) above.
[2124] *See* section VI.D.1(c)(iii)(a) (Alleged inconsistency in the Trial Chamber's finding about the LRA structure) above.

sections addressing (i) the existence of an agreement or common plan;[2125] (ii) the execution of the material elements of the crime through other persons;[2126] (iii) Mr Ongwen's control over the crime;[2127] and (iv) the mental elements.[2128] In relation to Mr Ongwen's control over the crime, the Trial Chamber found that while standing orders for the abduction of women and girls emanated from Joseph Kony, more specific orders were issued by the LRA commanders, including Mr Ongwen.[2129] The Trial Chamber stated that "[b]y its nature, Joseph Kony's standing or general orders for abductions of women or girls did not include operational particulars" and thus "the input of LRA commanders was crucial".[2130]

963. Regarding the distribution of women and girls, the Trial Chamber noted that "the question is not whether Joseph Kony himself 'distributed' women" but rather "whether [his] power to decide on the 'distribution' of abducted women and girls was exclusive".[2131] The Trial Chamber found that "the 'distribution' of the abducted women and girls was [the] prerogative of Joseph Kony, or, in his absence, of the Sinia brigade commander or battalion commanders".[2132] It also found "considerable evidence demonstrating that, regardless of the hierarchical structure of the LRA with Joseph Kony at its top, brigade or battalion commanders, including [Mr] Ongwen, did in fact 'distribute' abducted women and girls".[2133]

964. Regarding Joseph Kony's authority and that of other high ranking LRA commanders, including Mr Ongwen, and the orders given in relation to the distribution of abducted women and girls, the Trial Chamber assessed the relevant evidence and concluded as follows:

> It is established that Joseph Kony held the highest authority in the LRA, and as such also over Sinia. It is also established that he issued orders, mostly of a general nature as he was geographically removed, for the 'distribution' of abducted women and girls. This is, however, entirely compatible with other

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[2125] Conviction Decision, para. 3089.
[2126] Conviction Decision, paras 3090-3091.
[2127] Conviction Decision, paras 3092-3095.
[2128] Conviction Decision, paras 3096-3099.
[2129] Conviction Decision, paras 2114-2123.
[2130] Conviction Decision, para. 2116.
[2131] Conviction Decision, para. 2160.
[2132] Conviction Decision, para. 2161.
[2133] Conviction Decision, para. 2171.

> evidence which establishes clearly also that other high commanders of the LRA, namely the brigade and battalion commanders, and including [Mr] Ongwen, decided on the 'distribution' of women and girls in Sinia. If anything, the Chamber considers the evidence of who decided on the 'distribution' of the abducted women and girls to further support the conclusion that the LRA system of abduction and abuse of women and girls was coordinated among the LRA leadership.[2134]

965. On this basis, the Appeals Chamber finds that the Trial Chamber was reasonable in finding that "[Mr] Ongwen was among the persons who helped define and, through their actions over a protracted period, sustained the system of abduction and victimisation of civilian women and girls in the LRA" and that "his role [within Sinia] was crucial and indispensable".[2135]

966. In this regard, the Defence argues that while considering whether Joseph Kony's power to decide on the distribution of women and girls was exclusive,[2136] the Trial Chamber seems to have "equated carrying out orders in a coercive environment with being an architect of a common plan amongst members of equal rank […] ignoring the fact that it was Kony who granted the authority [to distribute women]".[2137] The Appeals Chamber notes that this argument seems to be closely related to those alleging that Mr Ongwen acted under duress, which will be addressed below.[2138]

967. The Defence also argues that the Trial Chamber disregarded "favourable" evidence indicating that Joseph Kony was "the sole competent authority".[2139] In this regard, the Appeals Chamber notes the Trial Chamber's finding that although "[s]ome witnesses testified confidently that Joseph Kony was the sole competent authority for 'distribution' of abducted women and girls", it did not attribute much significance to such evidence since "this assessment was not based on personal observation, but rather on a general understanding of the LRA that they had developed based on their experience in the bush, and which may not be accurate, especially in case of persons who never held leadership positions".[2140] The Appeals Chamber observes that apart

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[2134] Conviction Decision, para. 2182.
[2135] Conviction Decision, para. 3094.
[2136] Conviction Decision, para. 2160.
[2137] Appeal Brief, para. 930.
[2138] *See* section VI.F.2 (Grounds of appeal 26, 28 (in part), 44, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 58, 61, 62 and 63: Alleged errors regarding findings on duress).
[2139] Appeal Brief, para. 929.
[2140] Conviction Decision, para. 2159.

from disagreeing with the Trial Chamber, the Defence does not identify any error in the Trial Chamber's finding. Therefore, the Appeals Chamber dismisses the Defence's argument for lack of substantiation.

968. Furthermore, the Appeals Chamber notes that the Trial Chamber's findings in relation to Mr Ongwen's role in the LRA policy of abduction and victimisation of women and girls span over 210 paragraphs, based on a detailed evidentiary assessment.[2141] In these circumstances, the Appeals Chamber finds the Defence's argument that the Trial Chamber failed to explain how Mr Ongwen had a role in such policy to be misplaced. The Appeals Chamber also recalls its finding under ground of appeal 72[2142] and, consequently, rejects the Defence's argument that the Trial Chamber based its reasoning on unreliable logbook summaries of interceptor's recollections which, in the Defence's view, were not contemporaneous written records.[2143]

969. Accordingly, the Appeals Chamber finds no merit in the Defence's argument that Mr Ongwen had no control over the LRA policy of abduction, distribution and abuse of civilian women and girls.[2144]

970. In addition, the Defence challenges Mr Ongwen's criminal responsibility as an indirect co-perpetrator on the ground that the abduction and victimisation of women and girls in the LRA took place even before Mr Ongwen's own abduction and continued long after the charged period.[2145] The Appeals Chamber finds this argument to be without merit. Importantly, Mr Ongwen's charges as an indirect co-perpetrator for sexual and gender-based crimes did not specifically concern his contribution to the creation of the LRA system of abduction and abuse of civilian women and girls, but to the "realization" of such a system by, *inter alia*, "having operational control over the implementation of the [common plan] in [the] Sinia Brigade" and by "co-ordinating with Joseph Kony and his co-perpetrators about the implementation of the common plan".[2146] As noted above, the Trial Chamber reasonably found that Mr Ongwen was

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[2141] Conviction Decision, paras 2098-2309.
[2142] *See* section VI.C.2(c) (Alleged error in substituting short hand notes and P-0403's report with logbook summaries) above.
[2143] Appeal Brief, para. 931.
[2144] Appeal Brief, paras 926-932.
[2145] Appeal Brief, para. 925.
[2146] Confirmation Decision, pp. 99-101.

among the persons who helped define and sustained the LRA's system of abduction and victimisation of civilian women and girls.[2147] In these circumstances, the Appeals Chamber considers that the fact that such a policy pre-dated Mr Ongwen's own participation or continued after the charged period is irrelevant to Mr Ongwen's criminal responsibility as an indirect co-perpetrator and does not negate the Trial Chamber's finding.

971. The Appeals Chamber notes that, in this context, the Defence "recalls its arguments [in ground of appeal 64] regarding the alleged degree of free will enjoyed by commanders in the LRA", which, in its view, "directly contradicts an attribution of criminal responsibility to [Mr Ongwen]".[2148] However, the Appeals Chamber has already found that the Defence's argument that Mr Ongwen cannot be held responsible as an indirect perpetrator for the actions of commanders who were his subordinates given that they exercised free will and had personal initiatives, is based on a misunderstanding of indirect perpetration as a mode of liability.[2149] Accordingly, the Appeals Chamber rejects this argument.

972. With regard to the Defence's challenges to the Trial Chamber's findings on Mr Ongwen's *mens rea* with respect to sexual and gender-based crimes,[2150] the Appeals Chamber notes that these arguments are broad and unsubstantiated. For instance, the Defence argues that the Trial Chamber's findings on the *mens rea* elements "are undermined by pleadings in the case and inconsistent evidentiary findings in the Judgment"[2151] and that they "were not proved beyond reasonable doubt as specific and special intent were general and declaratory in nature and based on impermissible imputations by association of its findings against the LRA".[2152] The Appeals Chamber notes that the Trial Chamber assessed Mr Ongwen's *mens rea*, including the special intent required for torture and forced pregnancy, in the respective sections addressing

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[2147] *See* paragraphs 960-969 above. *See also* Conviction Decision, para. 3094.
[2148] Appeal Brief, para. 933, fn. 1198, *noting* "See above, Ground 64".
[2149] *See* section VI.D.1(c)(iii)(b) (Mr Ongwen's control over the crimes) above.
[2150] Appeal Brief, paras 661-663, 932, *referring to* Conviction Decision, paras 3094-3095, 3021-3026, 3027-3034, 3035-3043, 3044-3049, 3050-3055, 3056-3062, 3063-3068. *See also* Appeal Brief, paras 981, 1000.
[2151] Appeal Brief, para. 662.
[2152] Appeal Brief, para. 932.

Mr Ongwen's direct and indirect co-perpetration of sexual and gender-based crimes.[2153] By way of example, the Trial Chamber assessed Mr Ongwen's *mens rea* with respect to his direct commission of the crime of forced marriage as a form of other inhumane acts as follows:

> As concerns the mental elements, due to the nature of the acts performed by [Mr] Ongwen and due to the sustained character of the acts over a long period of time, the Chamber considers that [Mr] Ongwen meant both to engage in his relevant conduct and to cause the consequence.[2154]

973. The Trial Chamber reached this finding based on the factual findings that were supported by a detailed assessment of evidence.[2155] The same applies to the Trial Chamber's findings on Mr Ongwen's *mens rea* for other sexual and gender-based crimes, which were directly committed by him.[2156]

974. In addition, the Trial Chamber assessed Mr Ongwen's *mens rea* of sexual and gender-based crimes indirectly committed by him as follows:

> 3096. The conduct which [Mr] Ongwen undertook in relation to the crimes charged under Counts 61-68, is such that, by its nature, it could only have been undertaken intentionally. Thus, the Chamber considers that the conduct-related requirement of Article 30(2) of the Statute is met.[2157]
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> 3097. Furthermore, the Chamber reiterates, also with respect to the required mental elements, its findings to the effect that [Mr] Ongwen, Joseph Kony and the Sinia brigade leadership engaged in a coordinated and methodical effort, relying on the LRA soldiers under their control, to abduct women and girls in Northern Uganda and force them to serve in Sinia brigade as so-called 'wives' of members of Sinia brigade, and as domestic servants. [Mr] Ongwen ordered Sinia brigade soldiers to abduct civilian women and girls. In the exercise of his authority, he personally decided on the 'distribution' of abducted women and girls. He also personally assigned women and girls as so-called 'wives' and used his authority as LRA commander to enforce the so-called 'marriage' in Sinia brigade. The Chamber also found that some abducted women and girls were placed in [Mr] Ongwen's household under heavy guard, and some of them were made his so-called 'wives'. [Mr] Ongwen had sex by force with his so-called 'wives'. Abducted women and girls 'distributed' to him were subjected to beating

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[2153] Conviction Decision, paras 3025, 3032-3033, 3042, 3048, 3054, 3060-3061, 3067 (direct perpetration), 3096-3099 (indirect perpetration).
[2154] Conviction Decision, para. 3025.
[2155] Conviction Decision, paras 2009-2093.
[2156] Conviction Decision, paras 3032-3033, 3042, 3048, 3054, 3060-3061, 3067.
[2157] Conviction Decision, para. 3096.

> at his command at any time. They also performed domestic duties in his household.[2158]

975. The Appeals Chamber notes that the Trial Chamber's above findings are based on the factual findings that were supported by a detailed assessment of evidence, which spans over 215 paragraphs in the Conviction Decision.[2159]

976. In these circumstances, and in the absence of more concrete and discernible arguments, the Appeals Chamber rejects the Defence's broad arguments, namely, that the Trial Chamber's findings were "general and declaratory in nature", "based on impermissible imputations" and "undermined by […] inconsistent evidentiary findings".[2160]

(c) Overall conclusion

977. Having considered all the argument raised under grounds of appeal 87, 89 and 66 (in part) concerning alleged errors in the Trial Chamber's findings regarding Mr Ongwen's role in the LRA policy of abduction and abuse of civilian women and girls, the Appeals Chamber rejects these grounds of appeal.

2. Grounds of appeal 90 and 66 (in part): Alleged errors regarding forced marriage as a form of other inhumane acts

978. Under grounds of appeal 90 and 66 (in part) the Defence alleges factual and legal errors in relation to the Trial Chamber's findings on forced marriage and requests the reversal of Mr Ongwen's convictions for "forced marriage, sexual violence and all the sexual and gender-based crimes arising from the Chamber's evidentiary finding on forced marriage".[2161] In support of its allegation, the Defence challenges the Trial Chamber's interpretation of forced marriage as a form of other inhumane acts pursuant to article 7(1)(k) of the Statute,[2162] and raises several arguments in relation to the Trial Chamber's factual findings on forced marriage and other related findings.[2163]

[2158] Conviction Decision, para. 3097.
[2159] Conviction Decision, paras 2094-2309.
[2160] Appeal Brief, paras 662, 932.
[2161] Appeal Brief, para. 975.
[2162] Appeal Brief, paras 975, 978.
[2163] Appeal Brief, paras 990-1000.

979. In addition, the Appeals Chamber recalls that in ground of appeal 5, the Defence argues that "forced marriage is jurisdictionally defective, because it is not in the Rome Statute" and that "neither the Pre-Trial nor Trial Chamber has inherent jurisdiction to add new crimes, or to interpret the Statute in respect to new crimes, *i.e.* crimes not identified in the Statute".[2164]

980. In the following sections, the Appeals Chamber will first discuss the alleged errors in the Trial Chamber's legal interpretation of forced marriage and the principle of *nullum crimen sine lege*. It will then address the alleged errors concerning the Trial Chamber's factual findings on forced marriage and other related findings. With regard to the Defence's arguments regarding Joseph Kony's authority in the LRA,[2165] the Appeals Chamber recalls that this issue has already been addressed above under grounds of appeal 87, 89, and 66 (in part)[2166] and it will therefore not delve into such arguments again under the present grounds of appeal.

(a) Summary of the submissions

(i) The Defence's submissions

981. In relation to the legal interpretation of forced marriage, the Defence argues that "[f]orced marriage is not a crime under the Statute" and incorporates by reference its arguments contained in other documents, stating that "it urges the Appeals Chamber to consider the arguments raised prior to the Judgment".[2167]

982. During the hearing, the Defence submitted that convicting Mr Ongwen of forced marriage as a form of other inhumane acts violated the principles of *nullum crimen sine lege* and non-retroactivity *ratione personae*, as set out in articles 22 and 24 of the Statute, respectively.[2168]

983. The Defence further argues that the Trial Chamber did not provide a reasoned statement on the "nature and status of the marriage" on the basis of which Mr Ongwen

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[2164] Appeal Brief, paras 147-148.
[2165] Appeal Brief, paras 979-983.
[2166] *See* section VI.E.1(b) (Alleged error in finding that Mr Ongwen was one of the commanders who developed and implemented the LRA policy of abduction and abuse of civilian women and girls) above.
[2167] Appeal Brief, para. 978, fn. 1256, *referring to* Defence Closing Brief, para. 471; Defence Request for Leave to Appeal Confirmation Decision, paras 40-44; Defence Brief for Confirmation of Charges Hearing, paras 128-130; T-23, pp. 13-17.
[2168] T-264, p. 34, line 18 to p. 36 line 25.

was convicted.[2169] It submits that "[t]he Chamber established the jurisprudence on forced marriage in the abstract" and failed to establish that Mr Ongwen "violated a protected interest of false marriage under the Statute".[2170] The Defence also argues that "[t]he so-called married couple were the property of Kony over which he exercised complete and unchallenged ownership and authority" and that "[t]he purported husbands held them in trust for Kony who could and did determine the fate of the alleged conjugal unions at his pleasure".[2171]

984. Moreover, the Defence submits that the Trial Chamber "failed to provide a reasoned statement establishing that [Mr Ongwen] exercised an exclusive right of ownership over the so-called wives".[2172] According to the Defence, "[the] exclusivity of ownership of the women belonged to Kony, and not [Mr] Ongwen, who himself was subjected to it".[2173] The Defence argues that "[t]he exclusivity of ownership element of forced marriage as a crime against humanity was therefore not proved beyond a reasonable [doubt]".[2174]

985. Furthermore, the Defence maintains that "the facts of the case do not support the finding of an other inhumane act of forced marriage",[2175] noting, *inter alia*, that there was no marriage between the perpetrators and the victims as one of the requirements of marriage in the Acholi culture, namely the parental consents, was not fulfilled.[2176] The Defence asserts that the alleged conjugal union was "mere cohabitation".[2177]

(ii) The Prosecutor's submissions

986. The Prosecutor argues that the Defence's arguments on the Trial Chamber's interpretation of forced marriage is "incorrect", since it rests on "[its] mistaken notion on the nature of the crime, disregarding jurisprudence on the issue".[2178] The Prosecutor submits, by reference to the drafting history of the Statute and relevant jurisprudence,

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[2169] Appeal Brief, paras 993-997.
[2170] Appeal Brief, para. 996.
[2171] Appeal Brief, para. 997.
[2172] Appeal Brief, para. 999.
[2173] Appeal Brief, para. 999.
[2174] Appeal Brief, para. 999.
[2175] T-264, p. 35, lines 2-5.
[2176] T-264, p. 29, lines 20-25; p. 85, line 9 to p. 86, line 2.
[2177] T-264, p. 89, lines 20-22.
[2178] Prosecutor's Response, para. 560.

that the crime of "other inhumane acts" in article 7(1)(k) of the Statute has a restrictive scope and accords with the principle of *nullum crimen sine lege*.[2179] He submits that while there is no requirement that forced marriage should be expressly criminalised in international law, "the criminality of this type of conduct as an inhumane act was nonetheless both foreseeable and accessible".[2180]

987. The Prosecutor further submits that "forced marriage amounts to other inhumane acts, as the pertinent acts are of a nature and gravity similar to other article 7(1) acts".[2181] He argues that the central element of this crime is "the imposition of duties associated with marriage (including the exclusivity of the forced conjugal union imposed) on the victim", which "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" and that victims are "socially ostracised and suffer a serious attack on their dignity".[2182] Based on the above, the Prosecutor contends that the imposition of a conjugal union and its 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)" of the Statute.[2183] He argues that "[t]he protected interests for this inhumane act derives from international human rights law and the right to marry freely and consensually".[2184]

988. In addition, the Prosecutor argues that the Trial Chamber correctly found that Mr Ongwen was responsible for forced marriage as a form of other inhumane acts both as a direct perpetrator and as an indirect co-perpetrator.[2185] He submits that the Defence's unsubstantiated argument must fail "[g]iven 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".[2186] The Prosecutor

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[2179] Prosecutor's Response, paras 562-563; T-264, p. 46, lines 18-23.
[2180] Prosecutor's Response, para. 564.
[2181] Prosecutor's Response, para. 564.
[2182] Prosecutor's Response, para. 564, *referring to* Conviction Decision, para. 2748.
[2183] Prosecutor's Response, para. 564. During the hearing, the Prosecutor reiterated that "the key aspect of the conduct of forced marriage is the imposition of a forced and exclusive conjugal union on the victim", which distinguishes it from other sexual and gender-based crimes. *See* T-264, p. 44, lines 22-25.
[2184] T-264, p. 45, lines 11-12.
[2185] Prosecutor's Response, para. 568.
[2186] Prosecutor's Response, para. 568.

further argues that in claiming that Joseph Kony had "exclusive ownership" of the women and girls in the Sinia brigade, the Defence overlooks Mr Ongwen's own role and, in the context of indirect co-perpetration, "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".[2187]

(iii) The Victims' observations

989. Victims Group 1 and Victims Group 2 support the Trial Chamber's interpretation of forced marriage as a form of other inhumane acts pursuant to article 7(1)(k) of the Statute.[2188] Victims Group 1 submit that the Appeals Chamber should reject all arguments made by the Defence on forced marriage as they present "mere differences of opinion" with the Trial Chamber and fail to show errors of law or fact.[2189] Victims Group 2 argue that the Defence does not present cogent arguments explaining how the Trial Chamber erred in its factual or legal findings, nor does it show how the alleged errors materially affected the Conviction Decision.[2190]

990. During the hearing, Victims Group 1 submitted that the interest protected by forced marriage is "the autonomy to choose one's partner" and that the harm suffered from this crime is the social stigma faced by the victims.[2191] They argued that there is no violation of the principle of *nullum crimen sine lege* by convicting Mr Ongwen of forced marriage as a form of other inhumane acts.[2192] Victims Group 2 argued that "the crucial element of the crime [of forced marriage] is the mental and moral trauma resulting from the imposition, by threat or force arising from the perpetrator's words or conduct, of a forced conjugal association and a relationship of exclusivity between the so-called couple".[2193] They submitted that "[t]he use of the label 'wife' causes a unique psychological suffering which leads to stigmatisation and rejection of the victims by

[2187] Prosecutor's Response, para. 569.
[2188] Victims Group 2's Observations, para. 179; T-264, p. 50, line 1 to p. 51, line 13; p. 54, line 3 to p. 56, line 14.
[2189] Victims Group 1's Observations, para. 274.
[2190] Victims Group 2's Observations, para. 173.
[2191] T-264, p. 51, lines 3-13.
[2192] T-264, p. 51, line 21 to p. 53, line 4.
[2193] T-264, p. 54, lines 7-10.

their families and communities" and also "inflicts grave physical injury and results in long-term moral and psychological suffering for the victims".[2194]

(iv) The observations of the amici curiae

991. A number of *amici curiae* made observations, both in writing and orally, on the legal elements of forced marriage as a form of other inhumane acts under article 7(1)(k) of the Statute.[2195]

992. In particular, Oosterveld *et al.* submit that forced marriage is "not a 'new' crime", but "is a particular type of 'other inhumane act' that can be distinguished from the enumerated acts recognized in Article 7(1) of the Statute".[2196] They argue that the central defining aspect of forced marriage is "the imposition regardless of the will of the victim of a forced conjugal union in which the victim is exclusively attached to the other members of the union".[2197] Prof Meyersfeld and SALCT also submit that "[f]orced marriage is a distinct, cognisable crime" which falls under article 7(1)(k) of the Statute.[2198] They argue that the key distinguishing factor of forced marriage is "the imposition of the conjugal association on an unwilling participant that results in an unwanted and involuntary assumption of duties and obligations akin to a marriage under ordinary circumstances".[2199]

993. In contrast, Prof Allain submits that forced marriage is covered by the crime of sexual slavery, given "the substance of relationship" between the perpetrator and the victim.[2200]

(b) Relevant procedural background

994. In relation to the Defence's argument that "forced marriage is jurisdictionally defective" and that "neither the Pre-Trial nor Trial Chamber has inherent jurisdiction

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[2194] T-264, p. 54, lines 11-14.
[2195] *See e.g.* Observations of Oosterveld *et al.*, paras 2-32; Observations of Prof Meyersfeld and SALCT, paras 4-9, 21; Observations of Dr Behrens, paras 15-17; Observations of Dr Zakerhossein, paras 5-17; Observations of Mr Batra, p. 4.
[2196] Observations of Oosterveld *et al.*, paras 2, 10; T-264, p. 65, lines 2-19.
[2197] T-264, p. 67, lines 1-5.
[2198] Observations of Prof Meyersfeld and SALCT, para. 4; T-264, p. 74, lines 9-10.
[2199] Observations of Prof Meyersfeld and SALCT, para. 5; T-264, p. 74, lines 11-13.
[2200] Observations of Prof Allain, para. 3.

to add new crimes, or to interpret the Statute in respect to new crimes",[2201] the Appeals Chamber recalls that the Defence has already raised this issue at the pre-trial stage.

995. During the pre-confirmation of charges stage, the Defence submitted that "[s]ince forced marriage is not recognised as a crime before the ICC or in the Statute, […] [it] does not amount to a category of other inhumane acts", but "is subsumed in the crime of sexual slavery".[2202] The Pre-Trial Chamber rejected this argument in the Confirmation Decision, holding by reference to the jurisprudence of the SCSL and ECCC that "forced marriage may, in the abstract, qualify as 'other inhumane acts' under article 7 of the Statute rather than being subsumed by the crime of sexual slavery".[2203] The Pre-Trial Chamber also found that "forced marriage as an other inhumane act differs from the other crimes with which [Mr] Ongwen is charged, and notably from the crime of sexual slavery, in terms of conduct, ensuing harm, and protected interests" and therefore warranted a specific separate charge.[2204]

996. The Defence requested leave to appeal the Confirmation Decision on this issue, which was rejected by the Pre-Trial Chamber on the ground that "this issue does not hold the potential to significantly affect the fair and expeditious conduct of the proceedings or outcome of the trial".[2205]

997. On 1 February 2019, the Defence filed the Defence Motion on Defects in Confirmation Decision before the Trial Chamber, arguing that the defects in the Confirmation Decision in respect to sexual and gender-based crimes "violate [the] Court's jurisdiction and Mr Ongwen's right to be informed 'in detail of the nature, cause and content of the charges'".[2206] Noting that "the crime of forced marriage did not, and does not exist in the Statute", the Defence submitted that "this Court has no jurisdiction to add crimes which were not included by the Assembly of the State[s] Parties", which is the only body that has the authority to amend the Statute.[2207] It argued that "neither

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[2201] Appeal Brief, paras 147-148.
[2202] Defence Brief for Confirmation of Charges Hearing, paras 128-130. *See also* T-23, p. 14, line 6 to p. 16, line 8.
[2203] Confirmation Decision, paras 87-91.
[2204] Confirmation Decision, paras 92-95.
[2205] Decision on Request for Leave to Appeal Confirmation Decision, paras 33-39.
[2206] Defence Motion on Defects in Confirmation Decision, p. 10.
[2207] Defence Motion on Defects in Confirmation Decision, paras 40-42.

the Trial Chamber nor the Pre-Trial Chamber has inherent jurisdiction to add new crimes, or interpret the Statute in respect to new crimes, *i.e.* those not identified in the Statute".[2208] On this basis, the Defence submitted that the crime of forced marriage "should be dismissed as a matter of law as jurisdictionally defective", and that "the pleading is facially deficient and violates Mr Ongwen's right to notice under Article 67 of the Statute".[2209]

998. On 7 March 2019, the Trial Chamber dismissed the Defence's challenge as "untimely", while noting that it would decide upon the proper legal interpretation of forced marriage in its judgment.[2210]

999. On 14 March 2019, the Defence requested leave to appeal the Decision on Defence Motion Alleging Defects in Confirmation Decision on two issues:[2211]

> 1. Whether the [Impugned] Decision, based on procedural grounds under Rules 122(4) and 134(2), implements the Trial Chamber's responsibility under Article 64(2) to "ensure that a trial is fair […] and is conducted with the full respect for the right of the accused" consistent with Article 67(1); and
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> 2. Whether the [Impugned] Decision's finding, at paragraph 37, that jurisdictional arguments on forced marriage are untimely, is accurate.[2212]

1000. On 1 April 2019 the Trial Chamber granted leave to appeal with respect to the first issue.[2213]

1001. As recalled above, on 17 July 2019, the Appeals Chamber upheld the Decision on Defence Motion Alleging Defects in Confirmation Decision and noted that the jurisdictional challenges raised by the Defence had already been addressed and ruled upon at the pre-trial stage.[2214] However, it also noted that "[t]his is notwithstanding the

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[2208] Defence Motion on Defects in Confirmation Decision, para. 46.
[2209] Defence Motion on Defects in Confirmation Decision, para. 53.
[2210] Decision on Defence Motions Alleging Defects in Confirmation Decision, paras 31-37.
[2211] Defence Request for Leave to Appeal Decision on Defence Motion Alleging Defects in Confirmation Decision.
[2212] Defence Request for Leave to Appeal Decision on Defence Motion Alleging Defects in Confirmation Decision, para. 3.
[2213] Decision on Defence Request for Leave to Appeal, paras 11-15, p. 7.
[2214] *See* section VI.B.4 (Ground of appeal 5: Alleged error in proceeding to trial and in entering a conviction on the basis of a defective Confirmation Decision, in violation of the right to notice under article 67(1)(a) of the Statute) above. *See also* *Ongwen* OA4 Judgment, paras 155-158, 163(vii).

possibility for Mr Ongwen to challenge the legal interpretation of the relevant provisions in his closing submissions before the Trial Chamber, […] and eventually before the Appeals Chamber, should a conviction be entered and an appeal lodged against it".[2215]

(c) Relevant parts of the Conviction Decision

1002. At the outset, the Trial Chamber noted that the category of "other inhumane acts" of crimes against humanity "must be interpreted conservatively and – with due regard to article 22(2) of the Statute – must not be used to expand uncritically the scope of crimes against humanity".[2216] Recalling the residual nature of the crime of "other inhumane acts", the Trial Chamber stated that a conviction can be entered under article 7(1)(k) of the Statute "if the perpetrator inflicts great suffering, or serious injury to body or to mental or physical health, by means of a course of conduct which […] is, in its entirety, not identical, but is nonetheless 'similar' in character in terms of nature and gravity, to those enumerated crimes".[2217]

1003. By reference to "the fundamental right to enter a marriage with the free and full consent of another person", the Trial Chamber explained the concept of forced marriage as follows:

> 2748. The central element, and underlying act of forced marriage is the imposition of this status on the victim, *i.e.* the imposition, regardless of the will of the victim, of duties that are associated with marriage – including in terms of exclusivity of the (forced) conjugal union imposed on the victim – as well as the consequent social stigma. Such a state, beyond its illegality, has also social, ethical and even religious effects which have a serious impact on the victim's physical and psychological well-being. The victim may see themselves as being bonded or united to another person despite the lack of consent. Additionally, a given social group may see the victim as being a 'legitimate' spouse. To the extent forced marriage results in the birth of children, this creates even more complex emotional and psychological effects on the victim and their children beyond the obvious physical effects of pregnancy and child-bearing.[2218]
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> 2749. Accordingly, the harm suffered from forced marriage can consist of being ostracised from the community, mental trauma, the serious attack on the victim's

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[2215] *Ongwen* OA4 Judgment, para. 158.
[2216] Conviction Decision, para. 2741, *referring to* article 22(2) of the Statute; *Muthaura et al.* Confirmation Decision, para. 269.
[2217] Conviction Decision, paras 2745-2747.
[2218] Conviction Decision, para. 2748.

> dignity, and the deprivation of the victim's fundamental rights to choose his or her spouse.[2219]

1004. Based on this understanding, the Trial Chamber found that the underlying conduct of forced marriage and its impact on victims "are not fully captured by other crimes against humanity".[2220] Furthermore, in relation to sexual slavery and rape, it explained that:

> While the crime of sexual enslavement penalises the perpetrator's restriction or control of the victim's sexual autonomy while held in a state of enslavement, the 'other inhumane act' of forced marriage penalises the perpetrator's imposition of 'conjugal association' with the victim. Forced marriage implies the imposition of this conjugal association and does not necessarily require the exercise of ownership over a person, an essential element for the existence of the crime of enslavement. Likewise, the crime of rape does not penalise the imposition of the 'marital status' on the victim. When a concept like 'marriage' is used to legitimatise a status that often involves serial rape, victims suffer trauma and stigma beyond that caused by being a rape victim alone.[2221]

1005. Accordingly, the Trial Chamber interpreted article 7(1)(k) of the Statute "to include the inhumane act of forced marriage, namely forcing a person, regardless 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".[2222] It found that "[s]uch an act does not fall under any of the acts enumerated in Article 7(1)(a)-(j) of the Statute, but is similar in character to them".[2223] The Trial Chamber stated that "[w]hether the conduct charged in this case constitutes forced marriage under this definition is assessed on the facts".[2224]

1006. The Trial Chamber further held that forced marriage is a continuing crime, in the sense that "it covers the entire period of the forced conjugal relationship, and only ends when the individual is freed from it."[2225]

1007. With regard to the mental element, the Trial Chamber found that "[t]he perpetrator need not make a value judgment as to the 'inhumane' character of the act

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[2219] Conviction Decision, para. 2749.
[2220] Conviction Decision, para. 2750.
[2221] Conviction Decision, para. 2750.
[2222] Conviction Decision, para. 2751.
[2223] Conviction Decision, para. 2751.
[2224] Conviction Decision, para. 2751.
[2225] Conviction Decision, para. 2752.

but he or she "need[s] only to be aware of the factual circumstances that established the character of the inhumane act". [2226]

1008. Based on the established facts, the Trial Chamber found that "the specific legal elements of forced marriage as an other inhumane act, pursuant to Article 7(1)(k) of the Statute" are fulfilled.[2227]

(d) Determination by the Appeals Chamber

1009. As a preliminary issue, the Appeals Chamber recalls that in ground of appeal 5, the Defence argues that "forced marriage is jurisdictionally defective, because it is not in the Rome Statute" and that "neither the Pre-Trial nor Trial Chamber has inherent jurisdiction to add new crimes, or to interpret the Statute in respect to new crimes".[2228] As noted above, the Trial Chamber has already rejected the Defence's jurisdictional challenge and the Appeals Chamber confirmed the Trial Chamber's decision on that issue.[2229] Accordingly, the Appeals Chamber will not consider this argument further.

1010. Notwithstanding the above, and as previously noted, the Appeals Chamber confirmed the Trial Chamber's dismissal of the Defence's jurisdictional challenge with respect to the charges of forced marriage as a form of other inhumane acts. However, this did not preclude "the possibility for Mr Ongwen to challenge the legal interpretation of the relevant provisions […] before the Appeals Chamber, should a conviction be entered and an appeal lodged against it".[2230] Therefore, the Appeals Chamber will address the Defence's arguments on the interpretation of forced marriage as a form of other inhumane acts. In this regard, in the Appeal Brief, the Defence only submits that "forced marriage is not a crime under the Statute" and incorporates by reference its arguments contained in other documents filed during the trial.[2231] However, the Defence made further submissions on the interpretation of forced marriage during the hearing.[2232] Accordingly, the Appeals Chamber will address the

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[2226] Conviction Decision, para. 2753.
[2227] Conviction Decision, paras 3024, 3071.
[2228] Appeal Brief, paras 147-148.
[2229] *See* paragraphs 997-1001 above.
[2230] *See* paragraph 1001 above.
[2231] Appeal Brief, para. 978, fn. 1256, *referring to* Defence Closing Brief, para. 471; Defence Request for Leave to Appeal Confirmation Decision, paras 40-44; Defence Brief for the Confirmation of Charges Hearing, paras 128-130; T-23, pp. 13-17.
[2232] *See e.g.* T-264, p. 33, line 14 to p. 37, line 16.

Defence's challenge to the Trial Chamber's interpretation of forced marriage with reference to those arguments.

1011. In the following sections, the Appeals Chamber will address: (i) the alleged errors in the Trial Chamber's legal interpretation of forced marriage and the principle of *nullum crimen sine lege*; and (ii) the alleged errors in the Trial Chamber's factual findings on forced marriage and other related findings.

(i) Alleged errors in the Trial Chamber's legal interpretation of forced marriage and the principle of nullum crimen sine lege

1012. The Appeals Chamber recalls that the principle of *nullum crimen sine lege*, found in article 22(1) of the Statute, provides as follows:

> A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.[2233]

1013. At the outset, the Appeals Chamber notes that the Trial Chamber did not convict Mr Ongwen of "forced marriage" as a stand-alone crime – forced marriage not being enumerated in the Statute – but of "forced marriage as an other inhumane act, pursuant to Article 7(1)(k) of the Statute".[2234]

1014. Article 7(1)(k) of the Statute provides as follows:

> For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
>
> […] Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

[2233] *See also* article 15 of the ICCPR, which reads: "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby. 2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations."

[2234] Conviction Decision, paras 3026 (count 50), 3100 (count 61).

1015. As set out in the Elements of Crimes, the material and mental elements of "other inhumane acts" are as follows:

> 1. The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act.
>
> 2. Such act was of a character similar to any other act referred to in article 7, paragraph 1, of the Statute.
>
> 3. The perpetrator was aware of the factual circumstances that established the character of the act.[2235]

1016. The Elements of Crimes further defines the term "character", as referring, in relation to this provision, to "the nature and gravity of the act".[2236] Thus, an act charged under article 7(1)(k) of the Statute must be of a similar nature and gravity as any other act under article 7(1) of the Statute.

1017. The Appeals Chamber notes that the category of "other inhumane acts" serves as a "residual category" of crimes against humanity, designed to criminalise an act that does not specifically qualify as any of the other crimes under article 7(1) of the Statute, based on the understanding that an exhaustive enumeration of inhumane acts is impossible.[2237]

1018. However, as noted above, both the Statute and the Elements of the Crimes make it clear that not any act will amount to "an other inhumane act" within the meaning of article 7(1)(k) of the Statute.[2238] Indeed, article 7(1)(k) of the Statute and the Elements of the Crimes require the following criteria to be met: (i) the act must be of a similar nature and gravity to any other act referred to in article 7(1); (ii) the act must have resulted in great suffering, or serious injury to body or to mental or physical health; and (iii) the act must have been part of a widespread or systematic attack directed against any civilian population.

1019. With respect to the principle of *nullum crimen sine lege*, the Appeals Chamber notes that, as held by the ECCC Pre-Trial Chamber in the *Ieng Sary* Case, "other

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[2235] *See* Elements of Crimes, article 7(1)(k).
[2236] Elements of Crimes, article 7(1)(k), fn. 30.
[2237] *See* *Muthaura et al.* Confirmation Decision, para. 269; *Al Hassan* Confirmation Decision, para. 252. *See also* *Kupreškić et al.* Trial Judgment, para. 563; *Kordić and Čerkez* Appeal Judgment, para. 117.
[2238] *See* pargaraphs 1014-1015 above.

inhumane acts is *in itself* a crime under international law" and the requirements of this principle "attach to the entire category of 'other inhumane acts' and not to each sub-category thereof".[2239] Therefore, the Appeals Chamber considers that in order for a specific conduct to qualify as a form of other inhumane acts under article 7(1)(k) of the Statute, it must fulfil the elements required under that provision.[2240] In this context, the Appeals Chamber notes that, as held by Pre-Trial Chamber I in the *Katanga and Ngudjolo* Case, unlike its antecedents, such as the Nuremberg Charter and the ICTR and ICTY Statutes, which "conceived 'other inhumane acts' as a 'catch all provision', leaving a broad margin for the jurisprudence to determine its limits", the Statute contains certain delimitations with regard to the action constituting an inhumane act and the consequence required as a result of that action.[2241] Therefore, the scope of "other inhumane acts" as prescribed under article 7(1)(k) of the Statute and the Elements of Crimes is sufficiently clear and precise to satisfy the principle of *nullum crimen sine lege*.

1020. In light of the foregoing, the Appeals Chamber finds that convicting an accused of an act charged as a form of other inhumane acts pursuant to article 7(1)(k) of the Statute is not *ultra vires* and does not violate the principle of *nullum crimen sine lege*, as long as it meets the requirements set out in article 7(1)(k) of the Statute. As will be discussed below, the conduct of forced marriage charged in the present case as a form of other inhumane acts was found to meet such requirements and therefore convicting Mr Ongwen of this crime does not violate the *nullum crimen sine lege* principle.[2242]

1021. Since article 7(1)(k) of the Statute is an open provision – meaning that different types of conduct may amount to other inhumane acts as long as they satisfy the elements of article 7(1)(k) of the Statute – the Appeals Chamber considers that a chamber may have recourse to any relevant international instruments, such as conventions and treaties, in order to determine whether a specific conduct qualifies as a form of other inhumane acts. In this respect, the Appeals Chamber notes that a number of

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[2239] *Ieng Sary* Decision on Appeal Against Closing Order, para. 378 (emphasis in original), *referring to Blagojević and Jokić* Trial Judgment, para. 624; *Case 002/01* Appeal Judgment, para. 584.
[2240] *Case 002/01* Appeal Judgment, para. 584.
[2241] *Katanga and Ngudjolo* Confirmation Decision, para. 450.
[2242] *See* section VI.E.2(d)(ii) (Alleged errors in the Trial Chamber's factual findings on forced marriage and other related findings) below.

international conventions and treaties prohibit marriage in the absence of the full and free consent of the parties. For instance, article 16(2) of the UDHR provides that "[m]arriage shall be entered into only with the free and full consent of the intending spouses".[2243] The emphasis on "free and full consent" is echoed in article 23(3) of the ICCPR and in article 16(1)(b) of the CEDAW.[2244] Based on the above, it is clear that during the time relevant to the charges, the right to enter marriage only with the free and full consent of the interested parties was an internationally recognised human right. Therefore, forcing a person to enter into a marriage without his or her free and full consent amounts to a violation of an internationally recognised human right.

1022. With regard to the Trial Chamber's interpretation of "forced marriage", the Appeals Chamber notes that the Trial Chamber, by relying on relevant international law and jurisprudence on this matter, found that the central element and underlying act of forced marriage is "the imposition of [marital] status on the victim", and more specifically, "the imposition, regardless of the will of the victim, of duties that are associated with marriage – including in terms of exclusivity of the (forced) conjugal union imposed on the victim – as well as the consequent social stigma".[2245] In particular, the Trial Chamber found that "the harm suffered from forced marriage can consist of being ostracised from the community, mental trauma, the serious attack on the victim's dignity, and the deprivation of the victim's fundamental rights to choose his or her spouse".[2246] Based on this understanding, the Trial Chamber considered that "[t]he conduct underlying forced marriage – as well as the impact it has on victims – are not fully captured by other crimes against humanity".[2247]

1023. The Appeals Chamber concurs with the Trial Chamber's finding that the central element of forced marriage is the imposition of a conjugal union and the resulting spousal status on the victim.[2248] It is noted in this regard that the SCSL Appeals

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[2243] Article 16(2) of UDHR (Uganda became a member State of the United Nations on 25 October 1962).
[2244] Article 23(3) of ICCPR (Uganda ratified on 21 June 1995); article 16(1) of CEDAW (Uganda ratified on 22 July 1985). The 1995 Beijing Platform for Action also urges the governments to "[e]nact and strictly enforce laws to ensure that marriage is only entered into with the free and full consent of the intending spouses". *See* para. 274(e) of Beijing Declaration and Platform for Action.
[2245] Conviction Decision, para. 2748.
[2246] Conviction Decision, para. 2749.
[2247] Conviction Decision, para. 2750.
[2248] *See e.g. Brima et al.* Appeal Judgment, paras 195-196; *Sesay et al.* Appeal Judgment, para. 735; *Al Hassan* Confirmation Decision, para. 553.

Chamber in the *Brima et al.* Case held that "in the context of the Sierra Leone conflict, forced marriage describes a situation in which the perpetrator through his words or conduct, or those of someone for whose action he is responsible, compel a person by force, threat of force, or coercion to serve as a conjugal partner".[2249] The Appeals Chamber considers that the notion of "conjugal union" is indeed associated with the imposition of duties and expectations generally associated with "marriage".[2250] These duties and expectations may not only have a sexual component, but are related to the entire social and domestic dimension of a marital relationship.[2251] As such, the SCSL Appeals Chamber held that "unlike sexual slavery, forced marriage implies a relationship of exclusivity between the 'husband' and 'wife', which could lead to disciplinary consequences for breach of this exclusive arrangement".[2252]

1024. The Appeals Chamber therefore considers that forced marriage describes a situation in which a person is compelled to enter into a conjugal union with another person by the use of physical or psychological force, or threat of force, or by taking advantage of a coercive environment.[2253] Crucially, the imposition of such a union violates a person's right to marry, *i.e.* to freely choose one's spouse and consensually establish a family, which is recognised as a fundamental right under international human rights law.[2254] The Appeals Chamber considers that, as the Prosecutor submits,

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[2249] *Brima et al.* Appeal Judgment, para. 196. *See also* *Sesay et al.* Appeal Judgment, para. 735.
[2250] *See also* T-264, p. 100, lines 5-11 (Oosterveld *et al.* submitted that "[t]he definition of conjugal is simply the same as that of marriage or the socially constructed norms that go along with marriage. So when one says 'conjugal union', it means the same thing as taking the socially constructed norms of marriage, in this case in a perverted way, and applying them to the victims. So there's nothing particularly special about the word 'conjugal' as opposed to the word 'marriage' in this particular circumstance, except that it's all part and parcel of the expectations of marriage in the forced marriage".).
[2251] *Al Hassan* Confirmation Decision, para. 553 (Pre-Trial Chamber I stated that the concept of forced marriage is thus generally construed from a broader perspective whereby not only the sexual component of the conduct is taken into account but also the entire social and domestic dimension encompassed within and, in particular, the marital status imposed on the victim who is publicly or privately designated as the perpetrator's wife.).
[2252] *Brima et al.* Appeal Judgment, para. 195.
[2253] *Brima et al.* Appeal Judgment, para. 196; *Sesay et al.* Appeal Judgment, para. 735. *See also* *Al Hassan* Confirmation Decision, para. 559 (By reference to the SCSL Appeal Judgments and the *Ongwen* Confirmation Decision, Pre-Trial Chamber I stated that the specific conduct penalized under article 7(1)(k) of the Statute, in the form of a forced marriage, occurs when a person is compelled, regardless of his or her will, into a conjugal association with another person by the use of physical or psychological force, the threat of force or the taking advantage of a coercive environment.). While the Defence refers to the term "false marriage", the Appeals Chamber notes that the Defence fails to develop this concept, which is in any event unsupported by the jurisprudence.
[2254] *Al Hassan* Confirmation Decision, para. 554 (Pre-Trial Chamber I stated that the criminalization of forced marriage protects interests associated in particular with the violation of the right to marry, to choose a spouse and to consensually found a family, recognized in international human rights law.).

forced marriage is not necessarily sexual in nature but entails a "gendered harm", which is essentially the imposition on the victim of socially constructed gendered expectations and roles attached to "wife" or "husband".[2255] In addition, and as will be shown below on the basis of the facts underpinning this crime and established by the Trial Chamber, the relevant criminal act is of a nature and gravity similar to other acts referred to in article 7(1) of the Statute. Such an act may result "in great suffering" or in "serious injury to […] mental or physical health".[2256] Accordingly, the Appeals Chamber does not find any error in the Trial Chamber's interpretation of forced marriage as a form of other inhumane acts.

(ii) Alleged errors in the Trial Chamber's factual findings on forced marriage and other related findings

1025. The Defence argues that in the present case there was no conjugal union between the perpetrators and the victims, since one of the requirements of marriage in the Acholi culture was not fulfilled and that their relationship was in substance, "mere cohabitation".[2257] The Appeals Chamber considers that to establish "marriage" or "conjugal union", recognition as a formal or official marriage in a particular society is not required.[2258] Rather, it may be established on the facts of the case including the nature of the relationship between the perpetrator and the victim, as well as the subjective view of the victim, third parties and the perpetrator committing the act and his or her intention to consider the two of them to be "spouses".[2259] Therefore, the Appeals Chamber considers that whether or not the requirements of marriage in the Acholi culture or in Uganda were fulfilled has no relevance to the assessment of the

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[2255] T-264, p. 82, lines 11-18 (Counsel for the Prosecutor submitted that "what [forced marriage] always has is a gendered harm […] which is essentially the imposition of a gendered understanding or a gendered role of a wife on a victim. And it is the use of the word 'wife' and the status of wife that is imposed, that is – almost amounts to a sort of manipulation in the circumstances".). *See also* H. Baumeister, *Sexualised Crimes, Armed Conflict and The Law: The International Criminal Court and the Definitions of Rape and Forced Marriage* (Routledge, 2018), p. 69 (Braumeister notes that "[t]he categorisation of forced marriage as a form of sexual slavery ignores the gendered elements of forced marriage. Women are targeted because of their ascribed social roles as domestic workers, caretakers and sexual beings. The categorisation of forced marriage as a form of sexual slavery does not capture the forced exclusivity and intimacy of a forced marriage".).
[2256] *See* section VI.E.2(d)(ii) (Alleged errors in the Trial Chamber's factual findings on forced marriage and other related findings) below.
[2257] T-264, p. 29, lines 20-25; p. 85, line 9 to p. 86, line 2, p. 89, lines 20-22.
[2258] *See also* *Al Hassan* Confirmation Decision, para. 556.
[2259] *Al Hassan* Confirmation Decision, para. 556.

alleged acts of forced marriage. What matters is whether or not a conjugal union was factually imposed on the victims.[2260]

1026. The Defence also argues that "[t]he so-called married couple were the property of Kony over which he exercised complete and unchallenged ownership and authority".[2261] On this basis, the Defence submits that the "exclusivity of ownership of the women belong to Kony, and not [Mr] Ongwen, who himself was subjected to it" and that "the exclusivity of ownership element of forced marriage as a crime against humanity was therefore not proved beyond a reasonable doubt".[2262] By arguing that the exclusivity of ownership element of forced marriage was not proved beyond reasonable doubt, the Defence seems to conflate the concept of forced marriage with sexual slavery, which requires the exercise of any or all of the powers attaching to the right of ownership over one or more persons.[2263] In contrast, as noted above, the central element of forced marriage is the imposition of a conjugal union and the resulting spousal status on the victim.[2264] The Appeals Chamber therefore concurs with the Trial Chamber that "[f]orced marriage implies the imposition of […] conjugal association and does not necessarily require the exercise of ownership over a person".[2265] Therefore, contrary to the Defence's argument, the exclusivity of ownership is not an element of forced marriage as a form of other inhumane acts.

1027. The Appeals Chamber recalls that while the victims identified different moments as to exactly when they became Mr Ongwen's or other LRA members' "wives",[2266] these women were all considered their so-called "wives" during the charged period.[2267] The Trial Chamber also found that the victims were placed under heavy guard, were threatened with death if they tried to escape, were forced to have sexual intercourse with the so-called "husband" assigned to them, and were not allowed to have a sexual

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[2260] *See also* T-264, p. 98, lines 2-6 (Oosterveld *et al.* submitted that "[t]he first being the discussion of the need for statutory marriage to be a part of the definition, and I would draw attention to the fact that this Court has noted that legal marriage is not a requirement of forced marriage, but that what matters is the so-called marriage is factually imposed on the victim with the consequent social stigma.").
[2261] Appeal Brief, para. 997.
[2262] Appeal Brief, para. 999. *See also* T-264, p. 35, lines 6-8, p. 101, lines 20-24.
[2263] *See* Elements of Crimes, article 7(1)(g)-2.
[2264] *See* section VI.E.2(d)(i) (Alleged errors in the Trial Chamber's legal interpretation of forced marriage and the principle of *nullum crimen sine lege*) above.
[2265] Conviction Decision, para. 2750.
[2266] Conviction Decision, paras 2035-2036, 2203-2214.
[2267] Conviction Decision, paras 3023, 3070.

or romantic relationship with any man other than their so-called "husband".[2268] Moreover, the Trial Chamber found that the victims' status as so-called "wives" did not cease until they escaped or were released from the LRA.[2269] The Appeals Chamber therefore finds that the Trial Chamber reasonably concluded that the relationship between the perpetrators and the victims could be characterised as conjugal union.

1028. Furthermore, referring to the submission of Prof Allain, the Defence seems to argue that the crime of forced marriage does not reach the threshold of gravity required for "other inhumane acts" under article 7(1)(k) of the Statute.[2270] In this regard, the Appeals Chamber recalls that, as mentioned above, an act may amount to an other inhumane act pursuant to article 7(1)(k) of the Statute as long as it meets the requirements set out in article 7(1)(k) of the Statute.[2271] The Appeals Chamber notes that the Trial Chamber found, based on the evidence, that as a result of the imposition of a conjugal union, the victims endured severe mental and physical suffering by being subjected to repeated forcible sexual intercourse, actual physical violence, deprivation of liberty, and threat of violence and death.[2272] As a result, the Appeals Chamber finds that the Trial Chamber correctly found that the conduct in question reached the threshold of gravity required for "other inhumane acts" under article 7(1)(k) of the Statute.

1029. Furthermore, the Appeals Chamber concurs with the Trial Chamber that forced marriage as a form of other inhumane acts is "a continuing crime", which "covers the entire period of forced conjugal relationship, and only ends when the individual is freed from it".[2273] In relation to this finding, the Defence submits that the Trial Chamber considered it a continuing crime in order to convict Mr Ongwen for the acts which occurred prior to the charged period, *i.e.* between 1995 and 1998.[2274] The Defence's argument seems to be based on the understanding that this crime is committed and

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[2268] Conviction Decision, paras 3023, 3070.
[2269] Conviction Decision, para. 3023.
[2270] Defence's Response to the Amici Curiae Observations, para. 103, *referring to* Observations of Prof Allain, paras 49-58; *see* in particular para. 58.
[2271] *See* section VI.E.2(d)(i) (Alleged errors in the Trial Chamber's legal interpretation of forced marriage and the principle of *nullum crimen sine lege*) above.
[2272] Conviction Decision, paras 2028-2093, 2183-2309.
[2273] Conviction Decision, para. 2752.
[2274] T-264, p. 35, line 25 to p. 36, line 11.

completed at the time when the conjugal relationship between the perpetrator and the victim is entered. On this basis, the Defence seems to argue that since two of the victims (*i.e.* P-0099 and P-0101) became Mr Ongwen's so-called "wives" before 1 July 2002, Mr Ongwen could not have been convicted of this crime with respect to these victims.[2275] It therefore argues that the Trial Chamber violated the principle of non-retroactivity *ratione personae*, as set out in article 24 of the Statute, which reads as follows: "[n]o person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute".

1030. The Appeals Chamber is not persuaded by this argument. As noted above, forced marriage as a form of other inhumane acts is a continuing crime and, as such, criminalises not only the conduct of entering into a conjugal relationship, but the entire continued forced relationship.[2276] Accordingly, the Appeals Chamber finds that, in relation to P-0099 and P-0101, the "other inhumane act" of forced marriage is established throughout the period during which they were forced to remain as Mr Ongwen's so-called "wives", including during the time relevant to the charges. The Defence's argument is therefore rejected.

1031. The Defence also argues that Mr Ongwen "could not be found responsible for forced marriage as Sinia brigade commander before 4 March 2004" as he was not the commander of the Sinia brigade between 1 July 2002 and 4 March 2004.[2277] The Defence submits that the abduction of some of the victims (*e.g.* P-0351, P-0325 and P-0366) falls within the period when Mr Ongwen was in sickbay and that he was not responsible for such abductions as the commander of the Sinia brigade.[2278]

1032. The Appeals Chamber notes that the charges against Mr Ongwen covered the period between 1 July 2002 and 31 December 2005 when:

> [Mr] Ongwen was a military commander in the LRA, commanding units first at the battalion, and then at the brigade level. He spent the majority of this time in Sinia brigade, but also served for some time within the LRA headquarters, Control Altar. He commanded a battalion in Sinia brigade for much of mid-2002

[2275] T-264, p. 36, lines 11- 25.
[2276] *See* paragraph 1029 above.
[2277] Appeal Brief, para. 984.
[2278] Appeal Brief, paras 985-989.

> to March 2004. On or about 5 March 2004, [Mr] Ongwen became the commander of the Sinia brigade.[2279]

1033. In light of the above, the Appeals Chamber finds that the Defence's argument is based on a misunderstanding of the charges confirmed in this case. The charges against Mr Ongwen were not limited to the period when he was the Sinia brigade commander (after 5 March 2004), but covered the entire period between 1 July 2002 and 31 December 2005.[2280] The Defence's argument is thus rejected.

1034. Regarding the argument that Mr Ongwen was not responsible for abductions of women as the commander of Sinia Brigade during the period he was in sickbay, it is recalled that, based on a detailed analysis of the evidence,[2281] the Trial Chamber found, *inter alia*, that while Mr Ongwen was injured and placed in sickbay in October or November 2002, he retained command during that period and "maintained communication with other high commanders of the LRA" by using radio communication.[2282] The Trial Chamber also found that "any disruption to [Mr] Ongwen's exercise of his powers as Oka battalion commander was limited in time" and that he was again exercising his authority as battalion commander as early as December 2002.[2283] The Defence does not identify any error in the Trial Chamber's finding. While the Defence raised this argument in relation to Mr Ongwen's criminal responsibility as an indirect co-perpetrator, the fact that Mr Ongwen was in sickbay during the time of the victims' abduction does not negate his responsibility so long as he retained command as a military commander in the LRA. The Appeals Chamber thus rejects the Defence's argument.

1035. In addition, the Defence avers that it was not given notice of uncharged acts and charges of forced marriage and sexual violence committed by Joseph Kony and the Sinia brigade leadership, when Mr Ongwen was not the commander of the Sinia

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[2279] Confirmation Decision, Charges, para. 12.
[2280] Confirmation Decision, Charges, para. 12.
[2281] Conviction Decision, paras 1039-1049. *See also* section VI.D.2(c)(i)(a) (Alleged erroneous assessment of the evidence provided by P-0205, P-0070, P-0142 and P-0231) above.
[2282] Conviction Decision, paras 1038, 1044.
[2283] Conviction Decision, para. 1037.

brigade.[2284] It adds that the Trial Chamber impermissibly relied on the evidence of uncharged acts for corroboration.[2285]

1036. The Appeals Chamber notes that Mr Ongwen was given notice of the temporal and geographic scope of the charges regarding sexual and gender-based crimes,[2286] including the relevant facts before 1 July 2002.[2287] Furthermore, while the Defence refers to paragraphs 2202-2288 of the Conviction Decision, it does not identify any specific facts of which Mr Ongwen was not given notice.[2288] In addition, the Defence argues that Mr Ongwen was not given notice of "uncharged acts, acts outside the temporal and geographic scope of the charges and charges of forced marriage and sexual violence by Kony, Sinia leadership and Sinia brigade, which occurred during the period when he was not the commander of Sinia brigade".[2289] However, this argument again seems to be based on a misunderstanding of the charges confirmed in this case. As noted above, the charges against Mr Ongwen were not limited to the period when he was the Sinia brigade commander, but covered the entire period between 1 July 2002 and 31 December 2005 when he was a military commander in the LRA.[2290] The Appeals Chamber therefore rejects the Defence's argument.

1037. Finally, regarding the Defence's argument that the Trial Chamber "impermissibly" relied on uncharged acts for corroboration, the Defence does not identify which "evidence of facts not charged and outside the temporal and geographic scope of the case […] did not qualify as corroborative evidence" that could have "significantly impacted on the decision to convict [Mr Ongwen]".[2291] This argument is therefore dismissed for lack of substantiation.

[2284] Appeal Brief, para. 992.
[2285] Appeal Brief, paras 990-991.
[2286] Confirmation Decision, pp. 90-102. *See also* Pre-Confirmation Brief, paras 428-616.
[2287] For example, the Confirmation Decision notes the abduction of P-0099, P-0101, P-0214 and P-0226, which took place before 1 July 2002.
[2288] Appeal Brief, para. 992, fn. 1273, *referring to* Conviction Decision, paras 2202-2288.
[2289] Appeal Brief, para. 992.
[2290] *See* paragraph 1032 above.
[2291] Appeal Brief, paras 990-991.

1038. In light of the above, the Appeals Chamber finds that the Trial Chamber did not err by convicting Mr Ongwen of forced marriage as a form of other inhumane acts pursuant to article 7(1)(k) of the Statute.

1039. Finally, the Defence also argues that confirming a charge of forced marriage is in violation of articles 119 and 121 of the Statute.[2292] However, the Appeals Chamber notes that article 119 governs the settlement of disputes concerning the judicial function of the Court or those between two or more State Parties relating to the interpretation or application of the Statute[2293] and article 121 provides the procedure for amendments of the Statute.[2294] The Appeals Chamber finds that, for the reasons developed above,[2295] there was no violation of these two provisions because confirming a charge for forced marriage as a form of other inhumane acts under article 7(1)(k) of the Statute did not require any dispute settlement or amendments to the Statute. Accordingly, the Defence's argument in this regard is rejected.

(e) Overall conclusion

1040. Having considered all the arguments raised under grounds of appeal 90 and 66 in part concerning alleged errors in the Trial Chamber's findings on forced marriage as a form of other inhumane acts, the Appeals Chamber rejects these grounds of appeal.

[2292] Appeal Brief, para. 148.
[2293] Article 119 of the Statute reads: "1. Any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court. 2. Any other dispute between two or more States Parties relating to the interpretation or application of this Statute which is not settled through negotiations within three months of their commencement shall be referred to the Assembly of States Parties. The Assembly may itself seek to settle the dispute or may make recommendations on further means of settlement of the dispute, including referral to the International Court of Justice in conformity with the Statute of that Court."
[2294] Article 121(1) to (3) of the Statute reads: "1. After the expiry of seven years from the entry into force of this Statute, any State Party may propose amendments thereto. The text of any proposed amendment shall be submitted to the Secretary-General of the United Nations, who shall promptly circulate it to all States Parties. 2. No sooner than three months from the date of notification, the Assembly of States Parties, at its next meeting, shall, by a majority of those present and voting, decide whether to take up the proposal. The Assembly may deal with the proposal directly or convene a Review Conference if the issue involved so warrants. 3. The adoption of an amendment at a meeting of the Assembly of States Parties or at a Review Conference on which consensus cannot be reached shall require a two-thirds majority of States Parties."
[2295] *See* section VI.E.2(d)(i) (Alleged errors in the Trial Chamber's legal interpretation of forced marriage and the principle of *nullum crimen sine lege*) above.

3. Ground of appeal 88: Alleged errors regarding forced pregnancy

1041. Under ground of appeal 88, the Defence challenges the Trial Chamber's legal interpretation of the crime of forced pregnancy under articles 7(1)(g) and 7(2)(f) of the Statute and its factual findings.[2296] The Appeals Chamber will address these arguments in turn.

(a) Alleged error in the Trial Chamber's legal interpretation of forced pregnancy

(i) Summary of the submissions

(a) The Defence's submissions

1042. The Defence submits that the Trial Chamber erred in law when interpreting article 7(1)(g) of the Statute.[2297] In particular, with regard to the Trial Chamber's finding that "the crime of forced pregnancy is grounded in the woman's right to personal and reproductive autonomy and the right to family", the Defence submits that this "brings forced pregnancy into the political and ideological debate […], which the State Parties hoped to avoid through passionate debate and cautious safeguards".[2298] It argues that the Trial Chamber "failed to make a reasoned enquiry about whether its interpretation of the crime […] affects the national law of Uganda on abortion" and "[d]isregard[ed] a specific requirement in the Statute".[2299]

1043. The Defence further argues that it is debatable whether the references in the Conviction Decision are "a safe foundation on which to lay the jurisprudence of this Court" and that it was not given an opportunity to respond to the variety of opinions on a woman's reproductive autonomy and the right to family.[2300] It contends that contrary to article 31 of the Vienna Convention, the Trial Chamber "imported meanings from a variety of non-binding sources which were inconsistent with the intendment of the Statute".[2301] Furthermore, the Defence avers that the Trial Chamber *inter alia* "failed

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[2296] Appeal Brief, paras 935-974.
[2297] Appeal Brief, paras 960-964.
[2298] Appeal Brief, para. 961, *referring to* Conviction Decision, para. 2041.
[2299] Appeal Brief, para. 962.
[2300] Appeal Brief, paras 961, 964.
[2301] Appeal Brief, para. 964.

to take [the] Acholi cultural sensitivity on the trial record" into account as evidence for context, or to assess Mr Ongwen's *mens rea*.[2302]

(b) The Prosecutor's submissions

1044. The Prosecutor argues that the Defence's interpretation of the crime of forced pregnancy is "flawed" and "mistakes the rationale of the crime".[2303] He submits that, as shown in the drafting history and found by the Trial Chamber, the definition of forced pregnancy in article 7(2)(f) of the Statute is "purposely narrow and was a result of delicate compromise, which already reflects and accommodates the various concerns expressed during negotiations".[2304] The Prosecutor avers that this provision includes "an express safeguard" to reflect various concerns raised by delegations during the negotiation of the Statute, and in particular, to specify that the provision does not affect national laws on pregnancy.[2305]

1045. In addition, the Prosecutor argues that the Trial Chamber was not required to consider Ugandan national law on abortion in its assessment because "[a]bortion is not the same as the crime of forced pregnancy, nor is the [Trial] Chamber permitted to apply national law to judge international crimes in this context".[2306] He also submits that the Trial Chamber was not required to consider aspects of Acholi culture in establishing the crimes.[2307]

(c) The Victims' observations

1046. Victims Group 1 argue that all of the arguments raised by the Defence on forced pregnancy must be disregarded as they fail to demonstrate any errors of law and fact, and present mere differences of opinion with the Trial Chamber.[2308] They further submit that "forced pregnancy does not necessarily protect the right to terminate a pregnancy but the right to determine when, how a woman gets pregnant" and thus, is not incompatible with national law of abortion.[2309]

[2302] Appeal Brief, para. 963.
[2303] Prosecutor's Response, para. 579.
[2304] Prosecutor's Response, para. 579.
[2305] Prosecutor's Response, para. 579.
[2306] Prosecutor's Response, para. 581
[2307] Prosecutor's Response, para. 581
[2308] Victims Group 1's Observations, para. 274.
[2309] T-264, p. 53, lines 5-9.

1047. Victims Group 2 submit that the second sentence of article 7(2)(f) of the Statute "was not to restrict the Court's interpretation of the term 'forced pregnancy', but rather, to reassure concerned States that the enumeration of forced pregnancy as a crime against humanity and war crime in the Statute does not invalidate restrictions on abortion under national law".[2310]

(d) The observations of the *amici curiae*

1048. A number of *amici curiae* presented observations, both in writing and during the hearing, on the legal elements of the crime of forced pregnancy.[2311]

1049. In particular, Grey *et al.* submit that the interests protected by the crime of forced pregnancy "are personal, sexual and reproductive autonomy, [which are] values central to the protection of physical integrity and human dignity".[2312] Prof Meyersfeld and SALCT argue that "[t]he key distinctive component of the crime of forced pregnancy is the violation of a woman's reproductive health and autonomy".[2313] They explain that this crime results not only in the denial of a woman's right to be pregnant but also of her "rights to determine the *way* in which she may choose to be pregnant".[2314] Furthermore, Ardila *et al.* submit that the crime of forced pregnancy "is a form of reproductive violence, which affects a person's reproductive capacity and targets victims because of their reproductive capacity".[2315]

(ii) Relevant part of the Conviction Decision

1050. The Trial Chamber found that "[t]he crime of forced pregnancy is grounded in the woman's right to personal and reproductive autonomy and the right to family".[2316] It noted that "[t]he Statute adopted a 'narrow' definition of forced pregnancy, largely

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[2310] T-264, p. 58, lines 9-13.
[2311] *See e.g.* Observations of Grey *et al.*, paras 5-39; Observations of Prof Meyersfeld and SALCT, paras 15-20, 22; Observations of Ardila *et al.*, paras 3-19; Observations of Dr Behrens, paras 19-21; Observations of Mr Batra, p. 5.
[2312] T-264, p. 69, lines 1-6. *See also* Observations of Grey *et al.*, paras 34-39.
[2313] Observations of Prof Meyersfeld and SALCT, para. 16. *See also* T-264, p. 48, lines 1-18.
[2314] Observations of Prof Meyersfeld and SALCT, para. 16 (emphasis in original). *See also* T-264, p. 48, lines 10-12.
[2315] Observations of Ardila *et al.*, para. 4 (Ardila *et al.* note that "[r]eproductive autonomy refers to the capacity and possibility to freely make informed decisions relating to one's reproductive choices, including all aspects concerning impregnation, pregnancy, birth and maternity. Overall, it comprises the freedom to choose whether, how, and under what circumstances to reproduce, as well as the capability of doing so in a safe and healthy environment.").
[2316] Conviction Decision, para. 2717.

because the provision was 'one of the most difficult and controversial to draft'".[2317] Recalling the divergent views that had been expressed during the negotiations on forced pregnancy,[2318] the Trial Chamber found that the resulting definition set out in article 7(2)(f) of the Statute is "a delicate compromise that specified the *mens rea* requirement as 'affecting the ethnic composition of any population or carrying out other grave violations of international law'".[2319] The Trial Chamber also found that the second sentence of this provision[2320] "does not add a new element to the offence – and is thus not reproduced in the Elements of Crimes – but allays the concern that criminalising forced pregnancy may be seen as legalising abortion".[2321]

(iii) Determination by the Appeals Chamber

1051. At the outset, the Appeals Chamber notes that the Defence submits that the reference cited in footnote 7091 of the Conviction Decision[2322] "made its jurisprudence on forced pregnancy flawed on an evidentiary, procedural and legal basis".[2323] The Appeals Chamber observes however that it is unclear from the Defence's argument how such reference affected the jurisprudence on forced pregnancy. By reference to the authorities cited in footnote 7091, the Trial Chamber merely supported the view that individual victims of crimes against humanity need only be "persons" and not civilians for the purpose of international humanitarian law.[2324] The Appeals Chamber therefore dismisses the Defence's argument.

[2317] Conviction Decision, para. 2718.
[2318] Conviction Decision, paras 2718-2720.
[2319] Conviction Decision, para. 2721.
[2320] The second sentence of article 7(2)(f) of the Statute reads: "This definition shall not in any way be interpreted as affecting national laws relating to pregnancy".
[2321] Conviction Decision, para. 2721.
[2322] *See* Conviction Decision, fn. 7091, *noting* "Victims are described as 'person' or 'persons' across all Article 7(1) crimes except for forced pregnancy (refers to 'women') and the residual 'other inhumane acts' (which only speaks generally of inflicting 'great suffering, or serious injury to body or to mental or physical health […]'). No further status requirement is specified. In contrast, see the elements for the crimes under Article 8(2)(a) of the Statute (specifically requiring that the victim was 'protected under one or more of the Geneva Conventions of 1949'). *See also* ICTY, Appeals Chamber, *Prosecutor v. Mile Mrkšić & Veselin Šljivančanin*, Judgement, 5 May 2009, IT-95-13/1-A, para. 32; ICTY, Appeals Chamber, *Prosecutor v. Dragomir Milošević*, Judgement, 12 November 2009, IT-98-29/1-A, paras 58, 96; United States Military Tribunal, *The High Command Case*, Trials of War Criminals Before the Nuremberg Military Tribunals, 1949, Vol. XI, pp. 675, 679 (convicting General Walter Warlimont for significantly contributing to the illegal plan to lynch Allied flyers; this plan is described as a crime against humanity)."
[2323] Appeal Brief, para. 960.
[2324] *See* Conviction Decision, para. 2675 (The sentence to which footnote 7091 is attached reads: "Further, and although the attack must be directed against a civilian population, there is no requirement

1052. Turning to the Defence's arguments regarding the debate on the women's rights and the Trial Chamber's reliance on "non-binding" sources cited in footnote 7164 of the Conviction Decision,[2325] the Appeals Chamber notes that the crime of forced pregnancy as a crime against humanity is contained in article 7(1)(g) of the Statute. Article 7(2)(f) of the Statute defines "forced pregnancy" as follows:

> "Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy.

1053. In interpreting this provision, the Appeals Chamber considers it relevant to recall the drafting history of the crime of forced pregnancy. The negotiations on this crime originated from the proposal of the Women's Caucus for Gender Justice to enumerate sexual and gender violence including "*attacks on reproductive integrity such as forced pregnancy* or forced sterilization".[2326] During the December 1997 Preparatory Committee on the Establishment of an International Criminal Court, the inclusion of "enforced pregnancy" as a war crime was agreed upon by the delegations.[2327] The sole opposition was from the Holy See which argued that the term should be replaced with "forcible impregnation", which focuses only on the act of forcibly making a women pregnant but not the subsequent conduct of forcibly keeping her pregnant.[2328] In contrast, the delegations supporting "enforced pregnancy" contended that "forcible impregnation" did not adequately cover a situation such as the atrocities committed in Bosnia-Herzegovina, where Bosnian women were raped and detained in order to force them to give birth to half-Serb babies.[2329]

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that the individual victims of crimes be civilians; they need only be 'persons' under the Elements of Crimes".).

[2325] Appeal Brief, paras 961, 964.

[2326] Proposal of Women's Caucus for Gender Justice, p. 31 (Recommendation 7), para. WC.4.4. (emphasis added).

[2327] C. Steain, 'Gender issues' in R.S. Lee (ed.), *The International Criminal Court: the making of the Rome Statute – Issues, Negotiations, Results* (1999), p. 365.

[2328] C. Steain, 'Gender issues' in R.S. Lee (ed.), *The International Criminal Court: the making of the Rome Statute – Issues, Negotiations, Results* (1999), p. 365. *See also* Proposal of the Holy See.

[2329] C. Steain, 'Gender issues' in R.S. Lee (ed.), *The International Criminal Court: the making of the Rome Statute – Issues, Negotiations, Results* (1999), p. 366.

1054. During the negotiations in Rome, the proposal to include forced pregnancy in the Statute received strong support,[2330] although certain States expressed reluctance and, in particular, concerns that the inclusion of forced pregnancy might interfere with national regulations on abortion.[2331] Following intensive negotiations, an agreement was reached to include the crime of forced pregnancy in article 7(2)(f) of the Statute.[2332] Accordingly, the drafting history of this provision reveals that the crime of forced pregnancy has been considered as an attack on reproductive integrity since its inception.[2333]

1055. The Appeals Chamber considers that the facts that article 7(2)(f) of the Statute defines forced pregnancy as "the unlawful confinement of a woman forcibly made pregnant" and that it was criminalised separately from other crimes listed in article 7(1) of the Statute, such as rape and imprisonment, imply that this crime intends to protect a woman's reproductive rights, including the right to be pregnant and to autonomously determine the way in which she carries out her pregnancy.[2334] The Appeals Chamber

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[2330] C. Steain, 'Gender issues' in R.S. Lee (ed.), *The International Criminal Court: the making of the Rome Statute – Issues, Negotiations, Results* (1999), p. 367.
[2331] C. Steain, 'Gender issues' in R.S. Lee (ed.), *The International Criminal Court: the making of the Rome Statute – Issues, Negotiations, Results* (1999), pp. 365, 368. *See also* Rome Conference Summary Records, p. 148, para. 32 (The delegation for Saudi Arabia opposed the inclusion of "enforced pregnancy" in war crimes since its "country was opposed to abortion".), p. 166, para. 72 (The delegation for the Islam Republic of Iran argued that this crime "might be used as an argument against the prohibition of abortion and should therefore be dropped.").
[2332] The Appeals Chamber notes that the delegations agreed that the definition of forced pregnancy in the definitional paragraph under crimes against humanity (*i.e.* article 7(2)(f) of the Statute) would also apply to forced pregnancy as a war crime. *See* C. Steain, 'Gender issues' in R.S. Lee (ed.), *The International Criminal Court: the making of the Rome Statute – Issues, Negotiations, Results* (1999), p. 367.
[2333] *See* Observations of Grey *et al.*, para. 35.
[2334] *See e.g.* Observations of Grey *et al.*, paras 35-39 (Grey *et al.* submit that "[t]he focus on reproductive autonomy distinguishes 'forced pregnancy' from related crimes such as rape, enslavement or imprisonment. The harm recognised by the crime of forced pregnancy is therefore not forcing the victim to give birth but violating the victim's personal, sexual, and reproductive autonomy by unlawfully confining them, including by preventing them from accessing an abortion. Unlawful confinement can impact upon reproductive rights even in states where abortion is partially or completely criminalised or otherwise restricted. It obstructs access to essential services that the victim may otherwise have accessed (even if restricted under domestic law)."); Observations of Prof Meyersfeld and SALCT, para. 16 (Prof Meyersfeld and SALCT submit that "[t]he key distinctive component of the crime of forced pregnancy is the violation of a woman's reproductive health and autonomy. It is not only a question of denying a woman's right to be pregnant. It is also about denying a woman the right to determine the *way* in which she may choose to be pregnant. This includes a woman's approach to her physical and mental health during the pregnancy and her right to access healthcare that will prevent miscarriages or stillbirths. It also violates the right to exercise culturally specific customs relating to pregnancy."); Amnesty International, *Forced Pregnancy A Commentary on the Crime in International Criminal Law* (2020), pp. 9-10 (Amnesty International notes that "[t]he harm recognized by the crime is therefore not forcing the victim to give birth but violating the victim's sexual and reproductive autonomy by unlawfully confining them, including by preventing them from accessing a safe abortion". "Removing the victim's

concurs with the Pre-Trial Chamber's finding in the Confirmation Decision that "the essence of the crime of forced pregnancy is in unlawfully placing the victim in a position in which she cannot choose whether to continue the pregnancy".[2335] The Appeals Chamber also considers that the unlawful confinement of women made pregnant can impact a number of their sexual and reproductive rights. Indeed, women in those circumstances are prevented from accessing healthcare services and information which may facilitate their decision-making on the pregnancy, including abortion.[2336] Therefore, the definition provided in article 7(2)(f) of the Statute indicates that the main focus of this crime is to protect a woman's reproductive autonomy.

1056. Furthermore, the review of a number of international conventions and instruments reveals that the criminalisation of forced pregnancy seeks to protect women's reproductive rights. As referred to by the Trial Chamber,[2337] article 16(1)(e) of the CEDAW provides:

> State Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:
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> […]

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autonomy over the pregnancy through unlawful confinement is a serious violation of their sexual and reproductive rights, including the right to protect and control their own health and body. Moreover, unlawfully confining persons without adequate medical care, including sexual and reproductive health services, may also violate their rights to life, health, equality and discrimination, privacy and to be free from torture and other cruel, inhuman or degrading treatment.").

[2335] Confirmation Decision, para. 99.

[2336] *See e.g.* Observations of Grey *et al.*, para. 37 (Grey *et al.* submit that "[t]he harm recognised by the crime of forced pregnancy is therefore not forcing the victim to give birth but violating the victim's personal, sexual, and reproductive autonomy by unlawfully confining them, including by preventing them from accessing an abortion. Unlawful confinement can impact upon reproductive rights even in states where abortion is partially or completely criminalised or otherwise restricted. It obstructs access to essential services that the victim may otherwise have accessed (even if restricted under domestic law."); Observations of Prof Meyersfeld and SALCT, para. 16 (Prof Meyersfeld and SALCT submit that "[t]he key distinctive component of the crime of forced pregnancy is the violation of a woman's reproductive health and autonomy. It is not only a question of denying a woman's right to be pregnant. It is also about denying a woman the right to determine the way in which she may choose to be pregnant. This includes a woman's approach to her physical and mental health during the pregnancy and her right to access healthcare that will prevent miscarriages or stillbirths. It also violates the right to exercise culturally specific customs relating to pregnancy.").

[2337] Conviction Decision, fn. 7164. The Trial Chamber also referred to article 16 of the Proclamation of Tehran, which provides that "[p]arents have a basic human right to determine freely and responsibly the number and the spacing of their children". *See* article 16 of Proclamation of Tehran ("Parents have a basic human right to determine freely and responsibly the number and the spacing of their children".).

> The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights.[2338]

1057. Moreover, article 12(1) of the CEDAW reads:

> States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.[2339]

1058. Article 12(1) of the ICESCR also provides:

> The State Parties to the present Covenant recognize the right of everyone to the enjoyment to the highest attainable standard of physical and mental health.[2340]

1059. In this regard, the UN Committee on Economic, Social and Cultural Rights states that

> The right to sexual and reproductive health entails a set of freedoms and entitlements. The freedoms include the right to make free and responsible decisions and choices, free of violence, coercion and discrimination, regarding matters concerning one's body and sexual and reproductive health. The entitlements include unhindered access to a whole range of health facilities, goods, services and information, which ensure all people full enjoyment of the right to sexual and reproductive health under article 12 of the [ICESCR].[2341]

1060. In addition, the Committee of Experts of the Follow-up Mechanism to the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women declares

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[2338] Article 16(1)(e) of CEDAW. *See also* article 14(1)(b) of Protocol to ACHPR ("State Parties shall ensure that the health of women, including sexual and reproductive health is respected and promoted", which includes "the right to decide whether to have children, the number of children and spacing of children."); para. 96 of Beijing Declaration and Platform for Action ("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. Equal relationships between women and men in matters of sexual relations and reproduction, including full respect for the integrity of the person, require mutual respect, consent and shared responsibility for sexual behaviour and its consequences.").

[2339] Article 12(1) of CEDAW.

[2340] Article 12(1) of ICESCR.

[2341] Para. 5 of General Comment No. 22. *See also* para. 30 ("Also, women and girls living in conflict situations are disproportionately exposed to a high risk of violation of their rights, including through systematic rape, sexual slavery, forced pregnancy and forced sterilization. Measures to guarantee non-discrimination and substantive equality should be cognizant of and seek to overcome the often exacerbated impact that intersectional discrimination has on the realization of the right to sexual and reproductive health.").

> *That sexual and reproductive rights* are part of the catalogue of human rights that are protected and defenced by the universal and inter-American human rights system; and that sexual and reproductive rights are grounded in other essential human rights, including the right to health, the right to be free from discrimination, the right to privacy, the right not to be subjected to torture and ill-treatment, the rights of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so and the rights to make decisions concerning reproduction free of discrimination, coercion and violence and therefore to be free from sexual violence.[2342]

1061. The Appeals Chamber finds no merit in the Defence's argument regarding the Trial Chamber's reliance on "non-binding sources" in footnote 7164 of the Conviction Decision.[2343] Pursuant to article 31(1) of the Vienna Convention, article 7(1)(g) of the Statute must be interpreted in accordance with its ordinary meaning and in the light of its object and purpose.[2344] In addition, article 21(1)(b) of the Statute provides that the Court shall apply "where appropriate, applicable treaties and the principles and rules of international law". The Trial Chamber relied on the definition and object of article 7(1)(g) and 7(2)(f) of the Statute, as well as international conventions and instruments for the purpose of interpreting the crime of forced pregnancy.[2345] In these circumstances, the Appeals Chamber finds that the Trial Chamber's interpretation of article 7(1)(g) of the Statute is in accordance with article 31(1) of the Vienna Convention and it did not err in relying on the relevant international conventions and instruments.

1062. The Defence argues that the references the Trial Chamber relied upon when interpreting the crime "[were] not submitted into the trial record as evidence nor was it provided as expert evidence or *amicus curiae* opinion", and that the parties – in particular the Defence – were not provided with an opportunity to "respond" to such sources.[2346] The Appeals Chamber notes that the Trial Chamber made references to certain international instruments and accounts of the provision's drafting history. These

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[2342] Declaration on Violence against Women, Girls and Adolescents, p. 2 (emphasis in original).
[2343] Appeal Brief, para. 964.
[2344] *See* *Bemba* Appeal Judgment, para. 675 ("The Appeals Chamber has confirmed that the principles of treaty interpretation set out in article 31 of Vienna Convention also apply to the interpretation of the Statute. Therefore, its provisions are to be interpreted according to their ordinary meaning in their context and in the light of the object and purpose of the treaty.").
[2345] *See* Conviction Decision, paras 2717-2722.
[2346] Appeal Brief, para. 964.

legal references did not amount to "evidence", "expert evidence" or "*amicus curiae* opinion" and in any event, the Appeals Chamber notes that the parties and participating victims were provided with ample opportunity during trial to make submissions on the interpretation of forced pregnancy.[2347] The Defence's arguments are therefore rejected.

1063. In light of the above, the Appeals Chamber considers that the crime of forced pregnancy seeks to protect, among others, the woman's reproductive health and autonomy and the right to family planning. Therefore, the Appeals Chamber finds no error in the Trial Chamber's conclusion that "[t]he crime of forced pregnancy is grounded in the woman's right to personal and reproductive autonomy and the right to family".[2348] The Appeals Chamber thus rejects the Defence's arguments.

1064. In addition, the Defence argues that the Trial Chamber failed to provide a reasoned opinion as to whether its interpretation of forced pregnancy would affect the national law of Uganda on abortion.[2349] The Defence avers that the Trial Chamber's disregard for "a specific requirement" set out in the second sentence of article 7(2)(f) of the Statute "defeat[ed] the purpose for which the provision was added", namely "to provide guidance in the interpretation of the Statute and to avoid importing divisive contentious political, religious, cultural and ideological issues into the jurisprudence of the Court".[2350]

1065. The Appeals Chamber recalls that the formulation of article 7(2)(f) of the Statute was the result of the extensive efforts by the States to accommodate various concerns raised during the negotiations on the crime of forced pregnancy. The Appeals Chamber understands from the drafting history that the second sentence of this provision was inserted to alleviate the concerns raised by some States that the forced pregnancy provision might be interpreted as interfering with the States' approach to abortion.[2351]

[2347] *See e.g.* T-21, p. 48, line 15 to p. 49, line 1; T-23, p. 17, line 12 to p. 18, line 7; Defence Closing Brief (The Defence made no submissions with respect to forced pregnancy.).
[2348] Conviction Decision, para. 2717.
[2349] Appeal Brief, para. 962.
[2350] Appeal Brief, para. 962.
[2351] Observations of Grey *et al.*, para. 14. *See also* C. Steain, 'Gender issues' in R.S. Lee (ed.), *The International Criminal Court: the making of the Rome Statute – Issues, Negotiations, Results* (1999), p. 368.

On this basis, the Appeals Chamber concurs with the Trial Chamber that article 7(2)(f) of the Statute does not impose a new element to the crime of forced pregnancy.[2352]

1066. Therefore, the Trial Chamber was not required to consider Ugandan law on abortion in its assessment of the crime of forced pregnancy. Moreover, the Defence fails to show how Ugandan law on abortion was relevant to the Trial Chamber's disposal of this issue. Consequently, the Defence's argument is rejected.

1067. Finally, the Defence argues that the Trial Chamber failed to consider the evidence of Acholi cultural sensitivity provided by expert witness Seggane Musisi, in assessing Mr Ongwen's *mens rea*.[2353] The Appeals Chamber notes that the Trial Chamber assessed this witness's evidence as follows:

> He testified about his expert report on the interplay of Acholi culture with traumas and PTSD. He elaborated in particular on the impact of loss of traditions on the individual's and community's development as well as on Acholi cultural approaches to crimes and traumas. He described, for example, in detail the role of Acholi rituals in healing processes. The Chamber notes his evidence, but also observes that it does not directly underlie any part of the Chamber's analysis as to whether the facts alleged in the charges are established.[2354]

1068. The Appeals Chamber finds that the Defence merely disagrees with the above finding without substantiating how the Trial Chamber erred in not considering this evidence in its assessment of Mr Ongwen's *mens rea*. The Appeals Chamber thus dismisses the Defence's argument.

(b) Alleged errors in the Trial Chamber's factual findings and other issues

(i) Summary of the submissions

1069. The Defence submits that the Trial Chamber "disregarded and/or mischaracterised the evidence on the trial record which raised reasonable doubt" regarding the charges of forced pregnancy.[2355] In particular, the Defence argues that the Trial Chamber "used different standards [for Mr Ongwen and the victims of forced

[2352] Conviction Decision, para. 2721.
[2353] Appeal Brief, para. 963.
[2354] Conviction Decision, para. 602.
[2355] Appeal Brief, p. 223, paras 945-959

pregnancy] when discussing confinement, detention or imprisonment in the LRA".[2356] It also challenges the Trial Chamber's finding that the testimony of the seven women who testified before the Pre-Trial Chamber during the article 56 proceedings are "consistent and mutually corroborating".[2357] In addition, the Defence argues that the Trial Chamber failed to provide reasoning and findings on the constituent elements of forced pregnancy, as well as the contextual elements of crimes against humanity and war crimes.[2358]

1070. The Prosecutor argues that the Defence's argument on the Trial Chamber's factual findings is "imprecise and incorrect", since it "misinterprets the evidence, the findings and the law".[2359] He submits that the Defence's attempt to compare Mr Ongwen's arrest to the unlawful confinement of his so-called "wives" during their pregnancies is "misconceived and inapposite".[2360] He also submits that the Defence's narration of the testimony given by the victims is "inaccurate, selectively relying on portions of their testimony".[2361] Furthermore, he submits that the Defence's claim that the Trial Chamber failed to properly reason its decision is "unsubstantiated and inaccurate" and "should be dismissed summarily".[2362]

(ii) Relevant part of the Conviction Decision

1071. In assessing the evidence of sexual and gender-based crimes directly committed by Mr Ongwen, the Trial Chamber discussed: (i) the first forcible sexual encounter that each of the seven so-called "wives" (*i.e.* P-0099, P-0101, P-0214, P-0226, P-0227, P-0235 and P-0236) had with Mr Ongwen; (ii) the evidence showing that, over a long period of time, these women were subjected to sexual violence by Mr Ongwen repeatedly and continuously; and (iii) the pregnancies of these women as a result of having sexual intercourse with Mr Ongwen.[2363] It noted that "[a]ll pregnancies support

[2356] Appeal Brief, paras 945, 946.
[2357] Appeal Brief, paras 947-958.
[2358] Appeal Brief, paras 965-974.
[2359] Prosecutor's Response, para. 582.
[2360] Prosecutor's Response, para. 583.
[2361] Prosecutor's Response, para. 583.
[2362] Prosecutor's Response, para. 584.
[2363] Conviction Decision, paras 2041-2070.

the existence of a pattern of sexual violence, and three of them (two of P-0101 and one of P-0214) underlie the forced pregnancy charges in this case".[2364]

1072. Following its evidentiary assessment, the Trial Chamber concluded as follows:

> 2069. P-0101 became pregnant and gave birth to a girl fathered by [Mr] Ongwen sometime between July 2002 and July 2004. In 2004, P-0101 became pregnant and gave birth to a boy fathered by [Mr] Ongwen. Around December 2005, P-0214 gave birth to a girl fathered by [Mr] Ongwen. The charge of forced pregnancy as presented by the Prosecution is limited to these three pregnancies.[2365]
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> 2070. In addition, the Chamber notes that, while 10 of the 13 children fathered by [Mr] Ongwen were born outside the period relevant to the charges, they further support the existence of a pattern of sexual violence with which [Mr] Ongwen is charged, as well as, more generally, the Chamber's conclusions in respect to the facts of the charges. The Chamber notes in this regard that: in June 2002, P-0099 gave birth to a boy fathered by [Mr] Ongwen; around 1999, P-0101 gave birth to a girl fathered by [Mr] Ongwen; at some point after the period of time relevant to the charges and before her escape in 2010, P-0227 gave birth to a boy fathered by [Mr] Ongwen; in 2007 and 2009, respectively, P-0214 gave birth to two more children fathered by [Mr] Ongwen; in late 2007, P-0235 gave birth to a girl fathered by [Mr] Ongwen; in 2010, P-0235 gave birth to a boy fathered by [Mr] Ongwen; in late 2010, P-0236 gave birth to a boy fathered by [Mr] Ongwen; in 2014, P-0235 gave birth to a boy fathered by [Mr] Ongwen; and in 2014, P-0236 gave birth to a boy fathered by [Mr] Ongwen.[2366]

(iii) Determination by the Appeals Chamber

1073. The Appeals Chamber will address in turn the Defence's arguments that Trial Chamber (i) disregarded and/or mischaracterised the evidence; and (ii) erred in its findings on the constituent elements of forced pregnancy and the contextual elements of crimes against humanity and war crimes.

(a) Alleged errors in disregarding and/or mischaracterising the evidence

1074. The Defence argues that the Trial Chamber "used different standards [for Mr Ongwen and the victims of forced pregnancy] when discussing confinement, detention or imprisonment in the LRA".[2367] More specifically, it submits that while the

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[2364] Conviction Decision, para. 2041.
[2365] Conviction Decision, para. 2069.
[2366] Conviction Decision, para. 2070.
[2367] Appeal Brief, paras 945, 946.

Trial Chamber minimised the arrest and confinement of Mr Ongwen by Vincent Otti, it "magnified the evidence of the general condition of life in the LRA which did not target any of the victims and [their] circumstances of impregnation and confinement for impermissible inference to convict [Mr Ongwen] for forced pregnancy".[2368]

1075. At the outset, the Appeals Chamber stresses that Mr Ongwen's arrest and the unlawful confinement imposed on the victims of forced pregnancy are fundamentally different issues. While the former concerns Mr Ongwen's arrest by Vincent Otti on disciplinary grounds, the latter relates to one of the elements of the crime of forced pregnancy, as set out in article 7(2)(f) of the Statute, which Mr Ongwen was charged with and convicted of.

1076. In relation to Mr Ongwen's arrest, the Appeals Chamber notes that in the section setting out its analysis of evidence regarding Mr Ongwen's position within the LRA,[2369] the Trial Chamber considered the evidence relating to his arrest by Vincent Otti and also referred to other evidence indicating his activities in the immediate period following his arrest around April 2003.[2370] The Trial Chamber did so, in order to determine "whether [Mr Ongwen] was active as LRA commander throughout this period, without any significant interruption".[2371] Having assessed the relevant evidence, the Trial Chamber found that: (i) "arrest" and "prison" within the LRA "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"; (ii) Mr Ongwen was in fact active even under arrest and close supervision by Vincent Otti; and (iii) Mr Ongwen was promoted to second-in-command of the Sinia brigade in September 2003.[2372] On this basis, the Trial Chamber concluded that "[Mr] Ongwen's arrest in April 2003 did not for any significant period interrupt the exercise of his authority as commander".[2373]

[2368] Appeal Brief, paras 945, 946.
[2369] Conviction Decision, paras 1013-1083.
[2370] Conviction Decision, paras 1050-1063.
[2371] Conviction Decision, para. 1055.
[2372] Conviction Decision, paras 1056-1062, 1071-1074.
[2373] Conviction Decision, para. 1063.

1077. Regarding the confinement of the victims of forced pregnancy, the Trial Chamber found that the seven so-called "wives" were forced to have sex with Mr Ongwen on a repeated basis and, consequently, became pregnant and gave birth to children fathered by him.[2374] It further found that the so-called "wives", including P-0101 and P-0214 during their pregnancies, were not allowed to leave, placed under heavy guard, and told that they would be killed if they tried to escape.[2375] Based on the above, the Trial Chamber found that "[Mr] Ongwen confined P-0101 and P-0214, who had been forcibly made pregnant" and that the objective element of forced pregnancy was met.[2376] In this regard, the Appeals Chamber notes that contrary to the Defence's argument,[2377] the Trial Chamber's finding that the victims were confined during their pregnancy was supported by the evidence given by the so-called "wives".[2378]

1078. In light of the foregoing, the Appeals Chamber finds that the argument raised by the Defence is misconceived. While the Defence contests the Trial Chamber's use of different standards in assessing Mr Ongwen's arrest and the confinement of the victims of forced pregnancy, these two issues concern different situations and were addressed for entirely different purposes. As noted above, the Trial Chamber considered Mr Ongwen's arrest by Vincent Otti to determine whether this event had interrupted the exercise of Mr Ongwen's authority as LRA commander.[2379] Conversely, it assessed the unlawful confinement of the victims of forced pregnancy to determine whether the objective element of forced pregnancy was fulfilled in the present case.[2380] Accordingly, the Appeals Chamber rejects the Defence's argument.

1079. Furthermore, the Defence argues that "the finding by the Chamber that it arrived at its decision based on mutually corroborative account of the seven women is inconsistent with the testimony of these seven women".[2381] In this regard, the Appeals Chamber recalls that the Trial Chamber stated as follows:

[2374] Conviction Decision, paras 207, 3058.
[2375] Conviction Decision, paras 206, 3058.
[2376] Conviction Decision, para. 3059.
[2377] Appeal Brief, para. 946.
[2378] *See* paragraph 1082 below.
[2379] *See* paragraph 1076 above.
[2380] *See* paragraph 1077 above.
[2381] Appeal Brief, para. 958.

> All pregnancies support the existence of a pattern of sexual violence, and three of them (two of P-0101 and one of P-0214) underlie the forced pregnancy charges in this case. In it analysis, as explained above, the Chamber will discuss evidence of facts which are not included in the charges as such. However, the Chamber emphasizes that it considers all the evidence discussed of great relevance for the findings of fact underlying the charges, due to the compelling picture created by *the consistent and mutually corroborating accounts of the seven women*.[2382]

1080. The Appeals Chamber observes that the Defence makes reference to the testimony of six witnesses (*i.e.* P-0101, P-0214, P-0226, P-0227, P-0235 and P-0236), who were Mr Ongwen's so-called "wives".[2383] The Defence appears to argue that: (i) P-0101 and P-0214 were not forced to have, or voluntarily had, sexual intercourse with Mr Ongwen;[2384] and (ii) certain parts of P-0214's testimony contradict the Trial Chamber's finding that Mr Ongwen confined his so-called "wives".[2385]

1081. As noted above, the Trial Chamber found that Mr Ongwen had sex by force with his so-called "wives" whenever he wanted and as a result P-0101 and P-0214 became pregnant and gave birth to children fathered by Mr Ongwen during the charged period.[2386] The Trial Chamber reached this finding based on the testimony of the seven women regarding their first and subsequent forcible sexual encounter with Mr Ongwen[2387] and on the fact that six of them became pregnant and gave birth to children fathered by Mr Ongwen.[2388] In relation to the evidence regarding the victims' subsequent sexual encounters with Mr Ongwen, the Trial Chamber referred to the testimony of P-0101, P-0214, P-0226, P-0227, P-0235 and P-0236 who stated that they had no choice about having sex with Mr Ongwen.[2389]

1082. Moreover, the Trial Chamber's finding in relation to the confinement of the so-called "wives" was based, *inter alia*, on the following evidence: P-0099 who stated that she was not able to escape and go back home because if she tried to escape she would

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[2382] Conviction Decision, para. 2041 (emphasis added).
[2383] Appeal Brief, paras 948-957.
[2384] Appeal Brief, paras 948, 950.
[2385] Appeal Brief, paras 951-952.
[2386] Conviction Decision, paras 207, 3058.
[2387] Conviction Decision, paras 2042-2063, 2064-2068.
[2388] Conviction Decision, paras 2069-2070.
[2389] Conviction Decision, para. 2064, *referring to* P-0101: T-13, p. 19, line 9 to p. 21, line 10; P-0214: T-15, p. 25, lines 15-21, p. 27, line 19 to p. 28, line 3; P-0226: T-8, p. 44, line 11 to p. 46, line 10; P-0227: T-10, p. 42, lines 5-11; P-0235: T-17, p. 36, lines 4-14; P-0236: T-16, p. 24, lines 17-22.

have been killed by soldiers;[2390] P-0227 who stated that Mr Ongwen's settlement was "heavily guarded" and she could not have escaped;[2391] P-0101 who stated that she did not escape from Mr Ongwen's household as she had seen that those who tried to escape were killed;[2392] and P-0214 who stated that it was impossible to escape because if she tried to escape, she would have been taken back and killed.[2393]

1083. While P-0101 and P-0214 did not expressly testify that they were confined by Mr Ongwen during their pregnancy, the Appeals Chamber finds that contrary to the Defence's contention,[2394] it can be inferred from the entirety of their testimony that Mr Ongwen confined them throughout the period they remained his so-called "wives", including during their pregnancy.

1084. The Appeals Chamber is not persuaded by the Defence's interpretation of this testimony as its description of the evidence of P-0101 and P-0214 is inaccurate. The Defence argues that "[P-0214] testified that she voluntarily had sexual relations with [Mr Ongwen] while in Uganda because she was already in his household, and he assured her that he would take care of her".[2395] In the relevant part of her testimony referred to by the Defence, when being examined by the Prosecution about having sex with Mr Ongwen, P-0214 testified as follows:

> Q. Thank you, Madam Witness. […] So my understanding, Madam Witness, is that even though you were moving between Kitgum, Pader, Gulu and sometimes Sudan, you still continued to have sex with [Mr] Ongwen; you performed your matrimonial -- your sexual duties?
>
> A. Yes, I was supposed to have -- I was supposed to have marital relationships with him because I was already in his household and he told me that he was going to take care of me.[2396]

1085. The Appeals Chamber does not find from this testimony that P-0214 voluntarily had sex with Mr Ongwen. Rather, the Appeals Chamber understands her testimony to imply that part of her duties was to have sex with Mr Ongwen against her will. Indeed,

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[2390] Conviction Decision, para. 2029, *referring to* P-0099: T-14, p. 23, lines 5 to p. 24, line 9, p. 44, line 24 to p.45, line 24.
[2391] Conviction Decision, para. 2029, *referring to* P-0227: T-10, p. 27, line 24 to p. 28, line 5.
[2392] Conviction Decision, para. 2029, *referring to* P-0101: T-13, p. 44, lines 8-17.
[2393] Conviction Decision, para. 2029, *referring to* P-0214: T-15, p. 28, lines 12-18.
[2394] *See* Appeal Brief, para. 946.
[2395] Appeal Brief, para. 950.
[2396] P-0214: T-15, p. 27, line 22 to p. 28 line 3.

in a different part of her testimony, P-0214 expressly stated that it was not her choice to have sex with Mr Ongwen.[2397] The Appeals Chamber therefore rejects the Defence's argument.

1086. Regarding the testimony of P-0101 in the context of the article 56 proceedings, the Appeals Chamber notes that in response to the Single Judge's question whether she has ever slept voluntarily with Mr Ongwen or whether she was always forced to do so, she testified: "No, after – during the eight years, he did not force me. I was with him as husband and wife".[2398] However, the Appeals Chamber notes that when the Prosecution thereafter, in the same proceedings, read her previous written statement and, on that basis, asked her whether that statement was true, she answered: "Yes, that's the truth. Yeah, it's – there are certain things that I've forgotten".[2399] In that statement, P-0101 testified as follows:

> After this, the other times he had sex with me I did not think I had a choice. If I refused he would beat me; and he beat me a number of times for refusing to let him have sex with me. When I became pregnant with my three children to Ongwen, I did not think I had a choice as to whether I would become pregnant or not.[2400]

1087. Moreover, the Appeals Chamber notes that P-0101 confirmed the following statement she had given to the Prosecution:

> During the last interview the reason that at first I did not want to answer questions about Ongwen is because I fear him and thought he might kill me if he came to learn what I was saying. He had done bad things to me. For instance, he made me give birth to children when I was not supposed to. But then I thought if there was a way of keeping it confidential that I spoke to the ICC that it would be all right to answer the questions.[2401]

1088. The Appeals Chamber observes that it is often extremely difficult for witnesses who were subject to sexual and gender-based crimes to testify about their

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[2397] P-0214: T-15, p. 25, lines 15-21 ("Q. And how often did he have sex with you after this first time? A. It took a while and then we started again. Q. Madam Witness, did you have a choice about having sex with him? Madam Witness, did you hear my question? A. Yes, I heard your question. Q. Madam Witness, could you respond to my question? A. No, it wasn't my choice.").
[2398] P-0101: T-13, p. 19, line 24 to p. 20, line 3.
[2399] P-0101: T-13, p. 20, line 9 to p. 21, line 10.
[2400] P-0101: T-13, p. 21, lines 4-8.
[2401] P-0101: T-13, p. 46, lines 1-6.

experience,[2402] and that some may develop a sense of guilt about surviving a rape or may not even identify themselves as victims of such crimes.[2403] For these reasons, the Appeals Chamber considers that, as suggested by Prof Meyersfeld and SALCT, sexual and gender-based crimes "demand a more nuanced use of regular principles of evidence than those that pertain to other offences".[2404]

1089. In light of above, and the entirety of her testimony, the Appeals Chamber considers that the Trial Chamber reasonably found that P-0101 was forced to have sex with Mr Ongwen.

[2402] *See also* in this sense, Observations of Prof Meyersfeld and SALCT, paras 29-33; *Bemba* Conviction Decision, para. 230 (Trial Chamber III noted that in assessing oral evidence, "it [took] into account the fact that […] witnesses who suffered trauma may have had particular difficulty in providing a coherent, complete, and logical account" and that "[t]here are other potential reasons why a witness's evidence may have been flawed."); *Lubanga* Conviction Decision, para. 103 (Trial Chamber I noted with respect to the assessment of oral evidence that "[m]emories fade, and witnesses who were children at the time of the events, or who suffered trauma, may have had particular difficulty in providing a coherent, complete and logical account."); *Katanga* Conviction Decision, para. 83 (Trial Chamber II noted that "[t]he passage of time explains why memories may sometimes have faded and witnesses – some of whom were still children at the time, or were traumatised – might have had difficulty in providing a coherent, complete and logical account.").

[2403] *See also* in this sense, A.W. Burgess, 'Rape Trauma Syndrome' in *Behavioral Sciences & the Law* 1(3) (1983), pp. 100-105 (Burgess states that "[t]he rape trauma syndrome […] is divided into two phase which can disrupt the physical psychological, social or sexual aspects of a victim's life. The acute or disruptive phase can last from days to weeks and is characterized by general stress response symptoms. During the second phase – the long-term process of reorganization – the victim has the recovery task of restoring order to his or her lifestyle and re-establishing a sense of control in the world. This phase is characterized by rape-related symptoms and can last from months to years". According to Burgess, rape-related post-traumatic stress disorder contains a number of symptoms including a sense of "[g]uilt about surviving or behaviour employed during the rape" and "[i]mpairment of memory and/or power of concentration.").

[2404] Observations of Prof Meyersfeld and SALCT, para. 29 (Prof Meyersfeld and SALCT submit that "[t]here are three general principles relating to the admissibility, probative value, weight and reliability of evidence of [sexual and gender-based] crimes and to the determination of whether an element has been proved beyond reasonable doubt", which are: (i) "neurological response", meaning that "[v]ictims of gender-based violence may have scattered and delayed recollection of specific details"; (ii) as a result of the neurological response, victims "may often give testimony that lacks some details and/or that may be inconsistent"; and (iii) the necessity for the Court "to take into account the fact that it is often very difficult for witnesses of [sexual and gender-based] crimes to talk about the deeply personal information that characterises these crimes".). *See also* I. Bankates, *International Criminal Law* (Hart, 2010), p. 163 (Bankates notes that "[t]he inherently personal and sensitive object which rape violates should not allow for the use of regular principles of evidence pertaining to other offences. This notion was reflected in the Tribunals' Statutes, which provide guarantees for the protection of victims and witnesses, further implemented by the Rules of Procedure, which do not require corroboration in cases of sexual assault. This influence is evident in the ICC context, where rule 70 of its Rules of Procedure and Evidence provides that consent cannot be inferred by words or conduct under situations that undermined the victim's ability to give voluntary and genuine consent, nor by silence or lack of resistance. As a result, international tribunals seem to concur that in egregious and sustained situations of armed conflict and where rapes take part on a large scale, the non-consent of the victim and the *actus reus* of the offence may validly be adduced through circumstantial evidence.").

1090. In addition, the Appeals Chamber does not find that P-0214's testimony contradicts the Trial Chamber's finding that Mr Ongwen confined his so-called "wives".[2405] The Appeals Chamber notes that P-0214 testified about some instances in which Mr Ongwen allowed his so-called "wives" to temporarily leave his household.[2406] However, given the testimony of the so-called "wives" describing the coercive environment they faced in the LRA, the Appeals Chamber finds that the extract of P-0214's testimony, to which the Defence refers, does not call into question the Trial Chamber's finding that Mr Ongwen confined his so-called "wives", including P-0101 and P-0214 during their pregnancy.

1091. In light of the foregoing, the Appeals Chamber finds that the testimony of the seven witnesses are consistent and it was reasonable for the Trial Chamber to find that Mr Ongwen "confined P-0101 and P-0214, who had been forcibly made pregnant".[2407]

1092. Finally, the Defence submits that the findings in paragraphs 2069 and 2070 of the Conviction Decision[2408] are significantly undermined by the Trial Chamber's: (i) reliance on uncharged facts and its failure to comply with the temporal and geographic scope of the charges pursuant to article 74(2) of the Statute; and (ii) disregard for the evidence which raised reasonable doubt or was favourable to Mr Ongwen.[2409]

1093. With regard to the first argument, the Appeals Chamber recalls its findings under ground of appeal 6, as set out above,[2410] and notes that with respect to sexual and

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[2405] Conviction Decision, paras 951-952.
[2406] P-0214: T-15, p. 30, lines 15-25 ("Q. Right. Madam Witness, I would rephrase the question because it looks like part of your answer was lost in translation. Can you tell us, Madam Witness, did you ever go to the Nile? And what was your experience? A. It was while on our -- on our way to Congo we crossed the Nile. The boat capsized. We hung on to the boat and we were dragged hanging on to the boat. Nobody died. Q. Can you tell the Court which members of the household -- of Ongwen's household went with you on this crossing? A. The mothers had all been sent back home. We crossed the river with the girls, five of us."). *See also* P-0214: T-15, p. 31, lines 11-22 ("Q. Very well, Madam Witness. Madam Witness, have you ever been to [REDACTED] A. Yes, I have. Q. Under what circumstances? A. I went to hospital for treatment. Q. What was wrong with you? A. I had headaches that began in 2005. When the headaches became more intense, that was the time that they sent me for treatment. Q. Who sent you for the treatment? A. Otti Vincent. Q. How did you go for the treatment? A. It was during the peace talks. That's when the people who came for the peace talks came and took me and I went with them.").
[2407] Conviction Decision, para. 3059.
[2408] *See* paragraph. 1072 above.
[2409] Appeal Brief, para. 959.
[2410] *See* section VI.B.5(c)(ii) (Alleged erroneous reliance on evidence of facts falling outside the scope of the charges) above.

gender-based crimes directly committed by Mr Ongwen, the Trial Chamber discussed the first and subsequent forcible sexual encounters that seven women (*i.e.* P-0099, P-0101, P-0214, P-0226, P-0227, P-0235 and P-0236) had with Mr Ongwen. On that basis, the Trial Chamber found that Mr Ongwen had sex by force with P-0101, P-0214, P-0226 and P-0227 and that two of them (*i.e.* P-0101 and P-0214) became pregnant and gave birth to children fathered by Mr Ongwen.[2411] In this regard, the Trial Chamber relied on the factual finding that Mr Ongwen fathered numerous children with six women (*i.e.* P-0099, P-0101, P-0214, P-0227, P-0235 and P-0236) because even though the majority of the children fathered by Mr Ongwen were born outside the period relevant to the charges, according to the Trial Chamber, they "further support the existence of a pattern of sexual violence with which [Mr] Ongwen is charged".[2412] The Appeals Chamber does not find an error in the Trial Chamber's finding that the fact that Mr Ongwen fathered numerous children with several so-called "wives", even though some of births occurred outside the charged period, supports the existence of a pattern of sexual violence with which he was charged.[2413]

1094. The Appeals Chamber further notes that while the Trial Chamber relied on evidence outside the temporal scope of the charges, it properly limited its factual finding to the facts and circumstances described in the charges and thus, complied with article 74(2) of the Statute. Importantly, Mr Ongwen was convicted of the crime of forced pregnancy of P-0101 and P-0214, who gave birth to children fathered by him during the charged period.[2414] The Defence's arguments are thus rejected.

1095. Regarding the second argument, the Appeals Chamber notes that the Defence does not indicate which evidence the Trial Chamber disregarded in its assessment of forced pregnancy. The Appeals Chamber thus dismisses the Defence's unsubstantiated argument. In any event, the Appeals Chamber finds, for the reasons given above in paragraphs 1079-1091, that the Trial Chamber properly assessed the evidence before it and that the conclusion it reached was reasonable.[2415]

[2411] Conviction Decision, paras 2041-2070.
[2412] Conviction Decision, para. 2070.
[2413] Conviction Decision, para. 2070. *See also* Confirmation Decision, pp. 90-99.
[2414] Conviction Decision, para. 3062.
[2415] *See* paragraphs 1079-1091 above.

1096. Accordingly, the Appeals Chamber rejects the Defence's arguments that the Trial Chamber disregarded and mischaracterised the evidence in relation to the charges of forced pregnancy.

(b) Alleged errors regarding the elements of forced pregnancy and the contextual elements of crimes against humanity and war crimes

1097. The Defence argues that the Trial Chamber failed to provide reasoning and findings on the constituent elements of forced pregnancy as well as the contextual elements of crimes against humanity and war crimes.[2416] The Defence's arguments concern, *inter alia*: (i) the confinement of P-0101 and P-0214 prior to and during their pregnancy;[2417] (ii) the lack of genuine consent of the victims;[2418] (iii) the *mens rea* element, including "the intent of […] carrying out other grave violations of international law" as required under article 7(2)(f) of the Statute;[2419] and (iv) the contextual elements of crimes against humanity and war crimes.[2420]

1098. The Appeals Chamber recalls that it has already addressed and rejected the first two arguments raised by the Defence.[2421] Thus, it will not consider these arguments any further.

1099. In relation to the *mens rea* element, the Defence argues that "[i]t is discussed in the abstract and no specific finding is made […] with regard to each victim and within the context of crimes against humanity or war crimes".[2422] It also argues that the Trial Chamber "failed to specify the grave violation and provide a discussion about whether the discrete elements of the grave violations were proved beyond a reasonable doubt".[2423]

1100. The Appeals Chamber notes that in addition to the mental elements stipulated in article 30 of the Statute, article 7(2)(f) of the Statute requires that a perpetrator unlawfully confine a woman forcibly made pregnant "with the intent of affecting the

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[2416] Appeal Brief, paras 965-974.
[2417] Appeal Brief, paras 965, 968.
[2418] Appeal Brief, para. 970.
[2419] Appeal Brief, paras 967, 971-972.
[2420] Appeal Brief, paras 969-970, 972.
[2421] *See* paragraphs 1079-1091 above.
[2422] Appeal Brief, para. 972.
[2423] Appeal Brief, para. 971.

ethnic composition of any population *or* carrying out other grave violations of international law". As is clear from the language of the Statute (*i.e.* using the term "or"), the act of forced pregnancy must be committed with either of these two special intents.

1101. The Appeals Chamber finds no merit in the Defence's broad argument regarding the absence of specific finding on the *mens rea* elements. Contrary to the Defence's contention, the Trial Chamber made specific findings. It found from the "nature of the acts" and their "sustained character […] over a long period of time" that Mr Ongwen "meant to engage in the relevant conduct".[2424] It also found that Mr Ongwen acted "with the intent of sustaining the continued commission of other crimes found, in particular of forced marriage, torture, rape and sexual slavery".[2425] The Appeals Chamber notes that all of the foregoing acts constitute grave violations of international law.[2426] Consequently, the Trial Chamber did not err in finding that the special intent requirement of forced pregnancy was met in the present case.[2427] Therefore, the Appeals Chamber rejects the Defence's argument.

1102. Finally, the Appeals Chamber notes that the Trial Chamber's findings on the contextual elements of crimes against humanity and war crimes span over 20 paragraphs in the Conviction Decision and refer to a number of factual findings reached upon a detailed analysis of the evidence.[2428] In these circumstances, the Appeals Chamber finds no merit in the Defence's argument that the Trial Chamber made no discrete findings on the contextual elements of crimes against humanity and war crimes.

1103. Accordingly, the Appeals Chamber rejects the Defence's arguments.

[2424] Conviction Decision, para. 3060.
[2425] Conviction Decision, para. 3061.
[2426] *See* article 5 of the Statute: "The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole".
[2427] *See e.g.* K. Boon, 'Rape and Forced Pregnancy under the ICC Statute: Human Dignity, Autonomy, and Consent' in *Columbia Human Rights law Review 32(3)* (2001), p. 665 (Boon states that "[t]he alternate intent upon which forced pregnancy can be prosecuted is the intent to commit other grave violations of international law. This component broadens the crime considerably because it does not place restrictions on the ethnicity of the perpetrators or victims. It applies regardless of race, culture, or religion, and captures the frequent situations in which members of the military abuse their own civilians. Because this section does not limit the inquiry to grave breaches or other specified serious violations of international law, the judges will have discretion in determining how 'grave violations' should be interpreted. In general, the judges should draw analogies between the other crimes within the jurisdiction of the ICC.").
[2428] Conviction Decision, paras 2798-2806 (crimes against humanity), 2807-2817 (war crimes).

(c) Overall conclusion

1104. Having considered all the arguments raised under ground of appeal 88 concerning alleged errors in the Trial Chamber's findings concerning forced pregnancy, the Appeals Chamber rejects this ground of appeal.

F. Alleged errors regarding grounds for excluding criminal responsibility

1. Grounds of appeal 19, 27, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43: Alleged errors regarding findings on Mr Ongwen's mental disease or defect

(a) Background

1105. On 9 August 2016, the Defence gave notice of its intention to raise grounds excluding Mr Ongwen's criminal responsibility by reason of mental disease or defect (article 31(1)(a) of the Statute).[2429]

1106. The Defence alleged that, at the time material to the charges, Mr Ongwen suffered from PTSD 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'".[2430]

1107. As noted elsewhere in this judgment, in the course of the proceedings the Trial Chamber considered the evidence of five mental health experts,[2431] namely, Dr Catherine Abbo (hereinafter: "P-0445"),[2432] Professor Gillian Mezey (hereinafter: "P-0446")[2433] and P-0447 (Professor Roland Weierstall-Pust)[2434] who were called by the Prosecutor (hereinafter collectively: "Prosecutor's Experts") and the Defence

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[2429] *See* Defence Notification Pursuant to Rule 79(2) of the Rules.
[2430] Conviction Decision, para. 2450, *referring to* Defence Closing Brief, para. 536.
[2431] *See* paragraph 347 above.
[2432] Conviction Decision, para. 2479. P-0445 is a Senior Lecturer and Child and Adolescent Psychiatrist at Makerere University, Uganda. *See* UGA-OTP-0280-0732; P-0445: T-166, T-167, T-168.
[2433] Conviction Decision, para. 2470. P-0446 is a Professor of Forensic Psychiatry at St Georges University of London, United Kingdom and an Honorary Consultant in Forensic Psychiatry at Springfield Hospital, United Kingdom. *See* UGA-OTP-0280-0786; P-0446: T-162, T-163.
[2434] Conviction Decision, para. 2486. P-0447 is a Professor of Clinical Psychology and Psychotherapy at the University of Applied Science and Medical University, Hamburg, Germany. *See* UGA-OTP-0287-0072; P-0447: T-169, T-170.

Experts, D-0041 (Dr Dickens Akena) and D-0042 (Professor Emilio Ovuga).[2435] The Trial Chamber also considered the evidence presented generally during the trial that allowed it to draw conclusions on Mr Ongwen's mental state at the time of his conduct relevant to the charges. [2436]

1108. Furthermore, the Trial Chamber had before it a report from Professor de Jong who was appointed by the Court to conduct a psychiatric examination of Mr Ongwen's mental state during the trial.[2437] Professor de Jong did not testify during the trial.

1109. On the basis of the evidence of the Prosecutor's Experts, and the corroborating evidence heard at trial, the Trial Chamber concluded as follows:

> In line with the above, based on the expert evidence of Professor Mezey, Dr Abbo and Professor Weierstall-Pust, who did not identify any mental disease or disorder in [Mr] Ongwen during the period of the charges, further based on the corroborating evidence heard during the trial, which is incompatible with any such mental disease or disorder, and noting that the evidence of [the Defence Experts] cannot be relied upon, the Chamber finds that [Mr] Ongwen did not suffer from a mental disease or defect at the time of the conduct relevant under the charges. A ground excluding criminal responsibility under Article 31(1)(a) of the Statute is not applicable.[2438]

1110. The Defence raises four main arguments against this finding of the Trial Chamber. First, it submits that the Trial Chamber erred in its assessment of the reliability of the evidence of the mental health experts called by the Defence (grounds of appeal 27, 29, 31-32, and 37-41). Second, the Defence argues that the Trial Chamber erred in failing to rely on the evidence of the court appointed expert, Professor de Jong for its article 31(1)(a) assessment (grounds of appeal 19 and 42). Third, the Defence contends that the Trial Chamber erred by disregarding cultural factors when assessing Mr Ongwen's mental health (grounds of appeal 30, 34, 36, and 43). Fourth, the Defence argues that the Trial Chamber erred in its assessment of the evidence of the Prosecutor's mental health expert, P-0445 (ground of appeal 33).

[2435] Conviction Decision, para. 2522. D-0041 is a Lecturer at Makerere University, Uganda while D-0042 is a Professor at Gulu University, Uganda. *See* UGA-D26-0015-0004, UGA-D0015-0948; D-0041: T-248, T-249; D-0042: T-250, T-251. *See also* paragraph 218 above.
[2436] Conviction Decision, paras 2456, 2497-2521.
[2437] Conviction Decision, para. 2576.
[2438] Conviction Decision, para. 2580.

1111. Before addressing the merits of these grounds of appeal, the Appeals Chamber notes that with respect to several arguments, the Defence seeks to incorporate by reference, arguments made in its Closing Brief in order to supplement arguments in its Appeal Brief.[2439] The Appeals Chamber will address only those arguments that are properly developed in the Appeal Brief.[2440]

(b) Grounds of appeal 27, 29, 31-32, and 37-41: Alleged errors in the Trial Chamber's assessment of the Defence Experts' evidence

1112. Under these grounds of appeal, the Defence argues that the Trial Chamber failed to provide a reasoned opinion for rejecting the Defence Experts' evidence,[2441] and did not correctly apply the standard of proof to the allegation of mental illness or defect.[2442] With regard to the latter, the Appeals Chamber notes that the Defence repeats its argument concerning the Prosecutor's burden of proof in relation to article 31(1)(a) of the Statute, arguing that the Prosecutor failed to disprove each element of the ground excluding criminal responsibility by reason of mental disease or defect.[2443] The Appeals Chamber recalls that it has addressed and rejected this argument under grounds of appeal 7, 8, 10 (in part), 25 and 45.[2444]

1113. In addition, the Defence alleges errors with respect to each of the issues the Trial Chamber relied upon for rejecting the evidence of D-0041 and D-0042 as unreliable. The Defence submits that the Trial Chamber: (i) erred in concluding that the Defence Experts blurred the line between treating physicians and forensic experts;[2445] (ii) erred in concluding that the Defence Experts did not apply scientifically validated methods and tools in reaching their conclusions;[2446] (iii) erred in law and fact by accepting the Prosecutor's submission and P-0447's critique that D-0041 and D-0042's report was incoherent and inconsistent in its diagnoses;[2447] (iv) erred in law and fact by finding

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[2439] *See* Appeal Brief, fn. 353, paras 325 (fn. 362), 326 (fn. 364), 328 (fn. 366), 344 (fn. 385) 387 (fn. 452).
[2440] *See* paragraph above 97. *See also* section V.D. (Substantiation of arguments) above.
[2441] Appeal Brief, para. 327. *See also* Notice of Appeal, p. 12,
[2442] Appeal Brief, paras 321, 327, 419.
[2443] Appeal Brief, paras 321, 419.
[2444] *See* paragraphs 336-338 above.
[2445] Appeal Brief, paras 329-341.
[2446] Appeal Brief, paras 342-353.
[2447] Appeal Brief, paras 354-372.

that the Defence Experts failed to consider other available sources;[2448] (v) erred in concluding that the Defence Experts' approach to the question of malingering weighed against their reliability;[2449] (vi) erred in concluding that the Defence Experts' analysis was not anchored in the specific time and context in which Mr Ongwen acted.[2450] The Appeals Chamber will consider the above alleged errors in turn.

(i) The Trial Chamber's alleged failure to provide a reasoned opinion

(a) Summary of the submissions

1114. The Defence contends that in rejecting the Defence Experts' findings, the Trial Chamber failed to provide a reasoned opinion for its conclusions on their methodology.[2451] In support of this argument, the Defence cites the ICTY *Perišić* Case where the ICTY Appeals Chamber held that "an analysis limited to a select segment of the relevant evidentiary record is not necessarily sufficient to constitute a reasoned opinion".[2452]

1115. The Prosecutor submits that the Trial Chamber did not fail to provide a reasoned opinion for its rejection of the Defence Experts' evidence.[2453] He takes issue with the Defence's reliance on the *Perišić* Appeal Judgment in support of its argument and submits that the trial chamber's error in that case was a "failure to address the contrary testimony of witnesses it accepted as reliable", consequently, in his view, "there is no material comparison" to the case at hand.[2454] Furthermore, the Prosecutor submits that the Defence fails to "particularise or substantiate his claim of lack of reasoned opinion" and fails to "identify any pertinent evidence or argument which [it] considers should have been explicitly taken into account but was not".[2455]

1116. Victims Group 1 observe that contrary to the Defence's argument, the Trial Chamber did provide a reasoned statement for its conclusion.[2456] They point out that in

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[2448] Appeal Brief, paras 373-392.
[2449] Appeal Brief, paras 393-409.
[2450] Appeal Brief, paras 410-419.
[2451] Appeal Brief, para. 327.
[2452] Appeal Brief, para. 327, *referring to* *Perišić* Appeal Judgment, para. 95.
[2453] Prosecutor's Response, paras 190.
[2454] Prosecutor's Response, para. 191.
[2455] Prosecutor's Response, paras 192-193.
[2456] Victims Group 1's Observations, para. 120.

reaching its conclusion, the Trial Chamber first "set out the law and test to be met in an Article 31(1)(a) scenario" and then discussed all the expert evidence and corroborative evidence from the trial.[2457] In their view, the Trial Chamber did not err in this respect.[2458]

(b) Relevant parts of the Conviction Decision

1117. In addressing the Defence's grounds for excluding criminal responsibility the Trial Chamber explained that "a finding of a mental disease or defect is indispensable to conclude that there is a ground excluding criminal responsibility under Article 31(1)(a) of the Statute".[2459]

1118. After entering some preliminary findings on two issues which had a general bearing on the evidence related to mental disease or defect as a ground for excluding criminal responsibility,[2460] the Trial Chamber discussed the evidence and conclusions of the Prosecutor's Experts,[2461] examined the evidence in the case which related to the events during the period of the charges to determine whether Mr Ongwen exhibited any symptoms of a mental health disorder,[2462] discussed the evidence and conclusions of the Defence Experts[2463] and considered other evidence discussed by the parties.[2464]

1119. In relation to the Defence Experts' evidence, the Trial Chamber identified six issues relating to the methodology used by D-0041 and D-0042 in carrying out their assessments.[2465] The Trial Chamber found that these issues significantly affected the reliability of the Defence Experts' evidence and concluded as follows:

> Based on the above factors affecting the reliability of the evidence of [the Defence Experts], the Chamber concludes that it cannot rely on that evidence, and in particular not on the diagnoses of mental disorders in [Mr] Ongwen which are advanced therein.[2466]

[2457] Victims Group 1's Observations, para. 120.
[2458] Victims Group 1's Observations, para. 121.
[2459] Conviction Decision, para. 2453.
[2460] Conviction Decision, paras 2458-2469.
[2461] Conviction Decision, paras 2470-2496.
[2462] Conviction Decision, paras 2497-2521.
[2463] Conviction Decision, paras 2522-2574.
[2464] Conviction Decision, paras 2575-2579.
[2465] Conviction Decision, paras 2527-2573.
[2466] Conviction Decision, para. 2574.

(c) Determination by the Appeals Chamber

1120. For the reasons that follow, the Appeals Chamber is not persuaded by the Defence's argument that the Trial Chamber failed "to provide a reasoned opinion for its conclusions on [the Defence Experts'] methodology", since in its view, the Conviction Decision "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".[2467]

1121. First, the Appeals Chamber finds the Defence's reliance on the *Perišić* Case to be misplaced.[2468] In that case, the ICTY Appeals Chamber found that when analysing the evidence on Mr Perišić's superior responsibility and concluding that he exercised effective control, the trial chamber had failed to address the evidence of two witnesses (whom it appeared to have found credible with respect to other aspects of its judgment).[2469] The ICTY Appeals Chamber observed that the testimony of these witnesses suggested that Mr Perišić "did not have the authority to issue command orders or discipline members of the [Yugoslav Army] seconded to the [Serbian Army of the Krajina] and thus he did not exercise effective control over the [perpetrators] at the time the crimes were committed [in Zagreb]".[2470] In those circumstances, the ICTY Appeals Chamber found, *inter alia*, that "an analysis limited to a select segment of the relevant evidentiary record is not necessarily sufficient to constitute a reasoned opinion" and that the trial chamber's failure to discuss and analyse the witnesses' testimony, which was "clearly relevant" to its analysis of effective control, amounted to a failure to provide a reasoned opinion.[2471]

1122. The Appeals Chamber notes that the *Perišić* Case bears no meaningful resemblance to the present case, where the evidence of the medical experts, including other evidence presented generally at trial in relation to Mr Ongwen's mental state at

[2467] Appeal Brief, para. 327.
[2468] Appeal Brief, para. 327.
[2469] *Perišić* Appeal Judgment, paras 91-96.
[2470] *Perišić* Appeal Judgment, para. 91.
[2471] *Perišić* Appeal Judgment, para. 95.

the time of his conduct relevant to the charges, was considered and addressed by the Trial Chamber.[2472]

1123. Indeed, as noted above, the Trial Chamber identified and discussed six issues concerning the methodology employed by D-0041 and D-0042.[2473] The Trial Chamber explained that these methodological issues affected the reliability of D-0041 and D-0042's findings and conclusions, to such an extent, that it could not rely on them.[2474] In reaching its conclusion, the Trial Chamber discussed and made explicit findings on the evidence of the Defence Experts, as well as the Prosecutor's Experts, the evidence presented in rebuttal and rejoinder, and its own assessment of the evidence and then rejected the evidence of the Defence Experts on a reasoned basis. Contrary to the Defence's argument, there is no indication that the Trial Chamber analysed the evidence of the experts selectively or to the exclusion of other relevant evidence on the record.[2475] Moreover, the Defence fails to identify any relevant evidence that, in its view, the Trial Chamber was required to take into account and did not. As a result, the Appeals Chamber finds that the Trial Chamber did not fail to provide a reasoned opinion for its conclusions on the Defence Experts' methodology. The argument is therefore rejected.

(ii) Alleged error in concluding that the Defence Experts blurred the line between treating physicians and forensic experts

(a) Summary of the submissions

1124. The Defence argues that the Trial 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.[2476]

1125. Regarding the evidence of D-0041, the Defence submits that D-0041 made it very clear that the Defence Experts were not treating physicians as they were not involved in Mr Ongwen's actual treatment.[2477] While part of the responsibility of a psychiatrist is to recommend treatments for a patient based on a professional evaluation, the

[2472] Conviction Decision, paras 2470-2580.
[2473] *See* paragraph 1119 above.
[2474] Conviction Decision, paras 2527-2574.
[2475] Appeal Brief, para. 327.
[2476] Appeal Brief, paras 329-330, 335.
[2477] Appeal Brief, para. 331.

Defence argues that D-0041 "was not the provider of any suggested or recommended treatment for [Mr Ongwen]".[2478]

1126. The Defence further asserts that the Trial Chamber misrepresented the record when it found that the Defence Experts were in a therapeutic alliance with Mr Ongwen and that D-0041 had accepted the Prosecutor's suggestion that he was a treating physician.[2479] In the Defence's view, there was no evidence that the Defence Experts had lost their objectivity.[2480] It argues that by being transparent about how they became involved in the case and "disclosed their personal circumstances during the conflict which they had to overcome to carry out their professional tasks", the Defence Experts' "professional credibility and integrity were magnified".[2481]

1127. The Prosecutor asserts that the Defence's claims do not accurately represent the Trial Chamber's reasoning or the evidence and should be dismissed.[2482] He argues that the distinction that the Defence seeks to draw between a physician who is actually involved in the treatment as opposed to one who merely recommends a treatment based on a professional evaluation is one that is "without a difference".[2483] In this regard, the Prosecutor cites to evidence on the record which purports to show that D-0041 agreed that it was correct to characterise his role as a "treating physician" and as Mr Ongwen's "doctor".[2484] He argues that this evidence "underlines the artificiality of the distinction upon which [the Defence] seeks to rely".[2485]

1128. Furthermore, the Prosecutor argues that the Defence "incorrectly suggests that the Trial Chamber misinterpreted the Defence Experts' acknowledgment of the 'therapeutic alliance' that they had sought to establish with [Mr Ongwen] by means of their initial report".[2486] The Prosecutor argues that, contrary to the Defence's suggestion

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[2478] Appeal Brief, paras 331-332.
[2479] Appeal Brief, para. 336.
[2480] Appeal Brief, para. 340.
[2481] Appeal Brief, paras 340-341.
[2482] Prosecutor's Response, para. 194.
[2483] Prosecutor's Response, para. 200.
[2484] Prosecutor's Response, para. 200.
[2485] Prosecutor's Response, para. 201.
[2486] Prosecutor's Response, para. 202.

that "this alliance was merely a means to an end", D-0041 himself explained that "his primary concern after his initial encounter with Ongwen was therapeutic […]".[2487]

1129. Lastly, the Prosecutor submits, with regard to the Defence Experts' transparency about their personal circumstances and how they got involved in the case, that the "[Trial] 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".[2488]

1130. Victims Group 2 observe that D-0041 "admitted in his own words that he entered into a therapeutic alliance with Mr Ongwen and that, as a treating physician, it was his duty towards his patient to attempt to secure for him the most beneficial treatment".[2489] In their view, the Trial Chamber's finding concerning the loss of objectivity of the Defence Experts was factually correct and beyond reproach.[2490]

(b) Relevant parts of Conviction Decision

1131. The Trial Chamber observed that, based on their reports, the Defence Experts concerned themselves with a forensic examination as well as identifying recommendations for the treatment of the current mental conditions of Mr Ongwen.[2491] Furthermore, it noted that D-0041 stated that he and D-0042 established a "therapeutic alliance with the client" and accepted the suggestion, by counsel for the prosecution, that "as a treating physician, it is his duty to the person he is treating to attempt to secure for them the treatment which will be of greatest benefit to their health".[2492]

1132. The Trial Chamber concluded that

> In the assessment of the Chamber, there is an inherent incompatibility between the duties of a treating physician and the duties of a forensic expert. The 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. It is not in the role of a forensic expert to sustain a relationship of trust and confidence with the person to be examined for the court, and the expert must in fact take care to remain as objective and detached as possible. The blurring of these roles in the

[2487] Prosecutor's Response, para. 202.
[2488] Prosecutor's Response, para. 203.
[2489] Victims Group 2's Observations, para. 92.
[2490] Victims Group 2's Observations, para. 92.
[2491] Conviction Decision, para. 2529.
[2492] Conviction Decision, para. 2529.

evidence of [D-0042 and D-0041] is a factor which as such negatively affects the reliability of the reports they prepared as evidence in this case.[2493]

(c) Determination by the Appeals Chamber

1133. The Appeals Chamber notes that the Defence raises three main arguments that seek to challenge the reasonableness of the Trial Chamber's finding that the Defence Experts "concerned themselves not only with a forensic examination to assist the Chamber in its determination under Article 31(1)(a) of the Statute, but also with identifying recommendations for the treatment of the current mental conditions of [Mr Ongwen]" which, in the Trial Chamber's view, led to a loss of their objectivity.[2494]

1134. The Appeals Chamber will address the Defence's three main arguments in turn.

(i) Alleged lack of evidence and reasoning

1135. The Defence alleges that there was no "blurring" of the roles and that the Trial Chamber's finding is unsupported by the evidence, lacks reasoning in relation to its point on "blurring" and was "a key factor" in the Trial Chamber's rejection of the ground excluding criminal responsibility under article 31(1)(a) of the Statute and hence materially affected the Conviction Decision.[2495]

1136. For the reasons that follow, the Appeals Chamber is unpersuaded by these arguments. The Trial Chamber held that the Prosecutor correctly submitted that the Defence Experts' blurring of the roles of treating physicians and forensic experts led to a loss of their objectivity. The Trial Chamber based its conclusion on (i) the "face of their reports",[2496] which included "recommendations for the treatment"[2497] and "rehabilitation",[2498] as well as the Brief Medical Report of February 2016,[2499] which clearly stipulated that the report was "suitable for medical and not legal purposes";[2500]

[2493] Conviction Decision, para. 2531.
[2494] Conviction Decision, para. 2529.
[2495] Appeal Brief, paras 329-335.
[2496] Conviction Decision, para. 2529.
[2497] Conviction Decision, para. 2524, *referring to* Defence Experts' First Report, UGA-D26-0015-0004, at 0018.
[2498] Conviction Decision, para. 2525, *referring to* Defence Experts' Second Report, UGA-D26-0015-0948, at 0980.
[2499] Brief Medical Report of February 2016, UGA-D26-0015-0154.
[2500] Conviction Decision, para. 2526 ("It is noted that the report is accompanied by an '[i]mportant notice', stating that it is 'written in medical language, and is only suitable for medical and not legal purposes'. It is also stated in the introduction that the aim was to 'report the history of the presenting

(ii) D0041's statement that the Defence Experts had established a "therapeutic alliance" with Mr Ongwen;[2501] (iii) D-0041's acceptance of the suggestion by the Prosecutor that "as a treating physician, it is his duty to the person he is treating to attempt to secure for them the treatment which will be of greatest benefit to their health";[2502] and (iv) P-0447's expert opinion that "he suspected 'fundamental confusion, as between the role of treating physicians and forensic experts', which in his opinion may have been one reason for what he termed 'the vast amount of shortcomings in the report of [Professor Ovuga and Dr Akena]'".[2503]

1137. Consequently, the Appeals Chamber notes that the Trial Chamber's conclusion was, indeed, based on the evidence in the record. Furthermore, the Appeals Chamber observes that the Trial Chamber separately noted its concern about the Defence Experts' lack of objectivity in relation to their assessment of the possibility that Mr Ongwen may have been malingering.[2504] In this respect, the Trial Chamber criticised a statement of D-0041 as "a serious failure to grasp the problem appropriately" and held that "it confirms the concern of the Chamber, laid out above, that [D-0041 and D-0042], focusing on [Mr Ongwen] getting better, did not have the necessary distance to consider the totality of the evidence, which they should have done as forensic experts".[2505] In light of the above, the Appeals Chamber considers that the Defence fails to show that the Trial Chamber's conclusion was unsupported by the evidence.

1138. In addition, the Defence submits that there is no evidence to support the Trial Chamber's conclusion that D-0041 accepted the Prosecutor's suggestion that the Defence Experts were treating physicians.[2506] However, the Appeals Chamber notes that during D-0041's testimony, when Counsel for the prosecution suggested that he

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complaints in the last one year, for the sole reason of getting the client to access medical help.'"), *referring to* Brief Medical Report of February 2016, UGA-D26-0015-0154, at 0154.
[2501] Conviction Decision, para. 2529, *referring to* D-0041: T-248, p. 87, line 17 to p. 88, line 9.
[2502] Conviction Decision, para. 2529, *referring to* D-0041: T-249, p. 29, line 24 to p. 30, line 2.
[2503] Conviction Decision, para. 2530, *referring to* Rebuttal Report, UGA-OTP-0287-0072, at 0097.
[2504] Conviction Decision, para. 2563, *referring to* D-0041: T-248, p. 56, line 3 to p. 57, line 1.
[2505] Conviction Decision, para. 2563, *referring to* Conviction Decision, paras 2528-2531.
[2506] Appeal Brief, para. 338.

was a treating physician, D-0041 appears to have consistently answered in the affirmative.

> Q: Your role right from the start of your interaction with Mr Ongwen has included making recommendations for his treatment, hasn't it?. A Yes, it has. Q. You spoke yesterday of having formed a therapy alliance with your client? A. Therapeutic alliance. Q. You said both, actually. A. Okay. Q. As a treating physician, it's your duty to the person you're treating to attempt to secure for him the treatment which will be of greatest benefit to his health. Yes?[2507]

> A. That's correct. Q. Would it be fair to say that in your opinion, the mental health of your client would benefit most from a disposal by this Court that would enable him to resume life among his family in a domestic environment in Uganda, where he could be treated and rehabilitated? A. I think he can still get some treatment in his current state in this place. Q. That's not – sorry. A: And then whatever the Court decides, then we'll see whether he continues to get the treatment from home or wherever it is, but [...] Q. That's not the question. The question is, you as his treating physician, you want him – you've told us - to get the best treatment. Is it right that in your opinion, the most beneficial treatment would be that which I have described? A. But Mr Gumpert, I have no control over that. Q. That's not the question. I'm asking your opinion. You're his doctor, you have an opinion on how he […] Q: You're his doctor, you have prescribed or you have recommended treatment on - I count - at least three separate occasions? A. Yes, sir.[2508]

1139. Furthermore, the Defence asserts that D-0041 made it very clear that the Defence Experts were not treating physicians since they were not involved in Mr Ongwen's actual treatment, which was the domain of the Court and the ICC-DC health personnel.[2509] Instead it argues, on the basis of D-0041's testimony, that the Defence Experts merely made recommendations for treatments and medications as part of their "professional evaluation" and responsibility as psychiatrists.[2510]

1140. The Appeals Chamber considers that the distinction that the Defence seeks to draw between a physician who actually administers treatment and one who merely recommends treatment was not determinative for the Trial Chamber's finding.[2511] Rather, as correctly pointed out by the Prosecutor, the distinction that the Trial Chamber emphasised concerned the "inherent incompatibility" between the roles of a doctor who on the one hand, attempts to serve the best interests of a patient, and, on the other hand,

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[2507] D-0041: T-249, p. 29, line 16 to p. 30, line 1.
[2508] D-0041: T-249, p. 30, lines 2-17, 22-24.
[2509] Appeal Brief, paras 331-334.
[2510] Appeal Brief, para. 331.
[2511] Appeal Brief, para. 331.

also attempts to provide an objective forensic assessment for a court.[2512] The Appeals Chamber finds that the accuracy of the Trial Chamber's distinction is underscored by D-0041's own testimony that he and D-0042 conducted the clinical interview with Mr Ongwen not only "for the purposes of […] providing information to the Court but also […] to be able to identify illness and make recommendations that would help to alleviate the suffering of individuals in whatever circumstances they are in".[2513]

1141. Lastly, the Appeals Chamber finds no merit in the Defence's argument that the Trial Chamber's finding was "a key factor" in its rejection of the ground excluding criminal responsibility under article 31(1)(a) of the Statute and hence materially affected the Conviction Decision.[2514] The Trial Chamber's finding that the Defence Experts blurred the roles between treating physicians and forensic experts was but one factor that it found had undermined the reliability of their evidence.[2515] As correctly noted by the Prosecutor, the Trial Chamber "did not quantify the weight assigned to this factor, nor suggest that it was dispositive, but merely specified that it was taken into account".[2516] The argument is therefore rejected.

(ii) Alleged misrepresentation of the facts

1142. The Defence argues that the Trial Chamber misrepresents the record by claiming that the Defence Experts were in a therapeutic alliance with Mr Ongwen.[2517] It avers that D-0041 testified that their first interaction with Mr Ongwen "was used to establish a therapeutic alliance" with him to facilitate the gathering of further information from him at other times.[2518] In the Defence's view, the use of the term "therapeutic alliance" and D-0041's evidence cannot be construed to mean that D-0041 was a treating physician.[2519]

1143. At the outset, the Appeals Chamber notes that rather than misrepresent the record, the Trial Chamber based its finding on D-0041's clear acknowledgement that he and

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[2512] Conviction Decision, para. 2531. *See also* Prosecutor's Response, para. 201.
[2513] D-0041: T-248, p. 38, lines 21-24.
[2514] Appeal Brief, para. 335.
[2515] *See* Conviction Decision, para. 2527.
[2516] Prosecutor's Response, para. 196.
[2517] Appeal Brief, para. 336.
[2518] Appeal Brief, para. 337.
[2519] Appeal Brief, para. 337.

D-0042 had formed a "therapeutic alliance" with Mr Ongwen.[2520] Furthermore, the Appeals Chamber finds no merit in the Defence's argument that the use of the term "therapeutic alliance" by D-0041 and his related evidence was an insufficient basis for the Trial Chamber's inference that D-0041 was a treating physician.[2521] The Appeals Chamber considers that the Defence ignores the fact that the Trial Chamber also relied on: (i) the "face of their reports",[2522] which included "recommendations for treatment"[2523] and "rehabilitation"[2524] as well as the Brief Medical Report of February 2016, which clearly stipulated that the report was "suitable for medical and not legal purposes";[2525] and (ii) P-0447's expert opinion that there may have been confusion on the part of the Defence Experts concerning the role of treating physicians and forensic experts.[2526] When assessed together, the Appeals Chamber considers that these factors provide a sufficient basis for the Trial Chamber's inference that the Defence Experts' blurred the roles between treating physicians and forensic experts which led to a loss of their objectivity.[2527]

1144. In this regard, the Appeals Chamber notes that according to the Ethics Guidelines for the Practice of Forensic Psychiatry recommended by the American Academy of Psychiatry and the Law (hereinafter: "AAPL Guidelines"), "[w]hen psychiatrists function as experts within the legal process, they should adhere to the principle of honesty and should strive for objectivity".[2528] Commentary on this guideline further elucidates that

> Psychiatrists who take on a forensic role for patients they are treating may adversely affect the therapeutic relationship with them. Forensic evaluations usually require interviewing corroborative sources, exposing information to public scrutiny, or subjecting evaluees and the treatment itself to potentially damaging cross-examination. The forensic evaluation and the credibility of the practitioner may also be undermined by conflicts inherent in the differing clinical

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[2520] D-0041: T-248, p. 87, lines 17-23, p. 88, lines 6-9; T-249, p. 29, line 16 to p. 30, line 1.
[2521] Appeal Brief, para. 337.
[2522] Conviction Decision, para. 2529.
[2523] Conviction Decision, para. 2524 ("The report concludes by providing a series of recommendations for treatment"), *referring to* Defence Experts' First Report, UGA-D26-0015-0004, at 0018.
[2524] Conviction Decision, para. 2525, *referring to* Defence Experts' Second Report, UGA-D26-0015-0948, at 0980.
[2525] Conviction Decision, para. 2526, *referring to* Brief Medical Report of February 2016, UGA-D26-0015-0154, at 0154.
[2526] Conviction Decision, para. 2530, *referring to* Rebuttal Report, UGA-OTP-0287-0072, at 0097.
[2527] Conviction Decision, paras 2528, 2531.
[2528] *See* AAPL Guidelines, UGA-OTP-0287-0015, at 0017.

> and forensic roles. *Treating psychiatrists should therefore generally avoid acting as an expert witness for their patients or performing evaluations of their patients for legal purposes*.[2529]

1145. It follows that as forensic experts, the Defence Experts had a duty to remain objective and to avoid involving themselves in any treatment of Mr Ongwen's current mental conditions.

1146. Contrary to the Defence's argument, the Appeals Chamber finds that the Trial Chamber did not misrepresent the record when it relied on D-0041's clear acknowledgement that he and D-0042 had formed a "therapeutic alliance" with Mr Ongwen.[2530] The argument is therefore rejected.

(iii) Alleged lack of evidence for finding that Defence Experts lacked objectivity

1147. Finally, the Defence submits 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 in its view, "magnified" their "professional credibility and integrity".[2531] On this basis, the Defence argues that the Trial Chamber's conclusion is not supported by the evidence.[2532] The Appeals Chamber finds this argument to be unpersuasive. The Trial Chamber did not find the Defence Experts to lack objectivity because of any lack of sincerity or professional integrity on their part. Rather, the Trial Chamber found, *inter alia*, that the blurring of their roles as both treating physicians and forensic experts affected the reliability of their reports.[2533]

1148. In sum, the Appeals Chamber finds that the Defence fails to show that it was unreasonable for the Trial Chamber to conclude, based on the evidence before it, that the Defence Experts "concerned themselves not only with a forensic examination to assist the Chamber in its determination under Article 31(1)(a) of the Statute, but also with identifying recommendations for the treatment of the current mental conditions of

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[2529] *See* AAPL Guidelines, UGA-OTP-0287-0015, at 0017 (emphasis added).
[2530] Conviction Decision, para. 2529.
[2531] Appeal Brief, paras 340-341.
[2532] Appeal Brief, para. 341.
[2533] Conviction Decision, paras 2529, 2531.

[Mr Ongwen]" which, in the Trial Chamber's view, led to a loss of their objectivity.[2534] The Defence's arguments are therefore rejected.

(iii) Alleged error in concluding that the Defence Experts did not apply scientifically valid methods and tools

(a) Summary of the submissions

1149. The Defence alleges that the Trial Chamber's conclusion that the Defence Experts failed to use scientifically validated methods and tools for their forensic report is based on "the critique in P-0447's report of the methodology of the Defence Experts" and is unsupported by the evidence.[2535] In its view, the differences in the approach of P-0447 and the Defence Experts reflect "differences among experts, not grounds to invalidate methodology".[2536]

1150. The Defence further argues that the Trial Chamber misrepresented the Defence Experts' approach with respect to the version of an international classification system known as the Diagnostic and Statistical Manual of Mental Disorders (hereinafter: "DSM") that the experts had relied upon for the classifications of Mr Ongwen's disorders.[2537] It argues that contrary to the Trial Chamber's finding, the Defence Experts based their conclusions on the diagnostic criteria for mental disorders as defined in the updated DSM-5 and used the earlier DSM-IV edition to "present the summary of diagnoses" in order to "ease understanding" of the psychiatric problems that were identified.[2538] Furthermore, the Defence argues that its experts relied on the DSM-IV for a "multi-axial diagnoses", which facilitated "a convenient format for organizing and communicati[ng] clinical information".[2539] In the Defence's view, it was erroneous for the Trial Chamber to conclude that "a format for organising and communicating information is the same as diagnostic criteria for a disorder".[2540]

1151. In addition, the Defence contends that the Trial Chamber erred in giving weight to P-0447's view that the Defence Experts failed to adequately address the question of

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[2534] Conviction Decision, paras 2528-2529.
[2535] Appeal Brief, paras 342-343.
[2536] Appeal Brief, para. 344.
[2537] Appeal Brief, paras 345-350.
[2538] Appeal Brief, para. 346.
[2539] Appeal Brief, para. 347.
[2540] Appeal Brief, para. 350.

malingering.[2541] It argues that the Defence Experts explained that "there was no test for malingering" and that they had "assessed no clinical features and indications for malingering".[2542] Finally, the Defence submits that the Trial Chamber failed to indicate why it preferred P-0447's position over that of the Defence Experts and "why it made no finding of reasonable doubt, based on the latter's credible evidence".[2543]

1152. The Prosecutor submits that the Defence seeks to explain P-0447's criticism of the Defence Experts' approach – "particularly with regard to the value of the clinical interview, and the use of psychometric testing" – as "differences among experts, not grounds to invalidate methodology".[2544] In this regard, he submits that the Defence fails to address "the degree to which the critiques expressed by [P-0447] did or did not reflect reasonable differences in professional approach", nor does it address the evidence of P-0447 "that shows he is qualified to express an opinion on what constitutes reasonable professionalism".[2545]

1153. As to the Defence's argument that the Trial Chamber misrepresented the Defence expert's approach in referring to an outdated edition of the DSM, the Prosecutor submits that the Defence shows no error in the Trial Chamber's reasoning, to which the Defence does not even refer.[2546] Furthermore, the Prosecutor submits that "the fact that practitioner[s] may prefer some aspects of an outdated approach does not justify them in rejecting more recent advances".[2547]

1154. Moreover, the Prosecutor avers that the Defence's argument that "'a format for organising and communicating information' is not 'the same as diagnostic criteria for a disorder', […] 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 and forensically validated".[2548]

[2541] Appeal Brief, paras 351-352.
[2542] Appeal Brief, para. 351.
[2543] Appeal Brief, para. 353.
[2544] Prosecutor's Response, para. 207.
[2545] Prosecutor's Response, paras 207-208.
[2546] Prosecutor's Response, para. 209, *referring to* Conviction Decision, para. 2535.
[2547] Prosecutor's Response, para. 210.
[2548] Prosecutor's Response, para. 210.

1155. Lastly, the Prosecutor argues that the Trial Chamber was "entirely reasonable" in treating the Defence Experts' approach to the issue of malingering with caution.[2549] In his view, the Defence Experts' approach was "premised on the *a priori* assumption that a clinical interview is the only useful tool in assessing mental health".[2550] Given the contrary opinion of P-0447, who stated that there were other diagnostic tests that could have been used to rule out malingering,[2551] the Prosecutor submits that it was reasonable to conclude that the Defence Experts did not address this issue adequately.[2552]

1156. Victims Group 2 observe that the Defence's arguments reflect mere disagreement with the Trial Chamber's assessment of the evidence. In their view, the Defence "seems to labour under the wrong impression that the Chamber had to accept the evidence produced by the Defence [E]xperts unconditionally".[2553]

1157. With reference to the jurisprudence of the ICTY Appeals Chamber, Victims Group 2 further observe that in assessing expert evidence, a trial chamber is required to determine "whether there is transparency in the methods and sources used by the expert witness, including the established or assumed facts on which he or she relied".[2554]

(b) Relevant parts of the Conviction Decision

1158. For its finding that "major doubts exist as to the validity of the methods employed by [D-0041 and D-0042]",[2555] the Trial Chamber noted several concerns raised by P-0447 in the Rebuttal Report, where he was of the opinion that the Defence Experts failed to apply scientifically validated methods and tools for use as a basis for a forensic report.[2556] In essence, P-0447 criticised the Defence Experts' "exclusive reliance on the clinical interview, and the failure to 'make use of the wealth of assessment recommendations from the scientific literature [and to] utilize multiple sources of information as recommended in guidelines and publications'".[2557] P-0447 also

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[2549] Prosecutor's Response, para. 212.
[2550] Prosecutor's Response, para. 212.
[2551] Prosecutor's Response, para. 212, *referring to* T-252, p. 10, lines 20-25.
[2552] Prosecutor's Response, para. 212.
[2553] Victims Group 2's Observations, para. 93.
[2554] Victims Group 2's Observations, para. 95, *referring* to *Popović et al*. Decision on Expert, para. 29.
[2555] Conviction Decision, para. 2535.
[2556] Conviction Decision, paras 2532-2534.
[2557] Conviction Decision, para. 2532, *referring to* Rebuttal Report, UGA-OTP-0287-0072, at 0077.

criticised the Defence Experts' work on the basis that they used diagnostic labels from an outdated version of the DSM.[2558]

1159. On the basis of P-0447's criticisms the Trial Chamber concluded as follows:

> Noting also some of the alleged deficiencies in the reports which are discussed specifically below, the Chamber considers that major doubts exist as to the validity of the methods employed by [D-0041 and D-0042]. The heavy reliance on the clinical interview, disregarding the evidence from the trial, is striking, as is the scepticism expressed by [D-0041 and D-0042] towards other methods, which [P-0447] sufficiently demonstrated to be standard. Furthermore, the explanation provided in the 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. As experts, [D-0041 and D-0042] had the opportunity, and the role, to provide all necessary explanation.[2559]

(c) Determination by the Appeals Chamber

1160. First, the Defence alleges that the Trial Chamber erred in finding that the Defence Experts did not apply scientifically valid methods and tools, and asserts that this finding was not based on the evidence but merely "repeats" P-0447's criticism.[2560] In this regard, the Defence asserts that the Defence Experts, *inter alia*, "presented cogent evidence on the issues of corroboration, various diagnostic scales, psychometric testing and the DSM and the multi-axial diagnostic approach".[2561] In particular, the Defence claims that P-0447's critique on "the value of a clinical interview and the use of psychometric testing" amounts to "differences among experts" and "not grounds to invalidate methodology".[2562] Thus in the Defence's view, the Trial Chamber should have relied on its experts' evidence instead of P-0447's criticisms.[2563]

1161. The Appeals Chamber notes that the Trial Chamber prefaced its finding on a number of issues identified by P-0447 in the Rebuttal Report with respect to the methodology and tools employed by the Defence Experts to assess Mr Ongwen's mental health.[2564] P-0447 considered that the Defence Experts' methodology "[did] not

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[2558] Conviction Decision, para. 2533, *referring to* Rebuttal Report, UGA-OTP-0287-0072, at 0078.
[2559] Conviction Decision, para. 2535.
[2560] Appeal Brief, para. 343.
[2561] Appeal Brief, para. 343, *referring to* Defence Closing Brief, para. 651.
[2562] Appeal Brief, para. 344.
[2563] *See also* Appeal Brief, paras 352-353.
[2564] Conviction Decision, paras 2532-2534.

correspond with existing scientific literature".[2565] In particular, he criticised: (i) the Defence Experts' use of open-ended questions as a method to rule out malingering, stating that "their approach of avoiding giving clues about the nature of information they were interested in was inadequate and not supported by scientific literature as a method to rule out malingering";[2566] (ii) the Defence Experts' decision not to use structured rating scales even though "their use is recommended in scientific literature";[2567] (iii) the Defence Experts' "exclusive reliance on the clinical interview, and the failure to 'make use of the wealth of assessment recommendations from the scientific literature [and to] utilize multiple sources of information as recommended in guidelines and publications'";[2568] (iv) the Defence Experts' lack of "a clear distinction between data" and "inferences or opinions";[2569] (v) the Defence Experts' use of diagnostic labels from the DSM-IV rather than the DSM-5;[2570] (vi) the Defence Experts' view, as expressed by D-0041, that "the diagnosis of mental illness doesn't rely squarely on the core symptoms";[2571] and (vii) the Defence Experts' diagnoses of disorders associated with Mr Ongwen.[2572]

1162. P-0447 explained that, in providing the Rebuttal Report, his task involved "writing a report on a report, comparing the report to what you find in the scientific literature and the professional literature on forensic assessments".[2573] P-0447 further explained that

> For me, I would – the only point I'm making is that we have a report here and we have guidelines and we have standardized criteria and these standardized criteria are not made by [D-0042] and they're not made by [P-0447], but they are common accepted guidelines that have been made by professionals and these were discussed on an international basis. And so therefore it's not important if [D-0042 or [D-0041] are Acholi and it's not important that I'm a mzungu, but I think it's rather important that we compare the work that has been done to general

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[2565] Rebuttal Report, UGA-OTP-0287-0072, at 0076.
[2566] Conviction Decision, para. 2532, *referring to* Rebuttal Report, UGA-OTP-0287-0072, at 0076. *See also* Defence Experts' Second Report, UGA-D26-0015-0948, at 0950.
[2567] Conviction Decision, para. 2532, *referring to* Rebuttal Report, UGA-OTP-0287-0072, at 0077. *See also* Defence Experts' Second Report, UGA-D26-0015-0948, at 0950.
[2568] Conviction Decision, para. 2532, *referring to* Rebuttal Report, UGA-OTP-0287-0072, at 0077.
[2569] Conviction Decision, para. 2532, *referring to* Rebuttal Report, UGA-OTP-0287-0072, at 0077-0078.
[2570] Conviction Decision, para. 2533, *referring to* Rebuttal Report, UGA-OTP-0287-0072, at 0078.
[2571] Conviction Decision, para. 2534, *referring to* Rebuttal Report, UGA-OTP-0287-0072, at 0079. *See also* D-0041: T-248, p. 46, lines 9-11.
[2572] Conviction Decision, para. 2534, *referring to* Rebuttal Report, UGA-OTP-0287-0072, at 0082-0096.
[2573] P-0447: T-253, p. 17, lines 20-22.

> principles and then we can come to a conclusion. And I think based on this conclusion, I would say that this particular report – and not [D-0042], not [D-0041] as an individual per se, but I think that this report is not matching the quality criteria that we would expect from a forensic – from a proper forensic report.[2574]

1163. The Appeals Chamber notes that P-0447 evaluated the Defence Experts' approach by comparing it to "general principles", "standardized criteria" and "common accepted guidelines [for conducting forensic assessments] that have been made by professionals and […] discussed on an international basis".[2575] On this basis, P-0447 concluded that the Defence Experts' evidence did not "match the quality criteria we would expect from a […] proper forensic report".[2576]

1164. While the Trial Chamber found P-0447 to have "sufficiently demonstrated [other methods] to be standard" it also noted the Defence Experts' "scepticism" towards these methods to be "striking".[2577] In this respect, the Appeals Chamber notes that the Defence does not appear to dispute the cogency of these "standardized" methods nor does it address the Defence Experts' reluctance to apply them. Instead, the Defence contends that the differences in approach between P-0447 and the Defence Experts "are differences among experts, not grounds to invalidate methodology".[2578] The Appeals Chamber notes, however, that the Defence does not explain why, or even if, the concerns identified by P-0447 in the methodology of the Defence Experts amounted to reasonable differences amongst experts. As a result, the Appeals Chamber finds the Defence's argument to be unpersuasive and to merely reflect disagreement with the concerns identified by P-0447's critiques and the Trial Chamber's reliance thereon. Accordingly, the argument is rejected.

1165. Secondly, the Defence argues that the Trial Chamber's reliance on P-0447's criticism to assert that the Defence Experts used "outdated classifications" from an outdated edition of the DSM, is based on a "misrepresentation of the Defence Experts' evidence as well as the DSM-IV and DSM-5".[2579] The Defence submits that the

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[2574] P-0447: T-253, p. 14, lines 14-25.
[2575] P-0447: T-253, p. 14, lines 2-21, p. 17, lines 20-22. *See also* p. 31, lines 7-8, p. 74, lines 16-25, p. 76, lines 1-13.
[2576] P-0447: T-253, p. 14, lines 24-25.
[2577] Conviction Decision, para. 2535.
[2578] Appeal Brief, para. 344.
[2579] Appeal Brief, para. 345.

Defence Experts explained that while their findings are reported according to DSM-5, they presented the summary of diagnoses using DSM-IV, to "ease understanding of the psychiatric problems [they] identified".[2580]

1166. The Appeals Chamber notes that the Defence misconstrues the Trial Chamber's finding. Rather than criticise the fact that the Defence Experts reported their findings according to DSM-5, the Trial Chamber's critique was levelled squarely at the Defence Experts' reason for using "diagnostic labels from an outdated international classification system, i.e. DSM-IV, rather than DSM-5".[2581] The Trial Chamber found the Defence Experts' reason, namely, "to ease understanding of the psychiatric problems we identified" to be "entirely unconvincing" because in its view, "it is illogical to use an outdated system merely on the ground that it may arguably be easier to understand" especially since the Defence Experts "had the opportunity and the role, to provide all necessary explanation".[2582] The Appeals Chamber finds that the Defence fails to show any error in the Trial Chamber's reasoning in this respect.

1167. Moreover, the Defence argues that it also used the concept of "multi-axial diagnoses" from DSM IV-TR, which "provides 'a convenient format for organizing and communicat[ing] clinical information […]'".[2583] In the Defence's view, both P-0447 and the Trial Chamber erred in concluding that "a format for organising and communicating information is the same as diagnostic criteria for a disorder".[2584] The Appeals Chamber notes that, aside from P-0447's critique (that the "multi-axial diagnosis" used by the Defence Experts is also "out-dated", since "[a]ll axis have received major revisions in DSM 5"),[2585] the Defence's argument misrepresents the Trial Chamber's finding. Contrary to the Defence's assertion, the Trial Chamber did not conclude that "a format for organising and communicating information is the same as diagnostic criteria for a disorder".[2586] Rather, as noted above, it found that the

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[2580] Appeal Brief, para. 346.
[2581] Conviction Decision, paras 2533, 2535. *See* Rebuttal Report, UGA-OTP-0287-0072, at 0078 ("Standardized diagnostic labels and codes are vital to unequivocally identify disorders in forensic psychiatry/psychology (Giorgi-Guarnieri, 2002). […]. However, not a single code is provided, for some diagnoses, not even the correct labels".).
[2582] Conviction Decision, para. 2535.
[2583] Appeal Brief, para. 347.
[2584] Appeal Brief, para. 350.
[2585] Rebuttal Report, UGA-OTP-0287-0072, at 0078.
[2586] Appeal Brief, para. 350.

Defence Experts' reason for using an outdated system in relation to diagnostic labels was "entirely unconvincing".[2587] The Defence's argument is thus rejected.

1168. Third, the Defence argues that the Trial Chamber erred in relying on P-0447's critique that the Defence Experts failed to use psychometric tests in addressing the possibility of malingering.[2588] In the Defence's view, "there was no test for malingering" and Mr Ongwen did not exhibit any "clinical features and indications for malingering".[2589]

1169. The Appeals Chamber notes D-0041's testimony in relation to the possibility of malingering and how he would approach testing for it. In this regard, he stated that

> So the issue of malingering and faking bad is interesting because we really don't see why the client would do that. That's one. The client is extremely distressed about what he goes through. We don't see that in malingering. In clinical practice we don't see that kind of distress that people who malinger get. People who malinger want to actually confirm that they have an illness. The client doesn't even know that what he's going through is a mental illness.[2590]
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> When there is an issue about malingering or not, there are formal tests, psychometric tests which forensic psychiatrists use to detect malingering, aren't there? ometric tests. Which one would you use if the Court specifically asked you to help it with the question of malingering? A. We didn't assess for malingering, sir.[2591]
>
> PRESIDING JUDGE SCHMITT: Now in the abstract. If there was any other courtroom, any other client, if you had indicia for malingering, how would you try to identify them or exclude them, excluded? THE WITNESS: Mr President, I would do everything within my means to conduct a detailed clinical assessment which is far more superior than any psychometric test in coming up with a diagnosis. That's what all mental health care workers do.[2592]

1170. On the other hand, the Appeals Chamber observes that when D-0042 was questioned as to whether he could have used diagnostic or psychometric tools to establish a greater or lesser likelihood of malingering he stated that

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[2587] Conviction Decision, para. 2535.
[2588] Appeal Brief, para. 352.
[2589] Appeal Brief, para. 351.
[2590] D-0041: T-249, p. 79, line 22 to p. 80, line 3.
[2591] D-0041: T-249, p. 81, lines 7-15.
[2592] D-0041: T-249, p. 82, lines 7-13.

> We could, but only yesterday I said we had limited time and we needed to collect lots of other information and we didn't think it was economically wise to waste time using a scale.[2593]

1171. From the above testimony of the Defence Experts, it is clear that they did not consider nor did they attempt to use psychometric tests or any other tool in order to rule out the possibility of malingering on the part of Mr Ongwen. The Defence Experts instead relied primarily on the clinical interview with Mr Ongwen. P-0447 criticised the Defence Experts' approach since in his view, "[f]orensic guidelines rather suggest the use of multiple sources of information, including standardized assessments or collateral material" to rule out malingering.[2594]

1172. The Appeals Chamber finds that in light of the Defence Experts' approach and given the contrary opinion of P-0447, it was reasonable for the Trial Chamber to have regarded the Defence Experts' approach to malingering with caution.

1173. Lastly, the Appeals Chamber finds no merit in the Defence's allegation that the Trial Chamber failed to indicate why it preferred P-0447's evidence over the Defence expert's credible evidence.[2595] The Trial Chamber explained that it found P-0447's evidence "entirely convincing" and his testimony to be "impressive in its clarity and comprehensibility".[2596] Thus, in relying on his evidence, the Trial Chamber was not choosing P-0447's evidence over that of the Defence Experts. Rather, in carrying out its fact-finding function by weighing and evaluating the evidence, the Trial Chamber found P-0447's evidence to be more reliable.[2597]

1174. In sum, the Appeals Chamber finds that the Defence shows no error in the Trial Chamber's conclusion that "major doubts exist as to the validity of the methods employed by [the Defence Experts]".[2598] Accordingly, the Defence's arguments are rejected.

[2593] D-0042: T-251, p. 19, lines 20-22.
[2594] Rebuttal Report, UGA-OTP-0287-0072, at 0076.
[2595] Appeal Brief, para. 353.
[2596] Conviction Decision, para. 2496.
[2597] *See* paragraph 80 above.
[2598] Conviction Decision, para. 2535.

(iv) Alleged error in finding inconsistencies in the evidence of the Defence Experts

(a) Background

1175. The Defence alleges that the Trial Chamber erred in considering the Defence Experts' assessment of Mr Ongwen's mental health to be incoherent or inconsistent.[2599] In this regard, the Appeals Chamber notes that the Trial Chamber entered several findings concerning the "unexplained contradictions in the evidence of [D-0041 and D-0042] between the various statements and observations made, or between such statements and observations and conclusions finally drawn".[2600] Specifically, the Defence challenges the Trial Chamber's findings regarding inconsistencies in the assessment of: Mr Ongwen's mood,[2601] his alleged suicidal tendencies,[2602] his functionality,[2603] his diagnosis of amnesia,[2604] his appearance in clinical interviews,[2605] and "indicia […] of discontinuity" in relation to the diagnosis of dissociative identity disorder.[2606]

1176. Before addressing these alleged errors, the Appeals Chamber notes preliminarily, that, at paragraphs 371-372 of the Appeal Brief, the Defence takes issue with P-0447's use of the term "sloppy" to describe the approach of the Defence Experts and claims that the Trial Chamber "never points out what is sloppy or insufficient".[2607] The Appeals Chamber considers that this argument fails to allege any error that may impugn the Trial Chamber's reliance on P-0447's evidence for its finding that the Defence Experts' assessment of Mr Ongwen's mental health was sometimes incoherent or inconsistent.[2608] Indeed, the Appeals Chamber notes that at no point does the Trial Chamber use the term "sloppy". Consequently, this argument is dismissed.

[2599] Appeal Brief, para. 354.
[2600] Conviction Decision, para. 2536. *See* further paras 2537-2544.
[2601] Appeal Brief, paras 355-357.
[2602] Appeal Brief, paras 358-361.
[2603] Appeal Brief, paras 362-363.
[2604] Appeal Brief, paras 364-365.
[2605] Appeal Brief, paras 366-367.
[2606] Appeal Brief, para. 368.
[2607] Appeal Brief, para. 371. *See also* T-263, p. 44, line 20 to p. 45, line 3.
[2608] Conviction Decision, paras 2536, 2544.

(b) Inconsistencies in the reporting of Mr Ongwen's mood

1177. The Defence submits that the Trial Chamber misstates the evidence in relation to its finding of inconsistencies in the assessment of Mr Ongwen's "mood or feeling at a particular time".[2609] It argues that the Defence Experts had noted in the Defence Expert's First Report that Mr Ongwen's outward cheerful presentation "is deceptive and covers up the intense emotional turmoil he experiences almost every day".[2610] The Defence submits that this amounts to the concept of "masking" which it describes as "a form of covering something up, [which] deceives the observer".[2611] Moreover, the Defence alleges that D-0042 testified that "what appeared as inconsistencies in mood […] were not inconsistencies but an example of reaction formation" which "occurs when a person visibly shows the opposite emotion that s/he may be feeling inside".[2612] The Defence submits that the Trial Chamber does not explain why it rejected masking and reaction formation.[2613]

1178. The Prosecutor argues that the Trial Chamber reasonably rejected the Defence's theories of masking and reaction formation as "impossible in practice and purely theoretical" based on the expert evidence of P-0445, P-0446, P-0447, and even D-0041 "who conceded that it was rarely possible to 'mask symptoms of psychological distress […] for long'".[2614] In addition, the Prosecutor submits that the Defence fails to show that the Trial Chamber was unreasonable in approaching the Defence Experts' *ex post facto* explanation regarding masking and reaction formation with caution.[2615] In his view, "the fact that the experts did not immediately identify and resolve the apparent inconsistency in their first report was relevant in considering their reliability".[2616]

1179. In relation to D-0041 and D-0042's observations concerning Mr Ongwen's mood, the Trial Chamber found, *inter alia*, that

> Turning to particulars, there are a number of internal contradictions in [the Defence Experts'] Second Report. [Mr] Ongwen is recorded as 'report[ing]

[2609] Appeal Brief, paras 355-356.
[2610] Appeal Brief, para. 356, *referring to* Defence Expert's First Report, UGA-D26-0015-0004, at 0013.
[2611] Appeal Brief, para. 356.
[2612] Appeal Brief, para. 357.
[2613] Appeal Brief, para. 370.
[2614] Prosecutor's Response, para. 217.
[2615] Prosecutor's Response, para. 218.
[2616] Prosecutor's Response, para. 218.

> persistent sadness to an extent that he says he forgot to be happy or smile for many years', but his mood is assessed as 'happy' during the clinical interview on 17 April 2018, and generally during [the Defence Experts'] interactions with [Mr] Ongwen as 'subdued […] alternating with happiness, excitement and sense of satisfaction'. Similarly, the same report states that [Mr] 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', as well as that 'Mr. Ongwen seemed to have been well informed about our visit, and was positive about it'. [D-0042] stated in the Rejoinder Report that [Mr] Ongwen was 'masking symptoms' when presenting happy, but given that this is not specifically explained in the original report, the ex-post explanation is unconvincing.[2617]

1180. The Appeals Chamber finds that, contrary to the Defence's argument, the Trial Chamber did not factually misstate the evidence on the record when it found that the Defence Experts' explanation concerning masking "is not specifically explained in the original report, [and that] the ex-post explanation is unconvincing".[2618] The Appeals Chamber considers that when read in context, it is clear that in referring to the "original report" the Trial Chamber was referencing the Defence Experts' Second Report where it found contradictions in the assessment of Mr Ongwen's mood and noted that these contradictions were unexplained in that report, but that an explanation was only provided later by D-0042 in the Rejoinder Report, which the Trial Chamber found unconvincing.[2619] The Appeals Chamber finds that it was reasonable for the Trial Chamber to take these contradictions, and the lack of any explanation for them, into account when considering the overall reliability of the Defence Experts' assessments.

1181. As the Trial Chamber correctly pointed out, "mental health assessments may ordinarily have to process contradictory information […]".[2620] However, what is important is that these contradictions are adequately identified and resolved by the mental health experts to ensure that their assessments are understood and may be relied upon. The Appeals Chamber considers that the fact that the Defence Experts' First Report noted that Mr Ongwen was masking symptoms in his outward presentation suggests that the Defence Experts were in a position to identify and explain the apparent contradictions concerning Mr Ongwen's mood identified in the Defence Experts' Second Report. In the absence of such explanations, the Trial Chamber was entitled to

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[2617] Conviction Decision, para. 2537 (footnotes omitted).
[2618] Appeal Brief, para. 356, *referring to* Conviction Decision, para. 2537.
[2619] Conviction Decision, para. 2537.
[2620] Conviction Decision, para. 2544.

take this into account in its consideration of the reliability of the Defence Experts' evidence. The Defence shows no error in this regard.

1182. Moreover, the Appeals Chamber notes that in the context of addressing the Defence Experts' conclusion that the reason why people close to Mr Ongwen did not notice symptoms of his mental disorders was because Mr Ongwen was able to mask or hide them, the Trial Chamber rejected this possibility as being "impossible in practice and purely theoretical".[2621] Based on the evidence of the Prosecutor's Experts, and, in particular, the evidence of D-0041 – who testified that it was rarely possible to "mask symptoms of psychological distress […] for long",[2622] the Trial Chamber explained that

> 2556. Indeed, the Chamber finds the possibility that [Mr] Ongwen was able to successfully hide from the persons around him the symptoms of his mental disorders, and that he was able to do so for a long period of time, throughout the period of the charges and possibly throughout, or almost throughout, his entire stay in the LRA, impossible in practice and purely theoretical. This is surely the case considering that per the diagnoses of [the Defence Experts], [Mr**]** Ongwen would have had to hide over a long period of time a large variety of complex symptoms, including hiding/suppressing depressive mood, his alter personality, dissociative states, anxieties and hyperarousals.
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> 2557. [D-0041's] own evidence, cited just above, provides the first basis for this conclusion. Furthermore, [P-0445] acknowledged that masking of symptoms of depression can occur, but also stated that from her experience, severe depression is 'easily picked, and the masking I think would be for me as a far second, in my opinion'. [P-0446] testified that '[i]n practice it is very difficult for people to either mask their symptoms because they – 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'.[2623]

1183. Contrary to the Defence's argument, the Appeals Chamber finds that the Trial Chamber reasonably rejected the Defence Experts' evidence on "masking" and "reaction formation" and provided reasons for its findings.[2624] In particular, the Defence fails to substantiate the argument that the Defence Experts' evidence establishes a reasonable inference with respect to "masking" and "reaction formation" and that the

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[2621] Conviction Decision, para. 2556.
[2622] D-0041: T-248, p. 110, lines 18-21.
[2623] Conviction Decision, paras 2556-2557 (footnotes omitted).
[2624] *See* Appeal Brief, para. 370.

Trial Chamber's "inculpatory inference (rejecting the affirmative defence) is not the only reasonable inference available to be drawn from the evidence".[2625]

1184. In sum, the Defence shows no error in the Trial Chamber's identification of inconsistencies in the reporting of Mr Ongwen's "mood or feeling at a particular time" by the Defence Experts.[2626] Accordingly, the Defence's arguments are rejected.

(c) Inconsistencies in the claim that Mr Ongwen had suicidal tendencies

1185. The Defence submits 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".[2627] In addition, the Defence criticises P-0447's view that it was "unlikely" – "from a clinical perspective" – for an individual to survive eight "serious" suicide attempts.[2628] In its view, P-0447 "is negating the suicide ideation diagnosis based on the fact that [Mr Ongwen] made eight attempts and survived!".[2629]

1186. The Prosecutor submits that the Defence's arguments fail to engage with the substance of the Trial Chamber's finding.[2630] In their view, the Defence does not address why the Defence Experts' never explored with Mr Ongwen "which of [the two] motivations applied on any concrete occasion".[2631] Furthermore, the Prosecutor submits, with respect to the Defence's criticism of P-0447's view negating the suicide diagnosis, that the Defence "neither shows how this evidence had any impact on the [Conviction Decision], nor indeed shows any reason why [P-0447's] expert opinion was unreliable or contrary to common sense".[2632]

1187. The Trial Chamber found that it was "entirely unpersuaded" by the Defence Experts' contradictory claim that they identified suicidal tendencies in Mr Ongwen –

[2625] *See* Appeal Brief, para. 369.
[2626] Appeal Brief, para. 355.
[2627] Appeal Brief, para. 359.
[2628] Appeal Brief, paras 360-361, *referring to* P-0447's First Report, UGA-OTP-0280-0674, at 0691.
[2629] Appeal Brief, para. 360.
[2630] Prosecutor's Response, para. 220.
[2631] Prosecutor's Response, para. 219.
[2632] Prosecutor's Response, para. 221.

"referring to the occurrence of 8 suicide attempts with the intention to die" – while at the same time Mr Ongwen was also being motivated by a "survival instinct".[2633]

1188. While the Trial Chamber did not exclude the possibility "in principle that a person may simultaneously have suicidal tendencies and a strong survival instinct" it found that the contradiction lay in the fact that in the Defence Experts' evidence "they are put forward as the reason for essentially the same type of acts".[2634] In this regard, the Trial Chamber found that

> Indeed, [the Defence Experts] claimed in their first report that [Mr] Ongwen went to battle with the intent to get killed by enemy forces, while [D-0042] also testified that, due to his obsessive-compulsive disorder, 'Mr Ongwen would feel or experience the smell of blood, gun powder and then a premonition that they were being attacked', as a result of which 'he would organise his forces to ward off an attack'. It is nowhere clarified whether [the Defence Experts] ever tried to explore with [Mr] Ongwen at what time or on which occasions he acted out of one or the other motivation.[2635]

1189. The Appeals Chamber notes that the Trial Chamber did not exclude the possibility that a person may "simultaneously have suicidal tendencies and a strong survival instinct".[2636] However, as explained by the Trial Chamber, the contradiction identified was that the Defence Experts used these motivations "as the reason for essentially the same type of acts", without explaining which motivation applied in specific circumstances.[2637] This, in the Trial Chamber's view, undermined the reliability of the Defence Experts' conclusions. As argued by the Prosecutor, rather than engage with the substance of this finding, the Defence merely repeats its assertion that, the Defence Experts' were not being contradictory when they concluded that Mr Ongwen experienced suicidal tendencies while also being motivated by a survival instinct.[2638] The Defence shows no error in this regard and the argument is rejected.

[2633] Conviction Decision, para. 2538, *referring to* Defence Experts' First Report, UGA-D26-0015-0004, at 0009, Defence Experts' Second Report, UGA-D26-0015-0948, at 0957; D-0042: T-250, p. 37, lines 18-19.
[2634] Conviction Decision, para. 2538.
[2635] Conviction Decision, para. 2538 (footnotes omitted).
[2636] Conviction Decision, para. 2538.
[2637] Conviction Decision, para. 2538.
[2638] Appeal Brief, para. 359. *See also* Prosecutor's Response, para. 220.

1190. Furthermore, with respect to the Defence's criticism of P-0447's opinion on the Defence Experts' suicide ideation diagnosis, the Appeals Chamber finds that, again, the Defence does not demonstrate how this opinion affected the Trial Chamber's conclusion, if at all. Indeed, the Appeals Chamber notes that in arriving at its conclusion, the Trial Chamber did not rely on this particular opinion of P-0447.[2639]

1191. Consequently, the Defence shows no error in the Trial Chamber's identification of inconsistencies in the reporting of Mr Ongwen's suicidal tendencies by the Defence Experts. The argument is therefore rejected.

(d) Inconsistencies as to the compatibility of a mental disorder with careful planning and cognitive ability

1192. The Defence argues that the Trial Chamber, based on the positions of P-0446 and P-0447, rejected "the Defence Experts' evidence that mental illnesses are not incompatible with functionality".[2640] With reference to the evidence of PCV-0002 (Professor Wessels), an expert witness called by the Victims, the Defence argues that "he explained that even if someone shows resiliency, [it] is not a permanent state and dysfunction can occur if risk factors increase".[2641] This, in the Defence's view, is evidence of the fact that even if Mr Ongwen appeared resilient and functional at a particular time, this could change at any time due to the adverse environment of the LRA.[2642]

1193. The Prosecutor argues that the Defence misrepresents the Conviction Decision because the Trial Chamber made no determination on the Defence Experts' evidence "that mental illnesses are not incompatible with functionality".[2643] The Prosecutor submits that the Trial Chamber reasonably considered that D-0042's "own inconsistent statements were relevant in determining the reliability of his evidence – no matter which statement was right and which was wrong".[2644]

[2639] *See* Conviction Decision, para. 2538.
[2640] Appeal Brief, para. 362.
[2641] Appeal Brief, para. 363.
[2642] Appeal Brief, para. 363.
[2643] Prosecutor's Response, para. 223.
[2644] Prosecutor's Response, para. 223.

1194. The Trial Chamber noted that D-0042's evidence was contradictory on the question of whether the presence of a mental disorder would or would not "militate against careful planning", finding that the Defence expert first claimed "that it did and subsequently that it did not necessarily".[2645] In addition, the Trial Chamber found that D-0042 "simultaneously claimed both that [Mr] Ongwen's psychological and cognitive development was arrested at a sensitive period in his development and growth, at about between 8 and 10 years, and that he possessed cognitive ability that allowed him to discuss with other people important tactical matters".[2646] In this regard, the Trial Chamber found that the Defence's claim that Mr Ongwen's cognitive abilities were "uneven" – meaning that "in one situation he could discuss important tactical issues, [while] in other situations, he would not exhibit cognitive abilities"[2647] – was "wholly unsubstantiated" and did not solve the contradiction in D-0042's evidence.[2648]

1195. As noted by the Prosecutor, the Appeals Chamber considers that the Defence misrepresents the Conviction Decision by claiming that the Trial Chamber rejected the Defence Experts' evidence concerning the compatibility of mental illnesses with functionality. It is clear, from paragraph 2539 of the Conviction Decision, that the Trial Chamber made no determination at all, let alone reference the positions of P-0446 and P-0447, on this issue. Instead, far from addressing the compatibility of functionality and mental illness, the Trial Chamber was merely noting the inconsistent statements of D-0042, on the subjects of the presence of a mental disorder and the ability to carefully plan, and, Mr Ongwen's cognitive abilities. In the Trial Chamber's view, these inconsistencies were unexplained and were thus relevant for the Trial Chamber's assessment of the reliability of D-0042's evidence. For this reason, the Appeals Chamber finds that the Defence is not assisted in its argumentation by referencing PCV-0002's evidence. In any event, the Appeals Chamber notes that PCV-0002 "testified about his report 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".[2649] While noting his evidence, the Trial Chamber

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[2645] Conviction Decision, para. 2539, *referring to* D-0042: T-251, p. 72, line 25 to p. 73, line 5.
[2646] Conviction Decision, para. 2539, *referring to* D-0042: T-255, p. 7, lines 15-23, p. 14, lines 12-17.
[2647] Defence Closing Brief, para. 643.
[2648] Conviction Decision, para. 2539, *referring to* Defence Closing Brief, para. 643.
[2649] Conviction Decision, para. 601.

found "that it does not directly underlie any part of the Chamber's analysis as to whether the facts alleged in the charges are established".[2650]

1196. In sum, the Appeals Chamber finds that the Defence shows no error in the inconsistencies identified by the Trial Chamber in D-0042's observations regarding the issue of whether "the presence of a mental disorder does or does not militate against careful planning".[2651]

(e) Inconsistency in the diagnosis of dissociative identity disorder and an initial clinical observation

1197. The Defence contends that the Trial Chamber's conclusion concerning a contradiction in the Defence Experts' diagnosis of dissociative amnesia in the Brief Medical Report of February 2016 and the Defence Experts' Second Report is inaccurate and not based on the complete evidence on the issue of amnesia.[2652] In this regard, it points to the section of the Defence Experts' Second Report concerning dissociative amnesia under which numerous examples of memory loss suffered by Mr Ongwen are listed.[2653] The Defence asserts that these instances of memory loss are associated with a loss of consciousness on the part of Mr Ongwen, following various battles.[2654]

1198. The Prosecutor argues that the Defence fails to show that the Trial Chamber's conclusion is not based on the evidence.[2655] In fact, he submits that the Defence's argument "merely underlines the inconsistency between the initial clinical observations of the Defence Experts in 2016 (when they found no amnesia) and their subsequent observations in 2018 (when they found marked amnesia)".[2656]

1199. The Trial Chamber noted a contradiction in the Defence Experts' initial observation, made in the Brief Medical Report of February 2016, that Mr Ongwen "had good long term memory and 'had no amnesia of the events that happened while in the

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[2650] Conviction Decision, para. 601.
[2651] Conviction Decision, para. 2539.
[2652] Appeal Brief, para. 365.
[2653] Appeal Brief, para. 365, *referring to* Defence Experts' Second Report, UGA-D26-0015-0948 at 0971.
[2654] Appeal Brief, para. 365.
[2655] Prosecutor's Response, para. 225.
[2656] Prosecutor's Response, para. 225.

LRA ranks' and the diagnosis of dissociative identity disorder".[2657] The Trial Chamber further noted that the contradiction lay in the fact that one of the symptoms for dissociative identity disorder includes "amnesia in the form of 'gaps in the recall of everyday events, important personal information and/or traumatic events that are inconsistent with ordinary forgetting'".[2658] The Trial Chamber found that the Defence Experts' initial observation "also directly contradicts the diagnosis of dissociative amnesia".[2659]

1200. The Appeals Chamber notes that, in essence, the Defence argues that the Trial Chamber's finding is erroneous because it failed to consider the evidence in the Defence Experts' Second Report that describes "marked or patchy loss of memory" and "[m]emory loss for events associated with period[s] of loss of consciousness" corresponding to certain specified times.[2660] The Appeals Chamber finds this argument to be misplaced. For its finding that the Defence Experts contradicted themselves with respect to whether Mr Ongwen suffered from amnesia and hence dissociative identity disorder, the Trial Chamber relied on the Brief Medical Report of February 2016, which found that Mr Ongwen did not have amnesia and the Defence Experts' Second Report (produced in 2018) in which disorders associated with amnesia were diagnosed. The existence of a contradiction between these two reports on the question of whether Mr Ongwen had amnesia during the charged period is unassailable. By arguing that the Defence Experts' Second Report contained numerous examples of Mr Ongwen suffering from memory loss during the charged period, the Defence merely emphasises the inconsistency between the initial observation of the Defence Experts in 2016 (that Mr Ongwen had no amnesia) and their subsequent observations in 2018 (that Mr Ongwen had marked amnesia).[2661] The Appeals Chamber considers that it was

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[2657] Conviction Decision, para. 2540, *referring to* the Brief Medical Report of February 2016, UGA-D26-0015-0154, at 0155-0156.
[2658] Conviction Decision, para. 2540, *referring to* a Book extract, UGA-OTP-0287-0032, at 0033; P-0446's Report, UGA-OTP-0280-0786, at 0802 ("The key features of a Dissociative Disorder are that the individual experiences a marked disruption of identity and recurrent gaps in their memory"); Rebuttal Report, UGA-OTP-0287-0072, at 0083 ("According to the DSM 5 (APA, 2013), the diagnostic criteria [for Dissociative Identity Disorder] are the following A) Two or more distinct identities or personality states are present, […]. B) Amnesia that is not restricted to traumatic events but must occur as gaps in the recall of everyday events, important personal information and/or traumatic events".).
[2659] Conviction Decision, para. 2540.
[2660] Appeal Brief, para. 365, *referring to* Defence Experts' Second Report, UGA-D26-0015-0948 at 0971.
[2661] Appeal Brief, para. 365.

reasonable for the Trial Chamber to take note of this inconsistency, which was unexplained by the Defence or its experts, when assessing the reliability of the Defence Experts' conclusions.

1201. The Appeals Chamber finds that the Defence shows no error in the Trial Chamber's consideration of the inconsistency in the initial and later diagnosis of the Defence Experts with respect to whether Mr Ongwen suffered from amnesia and hence dissociative identity disorder. It was therefore reasonable for the Trial Chamber to take this into account when assessing the reliability of the Defence Experts evidence.

(f) Inconsistency in the clinical picture of a person suffering from a severe mental disorder and Mr Ongwen's presentation to the Defence Experts

1202. The Defence argues that its "incomprehensible" and outside of "the parameters of evidentiary value" for the Trial 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".[2662]

1203. The Prosecutor submits that the Trial Chamber "merely noted this opinion" and "neither expressly endorsed nor assigned any weight to it".[2663] In his view, the Defence's criticism is "exaggerated and misplaced" since "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".[2664]

1204. The Trial Chamber noted P-0447's opinion that the "clinical picture" of a person suffering from a severe mental disorder was contradicted by the Defence Experts' statement that Mr Ongwen "appeared for the clinical interview 'dressed smartly', 'in a happy mood' and was able to follow the interview for three hours".[2665]

1205. The Appeals Chamber is not persuaded by the Defence's argument that the Trial Chamber erred in giving credibility to P-0447's observation concerning Mr Ongwen's

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[2662] Appeal Brief, para. 367.
[2663] Prosecutor's Response, para. 227.
[2664] Prosecutor's Response, para. 227.
[2665] Conviction Decision, para. 2541.

"outward appearances".[2666] The Appeals Chamber notes that in the context of conducting a medical state or status examination of Mr Ongwen, the Defence Experts explained that psychiatrists "often ask the client a series of questions, and observe their behaviour".[2667] The Defence's experts further stated that "the medical state exam is made up of a number of sections", one of which is called "appearance and behaviour".[2668] Under this section, in the Brief Medical Report of 2016, the Defence Experts observed, *inter alia*, that

> [REDACTED].[2669]

1206. Further still, in the Defence Experts' Second Report, in the part entitled "Medical Status Examination" and under the section called "Appearance and behaviour", they noted that

> [REDACTED].[2670]

1207. As demonstrated by the reports of the Defence Experts, the Appeals Chamber notes that observations concerning a person's "outward appearance" is one of several factors relevant to assessing that person's mental state. Other factors include, for example, a person's speech,[2671] and his or her mood.[2672] P-0447's contrary opinion of the Defence Experts' observation was therefore relevant from a clinical perspective which, in the Appeals Chamber's view, the Trial Chamber reasonably noted.

1208. The Appeals Chamber finds that the Defence shows no error in the inconsistency identified by the Trial Chamber with respect to the Defence Experts' statement concerning Mr Ongwen's outward appearance and the clinical picture of a person suffering from a severe mental disorder. The argument is therefore rejected.

[2666] Appeal Brief, para. 367.
[2667] Brief Medical Report of February 2016, UGA- D26- 0015-0154, at 0155.
[2668] Brief Medical Report of February 2016, UGA- D26- 0015-0154, at 0155.
[2669] Brief Medical Report of February 2016, UGA- D26- 0015-0154, at 0155.
[2670] Defence Experts' Second Report, UGA-D26-0015-0948, at 0961.
[2671] Brief Medical Report of February 2016, UGA- D26- 0015-0154, at 0155.
[2672] Brief Medical Report of February 2016, UGA- D26- 0015-0154, at 0155; Defence Experts' Second Report, UGA-D26-0015-0948, at 0962.

(g) Inconsistency between the diagnosis of dissociative identity disorder and the absence of indicia of discontinuity

1209. The Defence challenges the Trial Chamber's finding concerning the absence of any indicia of discontinuity in the evidence to indicate the existence of a dissociative identity disorder.[2673] The Defence submits that the Defence Experts presented "significant evidence of two Dominics – A and B", however, the Trial Chamber relied on its findings in relation to corroborative evidence and the positions of P-0446 and P-0447 – "that if [Mr Ongwen] were mentally ill, someone around him would have observed and identified symptoms".[2674]

1210. The Prosecutor submits that it is "insufficient simply to claim without further elaboration that the Chamber should have preferred one piece of evidence to another".[2675] In his view, the Defence "does not even attempt to show that the Chamber's approach was unreasonable, or that it materially affected the decision".[2676]

1211. The Trial Chamber noted that D-0042 testified that lay persons around Mr Ongwen might not have observed any sign of dissociative identity disorder because of his ability to "cope" and thus disguise one of the two identities.[2677] The Trial Chamber further noted that according to P-0447's observation, based on scientific literature, "the ability to initiate and end dissociative states is one of the core features to differentiate between health and pathological states".[2678] In addition, the Trial Chamber noted that the first diagnostic criterion under the DSM-5, for this particular disorder, "must 'involve 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'".[2679] The Trial Chamber considered that none of the evidence obtained during the trial was consistent with indicia of discontinuity to indicate the existence of a dissociative identity disorder.[2680]

[2673] Appeal Brief, para. 368.
[2674] Appeal Brief, para. 368.
[2675] Prosecutor's Response, para. 229.
[2676] Prosecutor's Response, para. 229.
[2677] Conviction Decision, para. 2542.
[2678] Conviction Decision, para. 2542, *referring to* Rebuttal Report, UGA-OTP-0287-0072, at 0084.
[2679] Conviction Decision, para. 2542, *referring to* a Book extract, UGA-OTP-0287-0032, at 0033; Rebuttal Report, UGA-OTP-0287-0072, at 0083.
[2680] Conviction Decision, para. 2542.

1212. The Appeals Chamber understands the Defence to argue that the Trial Chamber erred in rejecting D-0042's explanation for why persons around Mr Ongwen would not have observed any signs of dissociative identity disorder because, in its view, it presented "significant evidence" of Mr Ongwen's two identities.[2681] For the reasons that follow, the Appeals Chamber is not persuaded by this argument.

1213. The Appeals Chamber notes that the Trial Chamber found D-0042's explanation that Mr Ongwen was able to "cope" and "disguise" his two identities from lay persons to be unpersuasive because, according to scientific literature, one of the core characteristics of dissociative states is the ability to "initiate" and "end" a dissociative state and the need for "a marked discontinuity in sense of self and sense of agency", accompanied by consequent effects on a person's behaviour.[2682] Importantly, the Trial Chamber found that none of the witnesses who testified during the trial, and, who were in a position to observe any symptoms of mental disease in Mr Ongwen, noticed any such signs of discontinuity related to dissociative identity disorder.[2683]

1214. Furthermore, the Appeals Chamber observes that the evidence relied upon by the Defence to demonstrate that Mr Ongwen suffered from dissociative identity disorder is based only on Mr Ongwen's self-reporting and is not corroborated by any other evidence heard at trial. In such circumstances, the Appeals Chamber considers that it was reasonable for the Trial Chamber to note the inconsistency between the diagnosis of dissociative identity disorder and the absence of *indicia* of discontinuity from the evidence obtained during the trial. Consequently, the Appeals Chamber finds that the Defence shows no error in the Trial Chamber's finding and the Defence's argument in this regard is therefore rejected.

(v) Alleged error in finding that the Defence Experts failed to take sufficient account of other available sources

(a) Background

1215. The Trial Chamber found that the Defence Experts "failed to take into account other sources of information about [Mr Ongwen] which were readily available to them",

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[2681] Appeal Brief, para. 368.
[2682] Conviction Decision, para. 2542.
[2683] Conviction Decision, para. 2542.

and considered this to be "an unjustifiable and fundamental failure that in itself invalidates the[ir] conclusions".[2684] While the Trial Chamber underlined the importance of conducting a clinical interview when diagnosing a mental illness, it nevertheless found that this "does not make any further additional information superfluous".[2685] In this regard, the Trial Chamber identified various specific shortcomings in the Defence Experts' methodology and conclusions.

1216. First, the Trial Chamber rejected D-0041's claim that the Defence Experts had sought corroborative sources to verify the account given by Mr Ongwen especially concerning his attempts at suicide on eight occasions, his experience of two different personalities, or the words that Mr Ongwen had allegedly uttered to P-0446 during an incident in the courtroom.[2686] Second, the Trial Chamber found that D-0041 and D-0042's failure to engage seriously with the clinical notes of the psychiatrist of the ICC-DC was "not justifiable".[2687] Third, the Trial Chamber found that the Defence Experts failed to "consider, or seek to consider, for their examination the evidence obtained during the trial".[2688] Fourth, the Trial Chamber found that even though the Defence Experts conducted four "collateral interviews" with persons who were apparently close to Mr Ongwen while he was in the LRA, this was not determinative. In any event, the Trial Chamber questioned the corroborative character of the information obtained from these interviews.[2689] Lastly, the Trial Chamber recalled that the other sources of reliable information that the Defence Experts' failed to address "overwhelmingly establish[ed] a picture incompatible with the conclusion that [Mr Ongwen] suffered from a mental disease […] at any time relevant to the charges".[2690] In this regard, the Defence Experts claimed that Mr Ongwen might have masked or hidden his symptoms, which the Trial Chamber found, based on the evidence, to be "impossible in practice and purely theoretical".[2691]

[2684] Conviction Decision, para. 2545.
[2685] Conviction Decision, para. 2547.
[2686] Conviction Decision, para. 2549. [REDACTED]. *See* UGA-D26-0015-0948, at 0953.
[2687] Conviction Decision, para. 2550.
[2688] Conviction Decision, para. 2551.
[2689] Conviction Decision, para. 2553.
[2690] Conviction Decision, para. 2554.
[2691] Conviction Decision, para. 2556.

1217. The Defence argues in relation to the above findings that the Conviction Decision contains "factual misrepresentations" concerning the extent to which the Defence Experts: (i) met with professionals treating Mr Ongwen at the ICC-DC and reviewed their notes ;[2692] (ii) interviewed collateral sources that corroborated Mr Ongwen's narrative;[2693] and (iii) accepted that lay persons who interacted with Mr Ongwen during the relevant period would have noted symptoms of a mental disorder.[2694] These arguments will be addressed in turn.

(b) The Defence Experts' consideration of the clinical notes of the ICC-DC psychiatrist

1218. The Defence argues that the Trial Chamber's conclusion that the Defence Experts did not engage seriously with the clinical notes of the psychiatrist of the ICC-DC "factually misrepresents the record".[2695] In its view, the Defence Experts did review the clinical notes that were given to them and they "continued to try to obtain materials, but to no avail".[2696] The Defence asserts that the Trial 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".[2697]

1219. The Prosecutor argues that there can be no doubt that the Defence Experts had access to the clinical notes to which the Trial Chamber referred, as evidenced by their statement in the Defence Experts First Report.[2698] The Prosecutor submits that in the face of discrepancies between the observations of Mr Ongwen's mental state recorded in the clinical notes and the opinion expressed by the Defence Experts in their report, "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".[2699]

[2692] Appeal Brief, paras 373-376.
[2693] Appeal Brief, paras 377-380.
[2694] Appeal Brief, paras 381-392.
[2695] Appeal Brief, para. 376.
[2696] Appeal Brief, para. 376.
[2697] Appeal Brief, para. 376.
[2698] Prosecutor's Response, para. 238.
[2699] Prosecutor's Response, para. 240.

1220. The Trial Chamber found, on the basis of the Defence Experts' First Report, that the Defence Experts were "informed of the content of the clinical notes" of the ICC-DC psychiatrist and that the information in those reports was "'to a large extent similar' to the information they had".[2700] The Trial Chamber noted, however, that the Defence Experts First Report "does not include any further discussion of the information contained in the clinical notes".[2701] Moreover, the Trial Chamber found that when D-0041 was confronted with extracts from the clinical notes, which appeared to contradict the diagnoses of the Defence Experts, his explanation for this was "unpersuasive" and a "deviation from what seemed to be the initial position on the clinical notes in the [Defence Experts First Report]".[2702] On this basis, the Trial Chamber found D-0041 and D-0042's failure to "engage in a detailed discussion of the content of the clinical notes [was] not justifiable".[2703]

1221. The Appeals Chamber notes that upon Mr Ongwen's arrival at the ICC-DC he was initially treated by a psychiatrist, REDACTED] between 2015-2016.[2704] [REDACTED] prepared clinical notes of her sessions with Mr Ongwen, in which she noted that his [REDACTED].[2705] [REDACTED].[2706]

1222. In this regard, the Defence Experts' First Report indicated that

> On 3rd and 4th November we had the opportunity to have the clinical notes of the Psychiatrist and Clinical Psychologist translated to us with the consent of Mr Ongwen in order for us to get collateral information about Mr Ongwen's clinical situation. Our impression is that the information translated to us was to a large extent similar to ours. One such agreement relevant to this report is the documentation by the mental health professionals at the ICC DC was Mr Ongwen's experience of being [REDACTED].[2707]

1223. The Appeals Chamber considers that it is clear that the Defence Experts had access to the clinical notes referred to by the Trial Chamber. Furthermore, as correctly noted by the Trial Chamber, the Defence Experts appear to agree, without any further

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[2700] Conviction Decision, para. 2550.
[2701] Conviction Decision, para. 2550.
[2702] Conviction Decision, para. 2550.
[2703] Conviction Decision, para. 2550.
[2704] *See* UGA-D26-0015-0100; UGA-D26-0015-0106. *See also* Prosecutor's Closing Brief, para. 390.
[2705] UGA-D26-0015-0106, at 0107.
[2706] UGA-D26-0015-0100, at 0100.
[2707] Defence Experts' First Report, UGA-D26-0015-0004, at 0005.

discussion, with the content of the clinical notes that indicated, *inter alia*, that Mr Ongwen suffered from [REDACTED].[2708] However, when questioned about the apparent contradictions in the diagnosis of the ICC-DC psychiatrist and that of the Defence Experts, D-0041 suggested that "clinical notes are written differently from notes that are written for other purposes" and "that they record the patient's state at a given moment, without 'point[ing] too much towards how well the patient was functioning per se'".[2709]

1224. The Appeals Chamber finds no error in the Trial Chamber's conclusion that D- 0041's explanation was "unpersuasive" and a "deviation from what seemed to be the initial position on the clinical notes in the [Defence Experts First Report]".[2710] In the Appeals Chamber's view, it was reasonable for the Trial Chamber to expect the Defence Experts to engage with the apparent contradictions in the diagnoses. The Defence's claim to "continue to try to obtain materials, but to no avail" is unclear as to what "other material" is being referred to and what, if any, impact such material would have had on the Trial Chamber's finding that the Defence Experts' "[failure] […] to engage in a detailed discussion of the content of the clinical notes is not justifiable."[2711] The Defence's argument, thus, fails to demonstrate an error in the Trial Chamber's representation of the facts and is therefore rejected.

(c) The Defence Experts' consideration of the available collateral sources relevant to their assessment

1225. The Defence argues that the collateral sources interviewed by the Defence Experts included one of Mr Ongwen's wives, one of Mr Kony's wives (who was a relative of Mr Ongwen), a senior LRA commander and a subordinate of Mr Ongwen.[2712] It argues that these sources provided "significant" corroborative information concerning

> [T]he rituals and indoctrination and brainwashing of new abductees; the gruesome punishments that abductees were forced to mete out to those who tried to escape but were caught; the use of torture within the LRA; the supernatural

[2708] UGA-D26-0015-0106, at 0107; UGA-D26-0015-0100, at 0100.
[2709] Conviction Decision, para. 2550, *referring to* D-0041: T-249, p. 12, lines 15-24, p. 57, lines 5-6, p. 58, lines 9-10.
[2710] Conviction Decision, para. 2550.
[2711] Appeal Brief, para. 376; Conviction Decision, para. 2550.
[2712] Appeal Brief, para. 377.

> powers and brutality of Kony; [Mr Ongwen's] personality as someone who liked to help his colleagues; observations of [Mr Ongwen's] suicidal behaviour and dissociative episodes; [Mr Ongwen's] attempts to escape the LRA and the intense scrutiny from Kony's intelligence network; and their perceptions of what this case against [Mr Ongwen] was about.[2713]

1226. In addition, the Defence submits that it presented evidence of Mr Joe Kakanyero, who described the harsh measures implemented in the LRA to discourage escape and who corroborated the evidence of the crimes committed by the LRA and the "traumatic events experienced by [Mr Ongwen] when he was abducted".[2714] In the Defence's view, it presented corroborative evidence, but the conclusions of this evidence contradicted the Conviction Decision's fundamental conclusions concerning Mr Ongwen's abduction.[2715] In its view, these conclusions included the finding "that [Mr Ongwen's] abduction was not relevant to the charged period, and that what every abductee experienced – the indoctrination, horrors, punishments and brainwashing – did not apply to [Mr Ongwen]".[2716]

1227. The Prosecutor contends that the Defence's arguments "repeat the same misconception identified in the [Conviction Decision] and shows no error in the Chamber's reasoning".[2717] He argues that, regardless of the content of the interviews, "they were simply not sufficient to address the issues raised by the Defence Experts' purported diagnosis of [Mr] Ongwen's mental health condition", and "by only taking into account a very limited part of the available evidence, might even have been inappropriately selective".[2718] In addition, the Prosecutor submits that the evidence being "re-emphasised" by Mr Ongwen "did not actually corroborate the Defence experts' conclusions", since it was more consistent with evidence militating against the likelihood that Mr Ongwen suffered from a mental disease at the times material to the charges.[2719]

[2713] Appeal Brief, para. 378, *referring to* Defence Experts First Report, UGA-D-26-0015-0004, at 0020-0023.
[2714] Appeal Brief, para. 379.
[2715] Appeal Brief, para. 380.
[2716] Appeal Brief, para. 380.
[2717] Prosecutor's Response, para. 235.
[2718] Prosecutor's Response, para. 235.
[2719] Prosecutor's Response, para. 236.

1228. The Trial Chamber noted that prior to the preparation of the Defence Experts First Report, D-0041 and D-0042 "conducted four 'collateral interviews' with persons identified by the Defence as having been close to [Mr Ongwen] while he was in the LRA".[2720] While the Trial Chamber questioned the "corroborative character of this information", it found that these interviews were "not determinative, as the issue at hand, as explained, is in their failure to take into account other sources of information and evidence about [Mr Ongwen] which were readily available to them".[2721]

1229. At the outset, the Appeals Chamber notes, as indicated by the Prosecutor, that the Defence, indeed, repeats its submissions made before the Trial Chamber concerning the four collateral sources that were interviewed without showing any error in the Trial Chamber's representation of the facts or conclusions.[2722] The Trial Chamber addressed these arguments by stating that the fact that these interviews were conducted is "not determinative", as the issue at hand was the Defence Experts' "failure to take into account other sources of information and evidence about [Mr Ongwen] which were readily available to them".[2723]

1230. In particular, the Trial Chamber found that the Defence Experts' did not take into account all the available information concerning Mr Ongwen's narrative of eight attempts at suicide.[2724] The Trial Chamber noted that this narrative was "based exclusively" on what Mr Ongwen said to them and was not verified against "the evidence of witnesses who interacted with [Mr Ongwen] at the time, and could have observed pertinent facts".[2725]

1231. In addition, the Trial Chamber noted that the Defence Experts "explicitly confirmed that they did not look for any sources of corroboration for [Mr Ongwen's] own reports of how his colleagues interpreted his behaviour related to his experience of two different personalities".[2726] Furthermore, with respect to certain words allegedly said to P-0446 in the courtroom, the Appeals Chamber notes that in the Defence

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[2720] Conviction Decision, para. 2553.
[2721] Conviction Decision, para. 2553.
[2722] *See* Appeal Brief, para. 378, *referring to* Defence Closing Brief, paras 618-621.
[2723] Conviction Decision, para. 2553.
[2724] Conviction Decision, para. 2549.
[2725] Conviction Decision, para. 2549.
[2726] Conviction Decision, para. 2549.

Experts' Second Report, [REDACTED].[2727] In this regard, the Trial Chamber found D-0041's explanation for not considering other sources of available information to corroborate Mr Ongwen's experience – because he had not obtained access to the transcript of the hearing – to be unpersuasive.[2728]

1232. The Appeals Chamber considers that, regardless of the information elicited from the four interviews conducted by the Defence Experts, it was not sufficient on its own, to address the issues raised by the Defence Experts' assessment of Mr Ongwen's mental health. In the Appeals Chamber's view, it was incumbent upon the Defence Experts to consider other sources of information about Mr Ongwen, as described by the Trial Chamber. In this regard, the Appeals Chamber notes the AAPL Guidelines which recommend that

> Psychiatrists practicing in a forensic role enhance the honesty and objectivity of their work by basing their forensic opinions, forensic reports and forensic testimony on all available data. They communicate the honesty of their work, efforts to attain objectivity, and the soundness of their clinical opinion, by distinguishing, to the extent possible, between verified and unverified information as well as among clinical "facts," "inferences," and "impressions".[2729]

1233. The Appeals Chamber considers that by only taking into account a selection of the available evidence for their conclusions, the Defence Experts undermined the reliability of their reports. Consequently, the Appeals Chamber finds that the Defence fails to show any error in the Trial Chamber's finding that the Defence Experts "failed to take into account other sources of information and evidence […] which were readily available to them".[2730]

1234. Moreover, the Defence fails to show any error in the Trial Chamber's finding that the evidence cited may not actually corroborate the Defence Experts' conclusions.[2731] The Trial Chamber noted that in the Defence Expert's First Report, reference is made to the collateral interviews for the description of Mr Ongwen as a "diligent fearless fighter, and also kind, likable and being a good administrator, and someone who 'liked

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[2727] *See* UGA-D26-0015-0948, at 0953.
[2728] Conviction Decision, para. 2549.
[2729] *See* AAPL Guidelines, UGA-OTP-0287-0015, at 0017.
[2730] Conviction Decision, para. 2553.
[2731] Conviction Decision, para. 2553.

to counsel those in trouble and […] was not a vicious person toward his colleagues'".[2732] The Appeals Chamber considers that it was reasonable for the Trial Chamber to question the corroborative value of this evidence, given that it may be interpreted as being more consistent with the evidence discounting the possibility that Mr Ongwen suffered from a mental disease or defect during the relevant period.

1235. Lastly, with respect to the argument that the Defence presented corroborative evidence which contradicted the Conviction Decision's fundamental conclusions,[2733] concerning the relevance of Mr Ongwen's abduction to the charged period and the harsh experiences of abductees in the LRA, the Appeals Chamber notes that this argument does not show any error in the Trial Chamber's finding that the Defence Experts themselves failed to take into account other sources of information and evidence.

1236. In sum, the Defence's arguments fail to demonstrate an error in the Trial Chamber's representation of the facts when it found that the fact that these collateral interviews were conducted by the Defence Experts' were not determinative, as the issue concerned "their failure to take into account other sources of information and evidence […] which were readily available to them".[2734] Therefore the arguments are rejected.

(d) The Defence Experts' consideration of the ability of lay persons to observe symptoms of mental disorder

1237. The Defence claims that "there is reasonable doubt that lay people can observe symptoms of mental illness".[2735] In its view, the Defence Experts' evidence showed that even if persons who interacted closely with Mr Ongwen noticed "some kind of traumatic event", that person would perceive his behaviour as "spirit possession and consider [Mr Ongwen] to be acting normally" rather than exhibiting a symptom of mental illness.[2736] The Defence contends that the Trial Chamber did not consider "the cultural aspects of a person's observations", since it was of the view that whether witnesses regarded symptoms of mental disorders as spirit possession was

[2732] Conviction Decision, para. 2553, *referring to* Defence Experts' First Report, UGA-D26-0015-0004, at 0010, 0022.
[2733] *See* paragraph 1226 above.
[2734] Conviction Decision, para. 2553.
[2735] Appeal Brief, para. 391. *See also* para. 381.
[2736] Appeal Brief, paras 382-383.

immaterial.[2737] The Defence asserts that the Trial Chamber's "inference, based on circumstantial evidence, that a person would see symptoms and think 'mental disorder' is clearly not the only reasonable inference from the evidence".[2738] Consequently, the Defence argues that the Trial Chamber erred in rejecting the Defence Experts' evidence.[2739]

1238. The Prosecutor argues that the Trial Chamber's finding, that lay persons interacting with Mr Ongwen at the relevant time would have noticed indications that he was suffering from a mental disorder, was not based exclusively on the evidence of the Defence Experts, but also on P-0446 and P-0447 whose evidence the Trial Chamber found to be reliable.[2740] Furthermore, the Prosecutor contends that the Defence confuses "the ability of observers to *understand the cause* of unusual behaviour with their ability simply to recognise the behaviour itself".[2741] In his view, the Defence shows no error in the Trial Chamber's reasoning by insisting that "people who interacted with [Mr Ongwen] 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".[2742]

1239. Victims Group 1 submit that the Trial Chamber's assessment of the lay witnesses' testimony was based on a "sound legal analysis" of evidence concerning Mr Ongwen's personality and other evidence on the record.[2743] They submit that based on this evidence none of the individuals observed Mr Ongwen exhibiting "a conduct or a symptom of a mental disease or defect".[2744] In any event, Victims Group 1 aver that for such an identification to be made, one does not have to be a mental health expert.[2745]

1240. Victims Group 2 submit that the Trial Chamber's reliance on lay witnesses' testimony as corroborating evidence was not an error.[2746] Furthermore, Victims

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[2737] Appeal Brief, para. 384.
[2738] Appeal Brief, para. 386.
[2739] Appeal Brief, para. 392.
[2740] Prosecutor's Response, para. 242.
[2741] Prosecutor's Response, para. 243 (emphasis in original).
[2742] Prosecutor's Response, para. 244.
[2743] Victims Group 1's Observations, para. 144.
[2744] Victims Group 1's Observations, para. 144.
[2745] Victims Group 1's Observations, para. 144.
[2746] Victims Group 2's Observations, para. 98.

Group 2 aver that the Defence's argument is disingenuous given that its own experts relied on the observations of lay persons in reaching their conclusion regarding Mr Ongwen's mental health.[2747] Finally, Victims Group 2 submit that D-0041 and D-0042 agreed that although lay persons cannot make a mental diagnosis, they would have nevertheless observed some symptoms of mental disorders.[2748]

1241. For its determination on whether Mr Ongwen suffered from any mental disorders during the period of the charges, the Trial Chamber considered 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".[2749] In this regard, the Trial Chamber found that it was "absolutely necessary" to examine the evidence presented during the trial for indications of any symptoms that may have been observed in Mr Ongwen's behaviour by witnesses who were in a position to do so.[2750] The Trial Chamber based this conclusion on the evidence of P-0446 and P-0447, as well as the Defence Experts who "agreed that albeit lay persons could not make a diagnosis, they would have noted at least some symptoms of the mental disorders in question".[2751]

1242. The Trial Chamber explained that it was not looking at this evidence "for a diagnoses of mental disease or defect".[2752] Rather, it was "assessing whether any descriptions in particular of the conduct of [Mr Ongwen] correspond to the symptoms of mental disorders".[2753] Furthermore, the Trial Chamber stated that "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".[2754]

1243. In declining to rely on the Defence Experts' evidence and conclusions concerning Mr Ongwen's mental health, the Trial Chamber found that they had failed to consider, for their examination, the evidence obtained during the trial from persons who

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[2747] Victims Group 2's Observations, paras 99-101.
[2748] Victims Group 2's Observations, para. 102.
[2749] Conviction Decision, para. 2497.
[2750] Conviction Decision, para. 2505.
[2751] Conviction Decision, paras 2498-2499, 2500, *referring to* D-0041: T-249, p. 91, line 9 to p. 92, line 22; D-0042: T-251, p. 52, lines 2-16.
[2752] Conviction Decision, para. 2501.
[2753] Conviction Decision, para. 2501.
[2754] Conviction Decision, para. 2501.

interacted with Mr Ongwen at the material times, "each within their specific context", and which the Trial Chamber found had "overwhelmingly establish[ed] a picture incompatible with the conclusion that [Mr Ongwen] suffered from a mental disease or defect at any time relevant to the charges".[2755]

1244. The Appeals Chamber notes that the Defence's challenge under this sub-ground of appeal is limited to the Trial Chamber's conclusion that the Defence Experts agreed with the proposition that the individuals who closely interacted with Mr Ongwen could have perceived symptoms of a mental disorder.[2756] In the Defence's view, the Defence Experts did not agree that lay persons could have observed symptoms of a mental disorder, rather, they explained that persons observing Mr Ongwen would have interpreted his behaviour as "spirit possession", which would have been considered "normal" given the specific cultural context.[2757]

1245. The Appeals Chamber considers the Defence's arguments to be misplaced. First, the Appeals Chamber notes that the Defence Experts agreed that even though lay persons, closely interacting with Mr Ongwen at the material time, are not qualified to diagnose a mental disorder, they would have noticed some behaviour of Mr Ongwen that was abnormal. D-0042 testified in relation to the presence of symptoms of PTSD, that they would have been noticeable to a lay person, and because they would have been viewed as spirit possession, Mr Ongwen would only become normal after a ritual was conducted.[2758] Likewise, D-0041 agreed that lay persons close to an individual suffering from a mental disease would notice if that individual, for example, cannot sleep or do his or her job.[2759] In light of these testimonies, the Appeals Chamber finds that it was

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[2755] Conviction Decision, para. 2554. *See also* paras 2500, 2545, 2548, 2549, 2551.
[2756] Appeal Brief, paras 381, 386, 391.
[2757] Appeal Brief, paras 382-384.
[2758] D-0042: T-251, p. 52, lines 2-16 ("Now, Professor, I accept that Mr Ongwen accepts criterion A. I accept that he has had exposure to actual or threatened death, serious injury, or possibly even sexual violence. I want to go straight to B, the presence after the traumatic events of various features. And I'm going to take the first three together, recurrent involuntary and intrusive memories, recurrent distressing dreams, dissociative reactions in which the individual feels or acts as if the traumatic events were recurring. Again, if this was happening to him on a regular and serious basis, you would expect the people around him to notice, wouldn't you, the people who live in his household, the people who sleep in his bed?
A. I would expect they would notice. But as I explained before, they would regard what they notice as the consequences of his involvement in – in the bush or bush activities. They would interpret this as spirit possession, signs of spirit possession, and they would expect that if only rituals could be conducted, Mr Ongwen would be normal. But otherwise, I cannot say that they did not notice").
[2759] D-0041: T-249, p. 92, lines 13-22.

reasonable for the Trial Chamber to recount the Defence Experts' testimony as indicating that they agreed that symptoms of the mental disorders in question would have been noticeable to the lay witnesses.

1246. Second, the Appeals Chamber recalls that the Trial Chamber explained that in order to assess whether there were any indications that Mr Ongwen suffered from a mental illness during the period of the charges, it was necessary to examine the evidence presented during the trial.[2760] The Trial Chamber further explained that while the witnesses in the case were not qualified to diagnose a mental disorder, the purpose of the exercise was to assess "whether any descriptions in particular of the conduct of [Mr Ongwen] correspond to symptoms of mental disorders".[2761] Contrary to the Defence's argument, the Trial Chamber did not infer that "a person would see symptoms and think 'mental disorder'".[2762] Rather, it considered the testimony of lay persons who closely interacted with Mr Ongwen, for the sole purpose of determining whether they recognised any unusual behaviour that corresponded with symptoms of a mental disorder. The question of whether lay persons would have understood the cause underlying any unusual behaviour to be attributable to "spirit possession" or a mental disorder is, as the Trial Chamber correctly stated, "immaterial".[2763] What was important was whether these lay persons recognised and reported any unusual behaviour that would have assisted the Trial Chamber in assessing whether Mr Ongwen suffered from a mental disease at the material time.[2764] In this regard, the Appeals Chamber notes that the Trial Chamber found that "no such testimony was given by witnesses who were in [a] position to observe [Mr Ongwen's] behaviour at the time relevant for the charges".[2765] Consequently, the arguments are rejected.

1247. The Appeals Chamber finds that the Defence shows no error in the Trial Chamber's conclusion that lay persons who interacted with Mr Ongwen would have noted symptoms of mental disorders and that the Defence Experts' failure to address

[2760] Conviction Decision, para. 2505.
[2761] Conviction Decision, para. 2501.
[2762] Appeal Brief, para. 386.
[2763] Conviction Decision, para. 2501.
[2764] Conviction Decision, para. 2497.
[2765] Conviction Decision, para. 2499.

the evidence presented at trial that corroborated this conclusion undermined the reliability of their evidence.[2766]

(vi) Alleged error in finding that the Defence Expert's approach to malingering affected the reliability of their evidence

(a) Summary of the submissions

1248. The Defence argues that, assuming Mr Ongwen was found to be malingering, the implication of the Trial Chamber's conclusion is that Mr Ongwen would have had to have "faked his illness for almost 26 years [which] is not believable" given the absence of "evidence that [Mr Ongwen] was exhibiting signs of mental distress or illness".[2767] Moreover, the Defence challenges the Trial Chamber's rejection of the Defence Experts' opinion on malingering, since in its view: (i) the Defence Experts were the only ones who "spent many hours" interviewing Mr Ongwen;[2768] (ii) the lack of unanimity among the experts implies "reasonable doubt" as to whether Mr Ongwen was malingering or not;[2769] (iii) Mr Ongwen had no motivation to malinger;[2770] and (iv) the Defence Experts had their own interest in addressing malingering properly.[2771]

1249. The Prosecutor submits that, as Mr Ongwen had no reason to believe, while he was in the LRA, that he would eventually be arrested and tried, "he did not have any reason to malinger at that time".[2772] The Prosecutor notes that, in any event, according to P-0446, "the danger of malingering principally arises in the forensic context after a person has been arrested – especially where diagnosing the existence of any mental disease or defect affecting their past conduct may depend to a great extent on self-reporting".[2773] In addition, the Prosecutor avers that contrary to the Defence's submission, the prosecution is not "seeking to have it both ways".[2774] In his view, the Defence's "position appears to be that the Defence experts cannot be faulted in their

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[2766] Conviction Decision, paras 2500, 2551.
[2767] Appeal Brief, paras 396-397.
[2768] Appeal Brief, para. 401.
[2769] Appeal Brief, para. 402.
[2770] Appeal Brief, paras 403-405.
[2771] Appeal Brief, paras 406-407.
[2772] Prosecutor's Response, para. 249.
[2773] Prosecutor's Response, para. 249, *referring to* Conviction Decision, para. 2559 *citing* T-163, p. 60, lines 10-24; Conviction Decision, para. 2567.
[2774] Prosecutor's Response, para. 250, *referring to* Appeal Brief, para. 398.

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 [Mr Ongwen] was not malingering and again uphold their hypothesis".[2775]

1250. Finally, the Prosecutor argues that "[g]iven the variety and nature of the evidence on the record", the Trial Chamber was entitled to rely on the forensic experts that it deemed reliable despite the fact that they may not have conducted clinical interviews with Mr Ongwen.[2776] Whether Mr Ongwen was actually thought to be malingering is beside the point, as the reason for the Trial Chamber's decision not to rely on the Defence Experts "were the clear and unexplained deficiencies" in their approach.[2777] Furthermore, whether Mr Ongwen had a motive to malinger is irrelevant since the Trial Chamber did not need to determine this, but rather to determine whether he suffered from a mental disease at the material times.[2778] The Prosecutor adds that the "Defence experts' interest in maintaining their professional reputation cannot, in itself, mean that their evidence must be treated as reliable".[2779]

1251. Victims Group 1 observe that the Trial Chamber's findings on the Defence Experts' approach to the issue of malingering was justified "in the face of more reliable evidence of the Prosecution experts and other evidence received in the record of the case".[2780]

(b) Relevant parts of the Conviction Decision

1252. The Trial Chamber recalled that the experts who gave evidence "generally agreed that malingering, also referred to as dissimulation or 'faking bad', is a known risk in mental health assessments".[2781] The Trial Chamber noted that P-0446 stated that "repeated contact with mental health experts can place a person in a situation where they 'learn over a period of time what responses are likely to result in secondary gain

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[2775] Prosecutor's Response, para. 250.
[2776] Prosecutor's Response, para. 251 (first bullet point).
[2777] Prosecutor's Response, para. 251 (second bullet point).
[2778] Prosecutor's Response, para. 251 (third bullet point).
[2779] Prosecutor's Response, para. 251 (fourth bullet point).
[2780] Victims Group 1's Observations, para. 135.
[2781] Conviction Decision, para. 2559.

for them and what responses are perhaps less desirable'".[2782] In addition, the Trial Chamber noted that P-0447 testified that "standardised psychometric assessment tools and the accounts of third parties with direct contact with the person can be used to control against malingering, and that there is a duty on forensic experts, according to commonly accepted professional standards, to use such methods".[2783]

1253. In assessing the evidence of the Defence Experts' on the question of malingering, the Trial Chamber noted that they excluded the possibility because they considered it "unlikely" – in particular because they did not see how Mr Ongwen might gain from malingering, and because he expressed the wish to get better when usually "people who are malingering don't want to get better".[2784] The Trial Chamber found this particular statement by D-0041 to represent "a serious failure to grasp the problem appropriately".[2785] In addition, the Trial Chamber considered that the methods actually used by the Defence Experts' to assess possible malingering, namely, relying on their own experience and the conduct of a clinical interview, were inadequate in the circumstances.[2786] On the basis of the Defence Experts' reports and their testimonies, the Trial Chamber concluded that the manner "in which they dismissed malingering as a possible explanation for the presence of symptoms of mental disorders apparent from the self-report of [Mr Ongwen] [was] unconvincing" and "a major factor militating against reliance on their reports".[2787]

(c) Determination by the Appeals Chamber

1254. At the outset, the Appeals Chamber notes the Defence's argument that the Trial Chamber incorrectly stated that "the experts who gave evidence 'generally agreed that malingering, […] is a known risk in mental health assessment'" given that P-0445 and Professor de Jong did not discuss this issue.[2788] The Appeals Chamber dismisses this argument for lack of substantiation.

[2782] Conviction Decision, para. 2559, *referring to* P-0446: T-163, p. 60, lines 10-24.
[2783] Conviction Decision, para. 2560, *referring to* P-0447: T-169, p. 56, line 7 to p. 58, line 5; P-0447's Report, UGA-OTP-0280-0674, at 0682. *See also* Rebuttal Report, UGA-OTP-0287-0072, at 0081, 0087-88.
[2784] Conviction Decision, paras 2561, 2563, *referring to* D-0041: T-248, p. 56, line 3 to p. 57, line 1.
[2785] Conviction Decision, para. 2563.
[2786] Conviction Decision, paras 2564-2566.
[2787] Conviction Decision, para. 2568.
[2788] Appeal Brief, para. 394.

1255. Furthermore, the Appeals Chamber finds no merit in the Defence's argument that, if Mr Ongwen was found to be malingering, the Trial Chamber's conclusion is "not believable" because it implies that Mr Ongwen would have had to have "faked his illness for almost 26 years" without any evidence from observers at the times material to the charges, to show that he was exhibiting signs of mental illness.[2789] The Appeals Chamber finds this argument to be speculative and irrelevant given that the Trial Chamber did not enter a finding as to whether or not Mr Ongwen was malingering. Instead, the Trial Chamber found the manner in which the Defence Experts dismissed the issue of malingering to be "unconvincing" and "a major factor militating against reliance on their reports".[2790]

1256. Turning to the Trial Chamber's findings regarding the Defence Experts' methodology on malingering, the Appeals Chamber notes that the Defence raises four arguments in this regard.

1257. First, the Defence argues that the Trial Chamber's finding which rejected their opinion and questioned their choice about standardised methods was "imprudent at the very least", since D-0041 and D-0042 were the only experts who spent hours interviewing Mr Ongwen.[2791] At the outset, the Appeals Chamber notes that the Prosecutor's experts were precluded from conducting clinical interviews with Mr Ongwen because he had declined their requests.[2792] This notwithstanding, the Appeals Chamber understands the Defence's argument to suggest that clinical interviews as opposed to other standardised psychometric assessment tools were the more effective method to detect malingering and therefore the Defence Experts' opinions should have been afforded weight.[2793] In this regard, the Appeals Chamber recalls that the Trial Chamber found that

> At the same time, during examination by the Prosecution, [D-0041] confirmed that he knew of psychometric tests which can be used to detect malingering, but claimed that they did not 'assess for malingering' because the 'clinical situations under which we operated did not point towards malingering'. It is noted that [D-0041] expressed a clear preference for clinical exams over psychometric tests in order to address the possibility of malingering. On the other hand, [D-0042]

[2789] Appeal Brief, paras 396-398.
[2790] Conviction Decision, para. 2568.
[2791] Appeal Brief, paras 400-401.
[2792] Conviction Decision, para. 2464.
[2793] Appeal Brief, para. 401.

> accepted that they 'could' have used psychometric tools to establish a greater or lesser likelihood of malingering, but stated that 'we had limited time and we needed to collect lots of other information and we didn't think it was economically wise to waste time using a scale'. On this point, the explanation is entirely unconvincing in light of the ample access [D-0042] and [D-0041] had to [Mr] Ongwen, as also pointed out by the Prosecution.[2794]

1258. The Appeals Chamber considers that, regardless of whether or not clinical interviews were the more effective tool for discerning malingering, it was nevertheless reasonable for the Trial Chamber to find that, despite the "ample access" that the Defence Experts had to Mr Ongwen, their explanations for how they excluded malingering in him were unsatisfactory and that their choice not to use further standardised methods to detect malingering was questionable and undermined their analysis.[2795]

1259. Second, the Defence points to the lack of unanimity amongst the mental health experts as to whether Mr Ongwen was malingering and argues, *inter alia*, that the implication is that there was reasonable doubt in this regard.[2796] To underscore its argument, the Defence states that "[l]ooking at the grouping of experts as a whole: two (P-0446; P-0447) said 'yes' to malingering; two (D-0041; D-0042) said 'no'; and two took no position (P-445; Professor de Jong)". The Appeals Chamber considers the Defence's assertion to misrepresent the conclusions of P-0446 and P-0447. There is no indication in the record, nor does the Defence refer to any, that P-0446 and P-0447 concluded that Mr Ongwen was malingering. In fact, P-0446, as noted by the Trial Chamber, criticised the Defence Experts and Professor de Jong for not considering the possibility of malingering, stating that "Professor de Jong has not considered the possibility of malingering or exaggeration in his report, despite this being very common in forensic populations", and, in relation to D-0041 and D-0042's report, she stated that "[t]he authors have not considered the possibility of exaggeration or malingering, or the reliability of Mr Ongwen's self-report".[2797] By the same token, P-0447 noted in his first report in relation to both the Defence Experts' and Professor de Jong's assessments, that "dissimulation was not considered and several contradictions were

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[2794] Conviction Decision, para. 2565.
[2795] Conviction Decision, para. 2566.
[2796] Appeal Brief, para. 402.
[2797] *See* P-0446's Report, UGA-OTP-0280-0786, at 0800 (para. 54), 0804 (para. 72), 0806 (para. 81). *See also* Conviction Decision, para. 2559.

not dissolved, consequently limiting the validity of the conclusions".[2798] Accordingly, and in light of the fact that the Trial Chamber found the Defence Experts' conclusions on malingering to be "unconvincing", given the deficiencies in their methodology, the Appeals Chamber finds that the "line-up of expert opinion" does not, as the Defence suggests, raise "reasonable doubt that [Mr Ongwen] was malingering and that the Prosecution had not disproved the affirmative defence beyond a reasonable doubt".[2799]

1260. Third, the Defence argues that according to the Defence Experts' assessment, Mr Ongwen had nothing to gain from malingering and therefore lacked any motivation to malinger.[2800] The Defence takes issue with the Trial Chamber's view that Mr Ongwen's motivation to malinger was obvious given the potential gain of excluding his criminal responsibility.[2801] In its view, the Trial Chamber ignored the evidence on record that showed, *inter alia*, that Mr Ongwen was not content with life and wanted to get better.[2802] The Appeals Chamber finds the Defence's argument to be inapposite. As discussed above, the Trial Chamber was not convinced by the Defence Experts' explanations and or methodology employed in order to exclude the possibility of malingering in Mr Ongwen.[2803] Moreover, as the Trial Chamber did not *actually* find Mr Ongwen to have been malingering, the issue of his possible motivation to do so is hypothetical, and, thus, irrelevant.

1261. Fourth, the Defence asserts that the Defence Experts were acutely aware of the impact of misdiagnosing malingering on their professional reputations, a fact that the Trial Chamber should not have discounted when it rejected their evidence as unreliable.[2804] As argued by the Prosecutor, the Appeals Chamber considers that the Defence Experts' interest in maintaining their professional reputations, in and of itself, does not render their evidence reliable.[2805] The Trial Chamber was required to evaluate

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[2798] *See* P-0447's First Report, UGA-OTP-0280-0674, at 0700. *See also* Rebuttal Report, UGA-OTP-0287-0072, at 0081, 0087-0088.
[2799] Appeal Brief, para. 402.
[2800] Appeal Brief, para. 403.
[2801] Conviction Decision, para. 2562.
[2802] Appeal Brief, para. 404.
[2803] Conviction Decision, paras 2566, 2568.
[2804] Appeal Brief, paras 407-408.
[2805] Prosecutor's Response, para. 251 (fourth bullet point).

their evidence against all evidence on the record in order to determine the reliability thereof. The Defence shows no error in the Trial Chamber's evaluation.

1262. Finally, the Appeals Chamber notes that the Defence makes several assertions in relation to the Trial Chamber's finding on the Defence Experts' consideration of the issue of malingering. It claims that the Trial Chamber erroneously adopted the malingering diagnosis as a factor in rejecting the affirmative defence", that it "failed to apply the legal standard of beyond a reasonable doubt correctly to the evidence", and "did not explain why it chose the Prosecution evidence over the Defence Experts' evidence" nor "present a full and reasoned statement as per Article 74(5) of the Statute".[2806]

1263. The Appeals Chamber considers these arguments to be without merit and to misrepresent the Trial Chamber's findings. As discussed above, the Trial Chamber did not find Mr Ongwen to have been malingering and did not choose the prosecution evidence over that of the Defence Expert's conclusions. In explaining its findings the Trial Chamber evaluated the methodology employed by the Defence Experts to assess malingering in light of inconsistencies therein indicated by the Prosecutor's Experts. Being unconvinced by the Defence Experts' explanations about these inconsistencies, the Trial Chamber was entitled not to rely on their evidence. The Appeals Chamber considers that the Defence fails to show any error in the Trial Chamber's approach or application of the beyond reasonable doubt standard to the evidence.

1264. Accordingly, the Appeals Chamber finds no error in the Trial Chamber's finding that the Defence Expert's approach to the question of malingering affected the reliability of their evidence. The Defence's arguments are therefore rejected.

(vii) Alleged error in finding that the Defence Experts' analysis was not anchored in the specific time and context

(a) Summary of the submissions

1265. The Defence argues that the Trial Chamber's finding is "factually inaccurate", given that the Defence Experts "were well aware of the charged period" and that their

[2806] Appeal Brief, para. 409.

reports included dates within this period based on information received from Mr Ongwen.[2807] In addition, they assert that the Defence Experts assessed Mr Ongwen "as a whole person to make their findings and conclusions", and that this included the effect of his abduction on his mental state "at all levels".[2808] In the Defence's view, the phrase "at the time of the person's conduct", pursuant to article 31(1) of the Statute, cannot be narrowly construed, so as to exclude "the sum of [a person's] previous history".[2809] Furthermore, the Defence argues that the Trial Chamber's conclusion that the Defence Experts' reports included "very general analyses and findings" is unfounded, because in their view, "it is evident that [the] findings and conclusions are based on specific detailed information".[2810] Lastly, the Defence contends that "it is disingenuous for the Chamber to reject an expert report because it failed to provide information to the Court about the client's views on conduct and his mental state in relation to the charged crimes", since the Defence has no obligation to do so.[2811]

1266. The Prosecutor submits that the Defence's "criticisms" of the Trial Chamber's conclusions "are all misplaced".[2812] In his view, the Defence Experts' references to dates falling within the period material to the charges does not mean that their assessment of Mr Ongwen's mental health "was conducted with the necessary specificity".[2813] Furthermore, he asserts that, contrary to the Defence's submission, the Trial Chamber did not consider the evidence of his abduction as "irrelevant" to the issue of his mental health.[2814] The Prosecutor argues that, notwithstanding the "potential relevance of this trauma", it "did not justify generalised opinions of resulting mental disorders which were not closely related to the times and acts relevant to the charges".[2815] Finally, the Prosecutor submits that the Defence Experts were nor required to "elicit evidence which was inculpatory", or "to enter into questions of criminal responsibility".[2816] Rather, they were meant to "engage seriously with the way (if any)

[2807] Appeal Brief, para. 410.
[2808] Appeal Brief, paras 411-412.
[2809] Appeal Brief, para. 413.
[2810] Appeal Brief, para. 414, *referring to* Conviction Decision, para. 2569.
[2811] Appeal Brief, para. 416.
[2812] Prosecutor's Response, para. 254.
[2813] Prosecutor's Response, para. 254.
[2814] Prosecutor's Response, para. 254.
[2815] Prosecutor's Response, para. 254.
[2816] Prosecutor's Response, para. 255.

in which their view of [Mr Ongwen's] mental health was concretely related to the charges in this case".[2817]

(b) Relevant parts of the Conviction Decision

1267. In the Trial Chamber's view, "a further methodological problem" in relation to the reports of [D-0042 and D-0041] was "the fact that the reports present very general analyses and findings, and are not clearly anchored on the relevant period and the more specific factual contexts in which [Mr Ongwen] acted".[2818]

1268. The Trial Chamber considered that the failure of the Defence Experts to engage with the "manifest challenge" of attempting to determine the state of Mr Ongwen's mental health between 2002 and 2005, more than a decade later, was a further factor that "significantly impair[ed] the value of the report prepared by the [Defence Experts]".[2819]

1269. Moreover, in considering the responses of the Defence Experts to questions from the Prosecutor regarding the charged crimes, the Trial Chamber noted that

> 2571. [D-0041], when asked by Prosecution counsel whether he and [D-0042] ever discussed with [Mr] Ongwen what he could remember about any of the charged crimes, brushed off the issue by stating that [Mr] Ongwen 'said he didn't commit the crimes'. When asked again if they asked [Mr] Ongwen about each of the crimes, Dr Akena responded: 'We asked him about his mental state between the periods of 2002 and 2005'.[2820]
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> 2572. [D-0042], when asked a similar question, responded: 'I am not sure if the alleged crimes were specifically linked to him with the evidence you have, or is it a matter of asking me for my opinion as to whether – opinion and fact as to whether I asked him'. Moreover, asked specifically about sexual and gender-based crimes, [D-0042] stated that '[t]he brief given to [them] was not sexual offences' but was given 'for nonsexual offences'.[2821]

1270. The Trial Chamber considered the above explanations of the Defence Experts to be "insufficient and unsatisfactory" given the clear language of article 31(1)(a) of the

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[2817] Prosecutor's Response, para. 255.
[2818] Conviction Decision, para. 2569.
[2819] Conviction Decision, para. 2570.
[2820] Conviction Decision, para. 2571, *referring to* D-0041: T-249, p. 41, lines 21-24, p. 42, lines 2-5. *See also* p. 43, lines 10-13.
[2821] Conviction Decision, para. 2572, *referring to* D-0042: T-251, p. 65, lines 8-13, p. 65, line 14 to p. 67, line 6. *See also* p. 71, lines 1-15.

Statute, which "requires an assessment of the relevant criteria 'at the time of that person's conduct'".[2822] In the Trial Chamber's view, the task of the mental health experts was "to explore specifically the mental status of the accused at the time of the acts in question" and that their failure to do so represented yet another reason that prevented it from relying on their evidence.[2823]

(c) Determination by the Appeals Chamber

1271. The Appeals Chamber notes that pursuant to article 31(1)(a) of the Statute "a person shall not be criminally responsible if, *at the time of that person's conduct* […] [t]he person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law".[2824] Thus, in order to exclude an accused's criminal responsibility, and as correctly stated by the Trial Chamber, "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".[2825] It follows that the state of an accused's mental health *at the time of each of the charged crimes* is decisive for a determination on whether criminal responsibility is excluded by way of mental disease or defect.

1272. The Defence challenges the Trial Chamber's finding that the Defence Experts' conclusions concerning his mental disorders were not "anchored on the relevant period" and the "specific factual contexts" in which Mr Ongwen acted.[2826] To demonstrate the Trial Chamber's alleged factual inaccuracy, the Defence argues that the Defence Experts were "well aware of the charged period" and included dates in their reports as far back as 1996 through 2005 when Mr Ongwen reported "specific experiences" related to the diagnosis of dissociative identity disorder.[2827] In this regard, the Defence refers to the Defence Experts' Second Report, which reads as follows:

> [REDACTED].[2828]

[2822] Conviction Decision, para. 2573.
[2823] Conviction Decision, para. 2573.
[2824] Emphasis added.
[2825] Conviction Decision, paras 2454, 2573.
[2826] Appeal Brief, para. 410.
[2827] Appeal Brief, para. 410
[2828] Defence Experts' Second Report, UGA-D26-0015-0948, at 0966.

1273. The Appeals Chamber considers that the above excerpt of the Defence Experts' findings does not support the Defence's argument, but rather illustrates the accuracy of the Trial Chamber's finding. In the Appeals Chamber's view, apart from referring to dates that fall within the period of time material to the charges, the Defence Experts fail to connect their diagnoses of mental illness, in any specific way, with Mr Ongwen's mental capacities at the time of each of the charged crimes. In the absence of such an analysis, the Appeals Chamber considers the fact that the Defence Experts assessed Mr Ongwen "as a whole person" and found that his mental illness "occurred after his abduction", to be irrelevant.[2829] Furthermore, the Appeals Chamber considers the Defence's argument that the phrase "at the time of the person's conduct", pursuant to article 31(1) of the Statute, cannot be narrowly construed so as to exclude "the sum of [a person's] previous history", to be misplaced.[2830] Far from excluding a mental health assessment that is holistic, article 31(1)(a) of the Statute merely requires that any such assessment include an analysis of the mental status of the accused at the time of each of the charged crimes.

1274. In addition, the Defence takes issue with the Trial Chamber's conclusion that the Defence Experts' reports included "very general analyses and findings" because in its view, "it is evident that [the] findings and conclusions are based on specific detailed information".[2831] In this regard, the Appeals Chamber notes that the Defence fails to point to any specific examples in the Defence Experts' reports in support of its argument. Furthermore, the Defence Experts' reports fail to address any challenges encountered in attempting to ascertain, more than a decade later, Mr Ongwen's mental health at the times material to the charges nor do they address any of the charged crimes and what, if anything, Mr Ongwen could remember about the particular conduct relevant to the charged crimes.[2832]

1275. Finally, the Defence argues that "it is disingenuous for the Chamber to reject an expert report because it failed to provide information to the Court about the client's views on conduct and his mental state in relation to the charged crimes".[2833] In the

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[2829] Appeal Brief, paras 411-412 (emphasis in original).
[2830] Appeal Brief, para. 413.
[2831] Appeal Brief, para. 414.
[2832] *See* Conviction Decision, paras 2571-2572.
[2833] Appeal Brief, para. 416.

Defence's view, it has no obligation to do so and the Trial Chamber "impermissibly shift[ed] the burden of proof […] from the Prosecution to the Defence".[2834] First, the Appeals Chamber considers that the Defence misrepresents the Trial Chamber's finding. Rather than require the Defence Experts to provide information to the Court about Mr Ongwen's views on his conduct relevant to the charged crimes, the Trial Chamber criticised the Defence Experts for not specifically addressing, as part of their forensic examination, their diagnoses of Mr Ongwen's mental disorders and how it related to the charged crimes. Second, as the Prosecutor correctly submits, there is no indication that the Trial Chamber required the Defence Experts to "elicit evidence [from Mr Ongwen] which was inculpatory".[2835] Indeed, the Trial Chamber explicitly clarified that "the task of mental health experts" engaged to examine an accused "is to explore specifically the mental status of the accused at the time of the acts in question […]".[2836]

1276. Consequently, the Appeals Chamber finds that the Defence fails to show that it was unreasonable for the Trial Chamber to conclude that the Defence Experts' reports "present very general analyses and findings and are not clearly anchored on the relevant period and the more specific factual contexts in which [Mr Ongwen] acted".[2837]

(viii) Overall conclusion

1277. Having considered the arguments raised under grounds 27, 29, 31-32, and 37-41 concerning alleged errors in the Trial Chamber's rejection of the Defence Experts' evidence, the Appeals Chamber finds that the Trial Chamber did not err in finding that it could not rely on the Defence Experts' evidence, given the concerns it had over the methodology employed by these experts and the "unexplained contradictions in […] the evidence of [these experts] between the various statements and observations made, or between such statements and observations and the conclusions finally drawn".[2838] These grounds of appeal are therefore rejected.

(c) Grounds of appeal 19 and 42: Alleged error in the Trial Chamber's failure to rely on Professor de Jong's

[2834] Appeal Brief, para. 416.
[2835] Prosecutor's Response, para. 255.
[2836] Conviction Decision, para. 2573.
[2837] Conviction Decision, para. 2569.
[2838] Conviction Decision, paras 2527, 2536.

report for its conclusions under article 31(1)(a) of the Statute

(i) Summary of the submissions

1278. The Defence argues that the Trial Chamber should have recognised the relevance of the evidence which it had requested, especially in relation to Professor de Jong's:

> a. Use of a clinical history, dating back to [Mr Ongwen's] childhood, as a basis to make his findings and conclusions;
>
> b. Recognition of [Mr Ongwen's] cultural context in respect to the role and importance of the spiritual world;
>
> c. Acknowledgment of the difficulties of westerners in understanding concepts in non-western cultures, echoing the point of PCV-2.[2839]

1279. Consequently, the Defence argues that the Trial Chamber was selective in its consideration of all the relevant evidence.[2840] In its view, a reasonable trier of fact would have reached a different conclusion concerning the relevance of Professor de Jong's Report to its assessment under article 31(1)(a) of the Statute, which would have materially affected the Conviction Decision.[2841]

1280. The Prosecutor submits that the Trial Chamber "reached a reasoned conclusion that [Professor de Jong's Report] was not relevant to the questions arising under article 31(1)(a) of the Statute".[2842] In his view, to show an error with the Trial Chamber's reasoning, the Defence "must either articulate a principle of law prohibiting the Chamber from acting as it did, which [it] has not, or show that no reasonable chamber could have regarded Prof. De Jong's evidence in this way".[2843] The Prosecutor further submits that unlike the other five expert witnesses tasked with assessing Mr Ongwen's mental health, Professor de Jong had a "distinct and unique mandate to recommend any treatment required by Mr Ongwen to participate in his trial".[2844] The Prosecutor argues that the Defence fails to demonstrate that Professor de Jong's evidence "would have served to establish any greater reliability of the Defence Experts,

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[2839] Appeal Brief, para. 274 (footnotes omitted).
[2840] Appeal Brief, para. 275.
[2841] Appeal Brief, para. 276.
[2842] Prosecutor's Response, para. 258.
[2843] Prosecutor's Response, para. 258.
[2844] Prosecutor's Response, para. 259.

or to establish that it was unreasonable for the Chamber to rely upon the [Prosecutor's Experts], corroborated by the other evidence received at trial".[2845]

1281. Victims Group 1 observe that the Trial Chamber was correct not to rely on Professor de Jong's Report for it assessment under article 31(1)(a) of the Statute. In their view, the report has no "bearing on the elements of the affirmative defences […]".[2846]

1282. Victims Group 2 observe that Professor de Jong "was not an expert witness *per se* who was called by the parties in order to prove their case or assist the Chamber to make it[s] determination on the ultimate issue – the guilt or innocence of [Mr Ongwen]".[2847] They emphasise that Professor de Jong was requested to give his opinion on a medical question rather than a finding of fact on one of the elements of the crimes charged.[2848]

(ii) Relevant parts of the Conviction Decision

1283. As noted above,[2849] the Trial Chamber appointed Professor de Jong to conduct a psychiatric examination of Mr Ongwen's mental state.[2850] The Trial Chamber ordered Professor de Jong to examine Mr Ongwen with a view to: "(i) making a diagnosis as to any mental condition or disorder that [Mr] Ongwen may suffer at the present time; and (ii) providing specific recommendations on any necessary measure/treatment that may be required to address any such condition or disorder at the detention centre."[2851] In his report, dated 7 January 2017, Professor de Jong diagnosed Mr Ongwen with "post-traumatic stress disorder (severe), major depressive disorder (severe) and other specified dissociative disorder".[2852] In the Conviction Decision, the Trial Chamber concluded that it could "not rely on [Professor de Jong's Report] directly for its conclusions" with respect to its assessment under article 31(1)(a) of the Statute, because the report "was prepared for a different purpose, having as its object of examination

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[2845] Prosecutor's Response, para. 260.
[2846] Victims Group 1's Observations, para. 99.
[2847] Victims Group 2's Observations, para. 75.
[2848] Victims Group 2's Observations, para. 76.
[2849] *See* paragraph 1108 above.
[2850] Conviction Decision, para. 2576.
[2851] Decision on Defence's First Request for a Medical Examination, p. 18.
[2852] Conviction Decision, para. 2576. *See also* Professor de Jong's Report, UGA-D26-0015-0046-R01, at 0051.

[Mr 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".[2853]

(iii) Determination by the Appeals Chamber

1284. In essence, the Defence takes issue with the Trial Chamber's conclusion that Professor de Jong's Report had no relevance for its assessment under article 31(1)(a) of the Statute.[2854] In particular, the Defence argues that Professor de Jong's observations – such as, those concerning Mr Ongwen's clinical history dating back to his childhood his recognition of Mr Ongwen's cultural context with regard to the importance of the spiritual world and his acknowledgment of the difficulties that westerners encounter in understanding concepts in non-western cultures – are relevant to assessing whether Mr Ongwen's criminal responsibility is excluded by way of mental disease or defect.[2855]

1285. The Appeals Chamber is not persuaded by this argument. First, the Appeals Chamber notes that Professor de Jong's observations were made in the context of conducting a psychiatric examination of Mr Ongwen, for the distinct purpose of assessing his mental condition and recommending treatment *during the trial*. As such, and as correctly pointed out by the Trial Chamber, Professor de Jong's observations had no relevance to the question of Mr Ongwen's mental health for the purposes of article 31(1)(a) of the Statute. In particular, the Defence is not assisted by its reliance on the ICTY *Perišić* Appeal Judgment to support its argument that the Trial Chamber's reasoning was inadequate because it overlooked relevant evidence in the record.[2856] As noted above, in that case the ICTY Appeals Chamber found, *inter alia*, that "an analysis limited to a select segment of the relevant evidentiary record is not necessarily sufficient to constitute a reasoned opinion" and that the trial chamber's failure to discuss and analyse the witnesses' testimony, which was "clearly relevant" to its analysis of effective control, amounted to a failure to provide a reasoned opinion.[2857] In the case at hand, rather than overlook Professor de Jong's Report, the Trial Chamber discussed it

[2853] Conviction Decision, para. 2578.
[2854] Appeal Brief, paras 272-273.
[2855] Appeal Brief, para. 274.
[2856] Appeal Brief, para. 275, fn. 285.
[2857] *Perišić* Appeal Judgment, paras 93, 95. *See* paragraphs 1121-1223 above.

and reasonably found that it was not relevant to its analysis of Mr Ongwen's mental health at the time of his conduct relevant to the charges.

1286. Second, the Appeals Chamber notes that the Trial Chamber was assisted by no less than five expert witnesses in its assessment of Mr Ongwen's mental health at the times material to the charges. In particular, the Defence Experts' evidence addressed, at length, Mr Ongwen's clinical and social history dating back to his childhood,[2858] the cultural context in which Mr Ongwen grew up and the importance of the spiritual world,[2859] and the difficulties that westerners encounter in understanding mental health in African societies.[2860] In this regard, the Defence does not address why, in addition to the evidence already on record in relation to these issues, the Trial Chamber should have also considered Professor de Jong's Report.

1287. Third, the Appeals Chamber observes that Professor de Jong specifically noted that his observations were gleaned from information obtained solely from Mr Ongwen without the benefit of corroboration from "family or acquaintances"[2861] and that his report had "several shortcomings", among which he singled out as "most important" the fact that "it was not possible to complement the interviews with additional information from the family and the community".[2862] In light of these shortcomings potentially affecting the reliability of his report, coupled with the evidence of the

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[2858] Defence Experts' First Report, UGA-D26-0015-0004, at 0006-0010; Defence Experts' Second Report, UGA-D26-0015-0948, at 0951, 0957-0958, 0961.
[2859] Defence Experts' First Report, UGA-D26-0015-0004, at 0011-0012; Defence Experts' Second Report, UGA-D26-0015-0948, at 0958, 0960.
[2860] D-0041: T-248, p. 49, lines 7-17 ("Earlier I had talked about the lack of mental health literacy, which is a very common thing in African populations. Most people in Africa, for example, cannot describe the signs and symptoms of depression by themselves. They cannot volunteer that. They don't go to the healthcare practitioner and start to tell the healthcare practitioner that: I'm feeling blue. I'm, you know, I'm in the gutters. I'm feeling sad. You know, I've lost it. I need Prozac. They don't say that. Which is extremely different from what we see in the western hemisphere, that in Europe, in the US and many other places, individuals actually go to seek mental health care from their – from their healthcare practitioners, especially for things like anxiety disorders and depressive disorders and post-traumatic stress disorders"); D-0042: T-254, p. 15, lines 16-24 ("Let me put it this way: In our part of the world we, we somatise. What that means is we convert psychological distress into physical symptoms. And we also spiritualise, that is, we explain our psychological distress in terms of the effects of spirits, ancestral spirits, the wrong we have done. And the evils that our ancestors themselves did, we explain this, our distress, as punishment for events that other people in our lineage, if it wasn't us, performed or committed. So we have – we are more likely to have people who are not mentally literate, by mentally literate meaning they do not understanding the phenomenology of mental illness, they will explain it in the ways I have done".).
[2861] Professor de Jong's Report, UGA-D26-0015-0046-R01, at 0053.
[2862] Professor de Jong's Report, UGA-D26-0015-0046-R01, at 0074.

Prosecutor's Experts which was consistent with evidence heard at trial, the Appeals Chamber cannot discern how the Conviction Decision would have been "materially affected" had the Trial Chamber considered Professor de Jong's Report in its entirety for its assessment under article 31(1)(a) of the Statute.[2863]

(iv) Overall conclusion

1288. Having considered the arguments raised under grounds 19 and 42 concerning alleged errors in the Trial Chamber's decision not to rely on Professor de Jong's report for its conclusions under article 31(1)(a) of the Statute, the Appeals Chamber finds that the Defence shows no error in the Trial Chamber's finding and therefore rejects these grounds of appeal.

(d) Grounds of appeal 30, 34, 36 and 43: Alleged errors in the Trial Chamber's assessment of culture and mental health

1289. Under these grounds of appeal, the Defence raises three main arguments, namely, that the Trial Chamber erred: (i) by disregarding cultural factors when assessing Mr Ongwen's mental health under article 31(1)(a) of the Statute;[2864] (ii) in concluding that P-0446 and P-0447 had taken cultural factors into consideration;[2865] and (iii) in treating certain incidents as trivial when assessing Mr Ongwen's mental health.[2866]

(i) Alleged error in disregarding cultural factors when assessing the ground for excluding Mr Ongwen's criminal responsibility by reason of mental disease or defect

1290. The Defence argues that the Trial Chamber failed to account for the cultural context relevant to assessing Mr Ongwen's mental health because: (i) it failed to provide adequate reasoning concerning its decision not to rely on the "psychological context" presented by expert witness Professor Seggane Musisi (hereinafter: "Professor

[2863] *See* Appeal Brief, para. 276.
[2864] Appeal Brief, paras 433-450.
[2865] Appeal Brief, paras 451-458.
[2866] Appeal Brief, paras 459-470.

Musisi"),[2867] and (ii) it misrepresented the evidence of Professor de Jong concerning the historical scope of his diagnosis.[2868]

(a) Summary of the submissions

1291. The Defence submits that on the basis of Professor Musisi's evidence it was demonstrated that during the more than 20 year insurgency in Northern Uganda, which included the charged period (2002-2005), the victimised population suffered "mass trauma" at the hands of both the LRA and the UPDF.[2869] Given this evidence, the Defence argues that the Trial Chamber "provided no reasoned statement" for its conclusion that it could not rely on the "psychological context" presented by Professor Musisi because it lacked "specific information" about Mr Ongwen's mental state during the period of the charges.[2870] Moreover, the Defence contends that it is "impossible to discern how the Chamber reached the conclusion that [Mr 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".[2871]

1292. With respect to Professor de Jong's Report, the Defence argues that the Trial Chamber misrepresented his conclusions when it found that he had not attempted to make a "historical diagnosis".[2872] The Defence contends that Professor de Jong's reference to Mr Ongwen's dissociative symptoms developing after his abduction is "historic" in the sense that it indicates the "time of abduction as a starting point in the diagnosis".[2873]

1293. In addition, the Defence argues that the Trial Chamber was inconsistent in its approach to contextual evidence.[2874] In this respect, it contends that the Trial Chamber viewed Mr Ongwen differently from others and disregarded the fact that he too suffered

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[2867] Appeal Brief, paras 438-439. The Appeals Chamber notes that Professor Musisi is a professor of psychiatry at Makerere University College of Health Sciences in Kampala, Uganda. He was an expert witness called by Victims Group 2, who provided a report and testified on the interplay of Acholi culture with traumas and PTSD. *See* Conviction Decision, para. 602. *See also* PCV-0003 Report, UGA-PCV-0003-0046; PCV-0003: T-177; T-178.
[2868] Appeal Brief, paras 442-445.
[2869] Appeal Brief, para. 437.
[2870] Appeal Brief, para. 438.
[2871] Appeal Brief, para. 439.
[2872] Appeal Brief, para. 443.
[2873] Appeal Brief, para. 444.
[2874] Appeal Brief, paras 440-441, 444-446.

trauma as an abductee, that he also had fears about Kony and that he too was subject to the same rules and threats as others in the LRA.[2875] Finally, the Defence claims that the Trial Chamber was "inconsistent about the 'charged period' focus", which is demonstrated by instances where it relied on evidence from periods outside the scope of the charges, but declined to do so when assessing Mr Ongwen's mental health.[2876]

1294. The Prosecutor submits in relation to Professor Musisi, that the Trial Chamber's decision not to rely on his evidence was reasonable given that nothing in his evidence suggests that the mass trauma he described caused PTSD in Mr Ongwen.[2877] With respect to the Defence's arguments concerning Professor de Jong's Report, the Prosecutor submits that his "reference to historic events, such as [Mr Ongwen's] abduction, does not imply that he sought to diagnose [Mr Ongwen's] mental health following his abduction".[2878] Furthermore, the Prosecutor avers that there is no basis for Mr Ongwen's claim that the Trial Chamber was inconsistent in its approach to contextual evidence.[2879] In his view, rather than treat Mr Ongwen differently from others in relation to his potential to suffer trauma, the Trial Chamber "reasonably considered that mental disorders were not necessarily a result of such trauma".[2880] Lastly, the Prosecutor submits that the Trial Chamber "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".[2881]

1295. Victims Group 1 observe that the Defence's arguments reflect mere disagreement with the Trial Chamber's decision not to rely on Professor Musisi's evidence.[2882] In their view, the Trial Chamber was justified in finding that Professor Musisi's evidence was not relevant for its determination under article 31(1)(a) of the Statute.[2883]

1296. Victims Group 2 observe that "the trial was about the criminal responsibility of [Mr Ongwen] during the charged period, not about the mass trauma he may or may not

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[2875] Appeal Brief, para. 440.
[2876] Appeal Brief, paras 441, 444.
[2877] Prosecutor's Response, para. 270.
[2878] Prosecutor's Response, para. 271.
[2879] Prosecutor's Response, para. 272.
[2880] Prosecutor's Response, para. 272.
[2881] Prosecutor's Response, para. 272.
[2882] Victim Group 1's Observations, paras 146-147.
[2883] Victim Group 1's Observations, para. 148.

have experienced along with the people of Northern Uganda".[2884] In their view, the Defence "fails to substantiate its arguments […] [or show] how exactly the Chamber erred [and the material effect of such error]".[2885]

(b) Relevant parts of the Conviction Decision

1297. In noting Professor Musisi's evidence, the Trial Chamber observed that "[his evidence] does not directly underlie any part of the Chamber's analysis as to whether the facts alleged in the charges are established".[2886] Specifically, for the purpose of article 31(1)(a) of the Statute, the Trial Chamber did not rely on the evidence of Professor Musisi "for the reason that it [did] not provide specific information in relation to the question [of] whether [Mr Ongwen] suffered from a mental disease or defect during the period of the charges".[2887]

1298. With respect to Professor de Jong, as previously recalled, the Trial Chamber declined to rely directly on his evidence for the purpose of article 31(1)(a) of the Statute because his mental health assessment had been conducted for a different purpose, namely, ascertaining Mr Ongwen's mental health "during the trial", rather than at the time of his conduct relevant to the charges.[2888] In that context, the Trial Chamber noted that Professor de Jong "did not attempt to make a historical diagnosis".[2889]

(c) Determination by the Appeals Chamber

1299. The Appeals Chamber notes that Professor Musisi, provided a report and testified "on the interplay of Acholi culture with traumas and PTSD"[2890] and elaborated on "the impact of loss of traditions on the individual's and community's development as well as on Acholi cultural approaches to crimes and traumas".[2891] With respect to The Appeals Chamber notes the opinion of Professor Musisi regarding the mass trauma suffered by the victimised population of Northern Uganda for more than two decades (which included the charged period 2002-2005) and the resultant mental health

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[2884] Victims Group 2's Observations, para. 104.
[2885] Victims Group 2's Observations, para. 105.
[2886] Conviction Decision, para. 602.
[2887] Conviction Decision, para. 2579.
[2888] *See* paragraphs 1283, 1285 above. *See also* Conviction Decision, para. 2578.
[2889] Conviction Decision, para. 2576.
[2890] Conviction Decision, para. 602. *See also* PCV-0003 Report, UGA-PCV-0003-0046; PCV-0003: T-177; T-178.
[2891] Conviction Decision, para. 602.

problems, such as PTSD, that were documented amongst LRA traumatized individuals, Professor Musisi noted that

> Acholiland experienced mass trauma at the hands of the LRA as never seen before in her history. People experienced and witnessed horrendous trauma and were terrorized by the LRA for over two decades. They experienced various PTSD symptoms which they expressed in accordance (*sic*) to their culture, traditions and customs. There have been numerous studies of LRA traumatized individuals in northern Uganda as previously discussed. The commonly observed and reported mental health problems are PTSD, Depression, suicide attempts, Anxiety disorder, Panic attacks, dissociative disorders, conversion disorders, psychosis, epilepsy, substance abuse, somatisation syndromes etc.[2892]

1300. Given this context of mass trauma and resultant mental health problems amongst victims of the LRA, the Defence argues that the Trial Chamber provided "no reasoned statement" for rejecting the "psychological context" provided by Professor Musisi's evidence.[2893] At the outset, the Appeals Chamber notes that the Defence is inaccurate in its assertion that the Trial Chamber provided "no reasoned statement".[2894] As noted above, in a section of the Conviction Decision entitled "Other expert testimony", the Trial Chamber noted Professor Musisi's evidence, but found that "it does not directly underlie any part of the Chamber's analysis as to whether the facts alleged in the charges are established".[2895] In particular, for the purpose of article 31(1)(a) of the Statute, the Trial Chamber explained that it "does not rely on the evidence of Professor Musisi, for the reason that it does not provide specific information in relation to the question whether [Mr Ongwen] suffered from a mental disease or defect during the period of the charges".[2896] The Appeals Chamber considers that the Defence's argument reflects mere disagreement with the Trial Chamber's reasoning rather than showing that there was no reasoning at all.

1301. The Defence further contends that in light of the context provided by Professor Musisi's evidence, it was incorrect for the Trial Chamber to conclude that Mr Ongwen, "who lived within this context of mass trauma as an abductee of the LRA, was not

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[2892] PCV-0003 Report, UGA-PCV-0003-0046 at 0074.
[2893] Appeal Brief, para. 438.
[2894] Appeal Brief, para. 438.
[2895] Conviction Decision, para. 602.
[2896] Conviction Decision, para. 2579.

affected by, or was immune from, this mass trauma".[2897] On the contrary, the Appeals Chamber notes that the Trial Chamber did not find that Mr Ongwen was unaffected by traumatic events as an abductee of the LRA or that "he did not experience what other abductees experienced" in relation to such mass trauma.[2898] Rather, the Trial Chamber found that, in the context of assessing his mental state at the time of his conduct relevant to the charges, the evidence showed that his exposure to such mass trauma did not necessarily result in him developing PTSD or any other mental disorder that the Defence Experts had diagnosed. For instance, the Trial Chamber noted the evidence of P-0446 where she stated in her conclusions that

> Based on a review of all the material I have been provided with, I do not consider that there is evidence to show that Mr Ongwen is currently, or has at any time, suffered from Posttraumatic Stress Disorder, Depressive Disorder (although he has 'mild' transient depressive symptoms during his incarceration), Dissociative Disorder or any other significant mental illness or disorder.[2899]

1302. The Trial Chamber further noted that according to P-0046

> Exposure to trauma, which she did not question in [Mr] Ongwen's case does not automatically result in the development of PTSD and that 'the majority of individuals exposed to trauma do not go on to develop [PTSD]'. She also added that PTSD was not 'generally associated with repeated and persistent aggression and violence'.[2900]

1303. The Trial Chamber also considered the evidence of P-0447 who was of the view that "trauma is of [a] subjective nature and that it need not necessarily lead to a trauma-related mental disorder".[2901] He explained further that

> A person that experiences a potentially traumatic event could therefore 1) process this event as traumatizing and develop a trauma-related mental disorder later in life, 2) process this event as traumatizing but not develop a trauma related mental disorder later in life due to factors of resilience, 3) not process this event as traumatizing and not develop a trauma-related disorder later in life, 4) not process this event as traumatizing but develop some other type of mental disorder later in life, 5) process this event as appealing and rewarding and not develop a trauma-related mental disorder later in life, 6) process this event as appealing/positively rewarding and develop a trauma-related mental disorder later in life due to other traumatic experiences, 7) process this event as appealing/positively rewarding

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[2897] Appeal Brief, para. 439.
[2898] Appeal Brief, para. 440.
[2899] Conviction Decision, para. 2471.
[2900] Conviction Decision, para. 2472, *referring to* P-0446's Report, UGA-OTP-0280-0786, at 0811-0812.
[2901] Conviction Decision, para. 2489, *referring to* P-0447's Report, UGA-OTP-0280-0674, at 0678-0679.

> and develop some other type of mental disorder later in life, 8) etc. etc. Thus, the relation between the experiences Mr. Ongwen might have made 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.[2902]

1304. Moreover, the Trial Chamber found "it significant that the large number of witnesses who described [Mr Ongwen's] actions and interactions with others, at various times relevant to the charges and in numerous contexts, did not provide any testimony which could corroborate a historical diagnosis of mental disease or defect".[2903]

1305. Furthermore, the Appeals Chamber observes that while Professor Musisi's evidence provided important context on the effect of the insurgency in Northern Uganda on the victims of that conflict, it did not provide any diagnosis on Mr Ongwen's mental health at the times material to the charges. In fact, Professor Musisi described his mandate as an expert witness as follows:

> We know that in war atrocities are not done by only one side. We also know, like I said, that other traumas can also cause PTSD. My task was not to address all the possible cause of trauma in Acholiland. It was to say that the trauma of the LRA, does it explain the symptoms we have seen in the abducted, in the abductees, be them child soldiers, be them abducted girls? And also to address life in the IDP camps. Full stop.[2904]

1306. In light of the above, the Appeals Chamber finds that it was reasonable for the Trial Chamber not to rely on Professor Musisi's evidence for its assessment under article 31(1)(a) of the Statute. The argument is therefore rejected.

1307. With respect to Professor de Jong's Report and the Defence's argument that the Trial Chamber misrepresented his conclusions when it found that he had not attempted to make a "historical diagnosis", the Appeals Chamber finds no merit in this argument.[2905] In addressing grounds of appeal 19 and 42, elsewhere in this judgment, the Appeals Chamber confirmed the reasonableness of the Trial Chamber's decision not to rely directly on Professor de Jong's evidence for its assessment under article 31(1)(a) of the Statute because that assessment had been conducted for a

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[2902] Conviction Decision, para. 2489, *referring to* P-0447's Report, UGA-OTP-0280-0674, at 0679-0680.
[2903] Conviction Decision, para. 2520.
[2904] PCV-0003: T-177, p. 71, lines 5-10.
[2905] Appeal Brief, paras 443-444.

different purpose, namely, to determine Mr Ongwen's mental state during the trial and not at the time material to the charges.[2906] The Appeals Chamber finds that in the context of making this finding the Trial Chamber noted that Professor de Jong "did not attempt to make a historical diagnosis",[2907] thereby indicating that his diagnosis did not concern Mr Ongwen's mental health at the relevant time. As argued by the Prosecutor, the Appeals Chamber considers that the fact that Professor de Jong referred to dissociative symptoms developing after Mr Ongwen's abduction does not imply that he "sought to diagnose [Mr Ongwen's] mental health following his abduction".[2908] On the contrary, as evidenced by Professor de Jong's Report, his diagnoses was based on Mr Ongwen's mental health at the time of the preparation of the report and does not explore the state of his mental health in relation to specific acts for the purposes of an assessment under article 31(1)(a) of the Statute.[2909] Consequently, the argument is rejected.

1308. In addition, the Appeals Chamber notes the Defence's argument that the Trial Chamber was inconsistent in its approach to contextual evidence.[2910] First, the Defence contends that the Trial Chamber treated Mr Ongwen as an exception in the sense that it disregarded his suffering and fears of Joseph Kony while acknowledging the suffering and fears of others.[2911] In this regard, and as noted above, the Appeals Chamber recalls that the Trial Chamber did not find that Mr Ongwen was unaffected by traumatic events as an abductee of the LRA, but it reasonably found that mental disorders were not necessarily a result of such trauma.[2912]

1309. Second, the Defence argues that the Trial Chamber was inconsistent in its focus on the "charged period" which it argues is evidenced by the Trial Chamber relying on evidence from periods outside the temporal scope of the charges, "to refute the duress argument – that [Mr Ongwen] did not escape", while at the same time declining to do so when assessing Mr Ongwen's mental health.[2913] The Appeals Chamber finds this argument to be misplaced. As stated above, in assessing Mr Ongwen's mental health

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[2906] *See* paragraphs 1284-1287 above.
[2907] Conviction Decision, para. 2576.
[2908] Prosecutor's Response, para. 271.
[2909] Professor de Jong's Report, UGA-D26-0015-0046-R01, at 0051-0053.
[2910] Appeal Brief, paras 440-441, 444-446.
[2911] Appeal Brief, para. 440.
[2912] *See* paragraph 1301 above. .
[2913] Appeal Brief, paras 441, 444-445.

for the purposes of article 31(1)(a) of the Statute, the Trial Chamber did not disregard the evidence of the trauma that Mr Ongwen suffered after his abduction, which was outside the temporal scope of the charges; rather, based on the expert forensic evidence before it, the Trial Chamber reasonably found that his exposure to such mass trauma did not necessarily result in him developing PTSD or any other mental disorder that the Defence Experts had diagnosed.[2914] Likewise, and for the reasons discussed further below,[2915] the Appeals Chamber finds that the Trial Chamber reasonably considered Mr Ongwen's refusal to surrender to government soldiers at a meeting in September 2006, which occurred outside the temporal scope of the charges, as part of its holistic assessment as to whether Mr Ongwen had the possibility to escape from the LRA at the time of his conduct relevant to the charges.[2916] Consequently, the Defence shows no error in the Trial Chamber's focus on the "charged period" and its approach to evidence outside the temporal scope of the charges. The argument is therefore rejected.

1310. Lastly, to highlight the importance of analysing the cultural context when assessing mental health, the Defence refers extensively to the evidence of Professor Michael Wessells (hereinafter: "Professor Wessells), another expert witness called by Victims Group 2 and whose evidence the Trial Chamber did not rely upon for the purposes of its assessment under article 31(1)(a) of the Statute.[2917] While the Defence does not allege any specific error in the Conviction Decision related to Professor Wessells' evidence, its reference to this evidence also does not show any error in the Trial Chamber's approach to the "cultural context" when reaching its conclusions on Mr Ongwen's mental status at the relevant time. Consequently, the Appeals Chamber does not consider it necessary to address this argument any further.

[2914] *See* paragraph 1301 above.
[2915] *See* paragraphs 1519-1521 below.
[2916] Conviction Decision, para. 2640. *See also* paras 2636-2639.
[2917] Appeal Brief, paras 446-450. The Appeals Chamber notes that Professor Wessels is a professor of clinical population and family health at Columbia University, United States of America. *See* Conviction Decision, para. 601.

(ii) Alleged error in concluding that P-0446 and P-0447 did not ignore cultural factors

(a) Summary of the submissions

1311. The Defence argues with respect to P-0446 that she "dismissed the role of cultural factors in any mental health assessment of [Mr Ongwen]".[2918] In its view, P-0446's evidence needs to be examined in the context of her lack of experience working with child soldiers or in conflict zones in Africa, according to her *curriculum vitae* and testimony.[2919] Moreover, the Defence points to P-0446's "lack of knowledge" about an article authored by D-0042 and P-0445 on "*orongo* and *cen*", which it argues are concepts that are central to mental health and culture in the *Ongwen* case.[2920] The Defence claims that the importance of this fact, coupled with P-0446's lack of experience with former LRA child soldiers cannot be easily dismissed.[2921]

1312. With respect to the evidence of P-0447, the Defence points to statements in the Rebuttal Report which it argues show that P-0447 "simply did not understand and/or apply any knowledge or respect for cultural factors in his evidence".[2922]

1313. The Prosecutor submits, with respect to P-0046, that it is "incontrovertible that [P-0446] 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".[2923] As to the Defence's arguments regarding P-0447, the Prosecutor submits that the "relevant passages of [P-0447's] evidence do not show him to have said anything of a nature calling into question the reasonableness

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[2918] Appeal Brief, para. 452.
[2919] Appeal Brief, para. 453.
[2920] Appeal Brief, para. 454. *See also* "'*Orongo*" and *Cen*' Spirit Possessions – Post-Traumatic Stress Disorder in a Cultural Context: Local Problem, Universal Disorder with Local Solutions in Northern Uganda", UGA-D26-0015-0197. In this publication, the authors describe "*orongo*" as (animal) spirit possession which occurs when the spirit of a wild animal that has been killed seizes the hunter who killed it. The authors state that according to Acholi culture, "anyone who kills a wild animal experiences guilt and suffers immediate emotional and psychological symptoms akin to modern post-traumatic stress disorder", UGA-D26-0015-0197, at 0199. In addition, the authors describe "*cen*" as a "psychotic disorder that develops when the spirit of a dead person that died from a violent and brutal killing possesses the killer or members of the community. […]. The features of *cen* include the symptoms of re-experiencing the traumatic event, the vivid pleas of the victim of murder, avoidant behaviour related to events and cues that remind the affected victim of a traumatic event, and hypervigilance", UGA-D26-0015-0197, at 0199.
[2921] Appeal Brief, para. 454.
[2922] Appeal Brief, para. 455.
[2923] Prosecutor's Response, para. 275.

of the Chamber's assessment of his evidence, including his account of cultural factors".[2924]

1314. Victims Group 1 observe that the Trial Chamber was correct in its conclusion that P-0446 and P-0447 did not ignore cultural factors.[2925] In their view, P-0446 and P-0447's explanation of how they arrived at their conclusions "do not show that cultural factors were ignored".[2926] Victims Group 2 observe that the Defence's arguments in this regard are "self-defeating and riddled with contradictions given the evidence in the case record on the matter".[2927]

(b) Relevant parts of the Conviction Decision

1315. The Trial Chamber specifically addressed the Defence's argument that P-0046 and P-0047 did not take sufficient account of cultural factors in their evidence. In particular the Trial Chamber observed that

> 2461. The Defence does not provide any reference for its claim that Prosecution experts 'repeatedly minimized' and 'dismissed' cultural factors. In fact, there was general agreement among 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. [P-0447] addressed this issue directly in his rebuttal report. He stated that whereas cultural factors needed to be acknowledged, '[t]his, however, doesn't change the core characteristics of the diagnosis'. [P-0446] made the observation that 'PTSD is one of the few diagnos[e]s that has been very much studied across different cultures because of its utility in relation to victims of war trauma and terrorist attacks, and therefore it has been validated across many different cultures and languages'. [P-0445] acknowledged that culture can influence diagnostic instruments but explained that this does not affect the standardisation of such instruments or internationally valid criteria, such as 'impairment of functioning'. [D-0441] also stated that the core symptoms of mental illnesses are similar across cultures.
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> 2462. Also, [P-0446], [P-0445] and [P-0447] have explained the process by which they came to their conclusions, and the Chamber does not see any indication that in doing so, they ignored cultural factors.[2928]

[2924] Prosecutor's Response, para. 277.
[2925] Victims Group 1's Observations, para. 139.
[2926] Victims Group 1's Observations, para. 139.
[2927] Victims Group 2's Observations, para. 106.
[2928] Conviction Decision, paras 2461-2462 (footnotes omitted).

(c) Determination by the Appeals Chamber

1316. The Defence criticises P-0446's assessment of Mr Ongwen's mental health on the basis that she "dismissed the role of cultural factors in any mental health assessment of [Mr Ongwen]".[2929] In support of this argument, the Defence quotes a portion of P-0446's testimony that states

> I do not consider that I needed to be aware of every single belief system and ritual that was performed within the LRA in order to understand that there was a spiritual – a strong spiritual and cultural element affecting the LRA at the time, and needing to factor this in when considering both the question of whether a mental disorder was present, but also how that mental disorder may have expressed itself, given that cultural context.[2930]

1317. In the Defence's view, this testimony must be assessed in light of P-0446's lack of experience with working with child soldiers and in conflict zones in Africa, as well as her lack of familiarity with an article authored by D-0042 and P-0445 addressing the concepts of "*cen*" and PTSD.[2931] For the reasons that follow, the Appeals Chamber considers the Defence's criticisms to be misguided.

1318. The Appeals Chamber considers that based on P-0446's testimony, that the Defence itself quotes, it is clear that she acknowledged the significance of the cultural context. Notably, she acknowledged the existence of a "strong spiritual and cultural element affecting the LRA at the time" and her ability to factor in this context when assessing whether a mental disease or defect was present and how it may have manifested given the cultural context.[2932] In this regard, the Appeals Chamber notes that other than claiming that P-0446 was not qualified and lacked relevant experience to assess Mr Ongwen's mental health, the Defence fails to substantiate what impact, if any, these alleged shortcomings had on her assessment and why it was unreasonable for the Trial Chamber to rely on her evidence.

1319. Moreover, it is unclear, either from the Defence's arguments or the evidence on the record, of what relevance the concepts of "*cen*" and "*orongo*"[2933] were for the

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[2929] Appeal Brief, para. 452.
[2930] D-0046: T-163, p. 18, line 24 to p. 19, lines 4.
[2931] Appeal Brief, paras 453-454.
[2932] D-0046: T-163, p. 18 line 24 to p. 19, lines 4.
[2933] For the definitions of these concepts *see* footnote 2920 above.

Defence Experts' diagnosis of Mr Ongwen's mental health. More specifically, it is unclear what impact P-0446's lack of familiarity with an article authored by D-0042 and P-0445 addressing these concepts had on her evidence. In any event, the Appeals Chamber considers that, as argued by the Prosecutor,[2934] the Defence's argument ignores other aspects of P-0446's testimony that indicate that even though she may not have known specifically about Acholi culture, she had experience working with patients from cultures other than her own,[2935] and was aware of developments in the field of psychiatry, namely, transcultural psychiatry which accounts for how psychiatric illnesses express and present themselves across different cultures.[2936] Specifically, the Appeals Chamber notes that P-0446 observed, for example, behaviour of Mr Ongwen that appears to be informed by his cultural background,[2937] and explained why, notwithstanding cultural and other factors, she considered that persons around Mr Ongwen would have noticed indications of mental illness.[2938]

1320. In light of P-0446's evidence, the Appeals Chamber finds that it was reasonable for the Trial Chamber to conclude that she had adequately accounted for cultural factors in her assessment of Mr Ongwen' mental health during the period relevant to the charges.

1321. In addition, the Defence criticises P-0447 on the basis of remarks he made in the Rebuttal Report, which, in its view, demonstrate that P-0447 "did not understand and/or apply any knowledge or respect for cultural factors in his evidence".[2939] The Defence takes issue with P-0447's observation concerning "contradictions" in the Defence Experts' evidence.[2940] Specifically, P-0447 stated in the context of his discussion of transcultural psychiatry that

> [His] impression during the court hearing was that contradictions were blamed (*sic*) to a misunderstanding western psychiatrist[s] have, who do not "sense" the special conditions in the "African" context.[2941]

[2934] Prosecutor's Response, para. 276.
[2935] P-0446: T-162, p. 10, line 2 to p. 11, line 4.
[2936] P-0046: T-163, p. 41, lines 24-25 to p. 42, lines 1-11.
[2937] P-0446: T-163, p. 26, lines 16-19.
[2938] P-0446: T-163, p. 86, line 4 to p. 87, line 3.
[2939] Appeal Brief, para. 455.
[2940] Appeal Brief, para. 457.
[2941] Rebuttal Report, UGA-OTP-0287-0072, at 0079.

1322. The Appeals Chamber notes, as correctly observed by the Defence, that P-0447 began his remark by stating that his observation was based on his "impression" of the Defence Experts' evidence gleaned from the hearing. The Defence contends that his impression was wrong since the Defence Experts specifically testified about "the differences in respect to mental health in African and Western societies".[2942] In particular, the Defence points to the testimony of D-0041, who "described the lack of mental health literacy in African populations" and their inability to "describe the signs and symptoms of depression by themselves", and D-0422's testimony about how African's somatise mental health symptoms, by converting "psychological distress into physical symptoms".[2943] The Appeals Chamber considers that P-0447's remark does not call into question the notion put forward by the Defence Experts that, based on culture, differences with respect to the level of mental health literacy exists between African and Western societies. Rather, P-0447's remark was aimed at highlighting his *impression* that the Defence Experts sought to deflect contradictions in their evidence by suggesting that western psychiatrists did not understand the African context. In the Appeals Chamber's view, this characterisation of the Defence Experts' evidence does not, as the Defence argues, "illustrate" that P-0447 "did not understand and/or apply any knowledge or respect for cultural factors in his evidence".[2944]

1323. First, the Appeals Chamber notes that the following excerpt of P-0447's testimony is especially illustrative of the fact that P-0447 was aware of the importance of cultural factors for a mental health assessment:

> Q. That people cannot always describe symptoms of depression by themselves. They, they don't say "I'm feeling blue. I'm feeling depressed." They may say something else, all right, to express the symptoms. A. Mm-hmm. Q. Now, would it be fair to conclude that how a person communicates his, his or her symptoms is a significant factor in making – in (a), assessing the person, and (b), in making a diagnosis? A. Yes, it is fair to say that. And Dr Akena also said that it's very important to probe, which means to probe the symptom means you have to make sure that you as a clinician correctly identified the symptom. And if you're not sure, this means you have to rephrase or ask specific questions so to get more clarity if your patient meets the symptom, even in his respective culture. Q. And would you agree with him on that point? A. *I agree that culture affects the way how, how symptoms are expressed and how – which words are used to describe*

[2942] Appeal Brief, para. 457.
[2943] Appeal Brief, para. 457.
[2944] Appeal Brief, para. 455.

> *the symptoms I have. Of course. Q. Okay. Thank you. A. But I never doubted this*.[2945]

1324. Second, the Appeals Chamber notes that with regard to cultural context and the criteria for assessing mental disorders, the American Psychiatric Association, observes that

> Throughout the DSM-5 development process, the Work Groups made a concerted effort to modify culturally determined criteria so they would be more equivalent across different cultures. In Section II, specific diagnostic criteria were changed to better apply across diverse cultures. For example, the criteria for social anxiety disorder now include the fear of "offending others" to reflect the Japanese concept in which avoiding harm to others is emphasized rather than harm to oneself. The new manual also addresses cultural concepts of distress, which detail ways in which different cultures describe symptoms. In the Appendix, they are described through cultural syndromes, idioms of distress, and explanations. These concepts assist clinicians in recognizing how people in different cultures think and talk about psychological problems.[2946]

1325. It follows that the DSM-5 provides standard diagnostic criteria for the diagnosis of mental disorders while also accounting specifically for differences across cultures. Thus, in the Appeals Chamber's view, while cultural context is important for the assessment of a person's mental health, it underscores that the diagnostic criteria to determine mental disorders are universally applicable and do not necessarily inhibit the ability of psychiatrists from diagnosing individuals simply because they are of a different culture, ethnicity, religion or geographical origin.[2947] Accordingly, the Appeals Chamber rejects the Defence's argument that P-0447's characterisation of the Defence Experts' evidence shows his lack of understanding or application of cultural factors.

1326. Lastly, the Defence takes issue with P-0447's remark in the Rebuttal Report that the Defence Experts were of the view that "non-African mental health professional[s] could not be capable of diagnosing individuals from an African country".[2948]

[2945] P-0447: T-253, p. 45, line 21 to p. 46, line 12 (emphasis added).
[2946] American Psychiatric Association, 'Cultural Concepts in DSM-5' on Psychiatry.com (2013), https://www.psychiatry.org/File%20Library/Psychiatrists/Practice/DSM/APA_DSM_Cultural-Concepts-in-DSM-5.pdf.
[2947] In this regard the Appeals Chamber notes P-0447's statement that whereas cultural factors needed to be acknowledged, "[t]his, however, doesn't change the core characteristics of the diagnosis", *see* Rebuttal Report, UGA-OTP-0287-0072, at 0079.
[2948] Appeal Brief, para. 456, *referring to* Rebuttal Report, UGA-OTP-0287-0072, at 0079.

Specifically, the Defence argues that there is no basis in the record to ascribe such a view to its experts.[2949] The Appeals Chamber notes that the relevant part of the Rebuttal Report containing P-0447's remark reads as follows:

> [D-0041's] statements that [REDACTED] (T-248 page 90, lines 7/8 & page 98, line 13) lack a scientific basis and seem to indicate that non-African mental health professionals could not be capable of diagnosing individuals from an African country. The publications by [D-0042] (Ovuga, 2001) and our own work on PTSD (Weierstall et al., 2012) are adequate examples that demonstrate that [it] is indeed possible to apply diagnostic criteria defined in DSM to the Ugandan context, including former LRA child soldiers. This contradicts the mystification by [D-0042] and [D-0041] of the psychiatrist's role in Uganda.[2950]

1327. It is thus clear that the evidential basis for P-0447's remark was the statements in the record of D-0041, which P-0447 interpreted as being indicative of the view that "non-African mental health professional[s] could not be capable of diagnosing individuals from an African country".[2951] Accordingly, the Defence's argument is rejected.

(iii) Alleged error in treating certain matters as trivial

(a) Summary of the submissions

1328. The Defence argues that, contrary to the Trial Chamber's finding, Mr Ongwen's request for termites was not a "trivial" matter.[2952] It argues that a reasonable trier of fact would have considered the cultural interpretation of this food request and concluded that Mr Ongwen was "not joking around" nor was he "happy and in a good mood".[2953] In the Defence's view, whether or not Mr Ongwen was "joking around" was "a key factual issue on which the Chamber's conclusion, rejecting the [grounds for excluding criminal responsibility], hinged".[2954] As to the example relating to the absence of any translation of the word "blues" in many African languages, the Defence argues that the Trial Chamber was wrong to trivialise "evidence of language and somatization".[2955]

[2949] Appeal Brief, para. 456.
[2950] Rebuttal Report, UGA-OTP-0287-0072, at 0079-0080.
[2951] Rebuttal Report, UGA-OTP-0287-0072, at 0079.
[2952] Appeal Brief, para. 461.
[2953] Appeal Brief, paras 464-465.
[2954] Appeal Brief, para. 463.
[2955] Appeal Brief, para. 470. *See also* para. 467, fn. 541, *referring to* D-0442: T-254, p. 15, lines 13-24. D-0442 described "somatisation" as the tendency of many African people to perceive mental distress in terms of physical symptoms.

The Defence contends that such evidence provides "alternative explanations" that could "raise reasonable doubt within the legal context in which it operates".[2956]

1329. The Prosecutor submits that the Defence's argument concerning Mr Ongwen's food request "merely reflects a difference in opinion on a wholly peripheral issue – whether a single remark by [Mr Ongwen] to an ICC-DC medical officer showed him to be making a joke or a serious request for a particular foodstuff".[2957] In the Prosecutor's view, regardless of which interpretation is correct, "it was not legally necessary for the Chamber to determine beyond reasonable doubt that [Mr Ongwen] was in a 'happy' mood on that one occasion".[2958] In relation to the argument that evidence of language and somatisation may provide alternative explanations for Mr Ongwen's words and behaviour, the Prosecutor submits that the Defence "fails to show how this linguistic phenomenon actually served to conceal any relevant symptoms of mental disease or defect in [Mr Ongwen] at the times material to the charges, so as to call into doubt the reliability of the [Prosecutor's Experts'] assessment".[2959] Accordingly, the Prosecutor submits that the Trial Chamber was reasonable and correct in regarding these issues as "trivial".[2960]

1330. Victims Group 1 observe that the Trial Chamber correctly found that "[t]he question of termites as food rather than a joke and the word 'blues' not being in many African languages" was trivial and not relevant to the issue of whether the Prosecutor's Experts' "minimised and dismissed the role of culture in the assessment of [Mr Ongwen's] mental health".[2961]

1331. Likewise, Victims Group 2 submit that the Trial Chamber was correct in dismissing the Defence's arguments in this respect as trivial.[2962] They further submit that based on the evidence of certain witnesses who shared Mr Ongwen's cultural background, "it was absolutely clear that [Mr Ongwen] was a man of jokes".[2963]

[2956] Appeal Brief, para. 470.
[2957] Prosecutor's Response, para. 284.
[2958] Prosecutor's Response, para. 284.
[2959] Prosecutor's Response, para. 285.
[2960] Prosecutor's Response, paras 284, 285.
[2961] Victims Group 1's Observations, para. 140.
[2962] Victims Group 2's Observations, paras 110, 115.
[2963] Victims Group 2's Observations, paras 111-112, *referring to* Conviction Decision, paras 2506, 2512, 2513.

Moreover, they submit that the fact that P-0447 did not know that termites were considered a delicacy in Acholi culture was "inconsequential" given that "an assessment of these facts in the sense suggested by the Defence would not have ultimately changed the outcome of the [Conviction Decision] in any way […]".[2964] Lastly, Victims Group 2 aver that D-0042 never used the terms "blues" or "feeling blue" to describe Mr Ongwen or "make any conclusions concerning his mental health".[2965] Consequently, they observe that the Trial Chamber could not have made any reference to D-0042's "theoretical explanations" in dismissing the grounds for excluding his criminal responsibility.[2966]

(b) Relevant parts of the Conviction Decision

1332. In the context of addressing the Defence's arguments as to whether the Prosecutor's Experts had taken into account cultural factors in their evidence, the Trial Chamber noted two specific issues which the Defence considered significant, namely, Mr Ongwen's food request whilst in the ICC-DC and the absence of a direct translation of the term "blues" in many African languages.[2967] The Trial Chamber dismissed these arguments on the basis that "the interpretation that [Mr Ongwen's] request for termites [was] a serious food request rather than a joke and the absence of the word 'blues' in 'many African languages', are trivial and without any serious link to the issue under consideration".[2968]

(c) Determination by the Appeals Chamber

1333. The Appeals Chamber understands the Defence's main contention under this sub-ground of appeal to be that, for it its assessment under article 31(1)(a) of the Statute, the Trial Chamber failed to appreciate Mr Ongwen's cultural context and its implications especially when interpreting other persons' observations of Mr Ongwen.[2969] In particular, the Defence argues that one of the primary reasons for finding that Mr Ongwen did not suffer from a mental disease or defect at the time relevant to the charges, was "the theory that [Mr Ongwen] appeared happy and joking,

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[2964] Victims Group 2's Observations, para. 112.
[2965] Victims Group 2's Observations, para. 115.
[2966] Victims Group 2's Observations, para. 115.
[2967] Conviction Decision, para. 2463.
[2968] Conviction Decision, para. 2463.
[2969] Appeal Brief, para. 461.

and displayed no symptoms of mental illness to anyone around him".[2970] To refute this theory the Defence refers to two examples in the evidence.

1334. First, the Defence refers to an incident recorded by [REDACTED], the ICC-DC psychiatrist, who reported that Mr Ongwen had "jokingly" asked if it was possible to put "termites" on the ICC-DC shopping list, because he did not like Dutch food.[2971] When D-0041was questioned about this incident by the Prosecutor, who suggested that Mr Ongwen's jovial demeanour was not "typical" behaviour of someone who was "suffering from [a] major depressive disorder",[2972] D-0041 responded as follows:

> A. Did the psychiatrist really understand when the client said termites? Because termites is white ants, *ngwen*. Q. Yes. A. It's dishes that's added onto people's meals. Maybe he wanted it to be added to his list. Around that time they are readily available in northern Uganda. I don't think this was a joke, but that's fine. I wasn't there, but I don't think it was a joke. I think the client really wanted something different from Dutch food. But that's my opinion. I may be wrong.[2973]

1335. When P-0447 was questioned by the Defence and asked to comment on D-0041's suggestion, he responded as follows:

> My interpretation, my interpretation would be that I think Mr Ongwen is making a joke in this term, because I would understand it in a way that why would he like to have termites. [2974]

1336. The Defence argues that based on this evidence "a reasonable trier of fact" applying a cultural interpretation, would have concluded that Mr Ongwen was not "joking around" or "happy and in a good mood".[2975] The Appeals Chamber is unpersuaded by this argument. The issue as to whether Mr Ongwen was joking or making a serious food request is inconsequential and has no bearing on the mental health experts' or the Trial Chamber's assessment of his mental health years earlier, at the *times relevant to the charges*. As argued by the Prosecutor, it was "not legally necessary", nor did the Trial Chamber determine that Mr Ongwen was in a "happy mood" or not "joking around" on that particular occasion.[2976] In the Appeals Chamber's

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[2970] Appeal Brief, para. 462. *See also* Conviction Decision, paras 2506-2517.
[2971] D-0041: T-249, p. 50, line 25 to p. 51, lines 12-14.
[2972] D-0041: T-249, p. 51, lines 14-17.
[2973] D-0041: T-249, p. 51, lines 18-25.
[2974] P-0447: T-253, p. 44, lines 23 to p. 45, line 1.
[2975] Appeal Brief, para. 465.
[2976] Prosecutor's Response, para. 284.

view, this incident does not demonstrate, in the manner suggested by the Defence, the importance of "cultural context" when interpreting other persons' observations of Mr Ongwen's words and behaviour.[2977] Consequently, the Appeals Chamber finds that the Trial Chamber reasonably dismissed Mr Ongwen's food request as "trivial and without any serious link to the issue under consideration".[2978]

1337. Second, the Defence refers to an observation by D-0041 in his testimony that the term "blues" (meaning to feel sad) cannot be directly translated in many African languages, and associates this with an observation by D-0042 that many African people tend to perceive or describe mental distress in terms of physical symptoms (somatisation).[2979] In this regard, the Defence argues that "where a concept or a feeling cannot be expressed in a particular language, it is logical that the person would find other ways to express the feeling", and that in the present case, the Trial Chamber "based on its own cultural constructs, dismissed the evidence of language and somatization as 'trivial'".[2980]

1338. At the outset, the Appeals Chamber notes that the Trial Chamber did not dismiss the notion of "somatisation" as trivial. Rather, it addressed the issue in the context of its "discussion of the corroborative evidence of witnesses who observed or interacted with [Mr Ongwen] during the period of the charges".[2981] The Trial Chamber explained that it assessed the evidence of the witnesses to ascertain whether they described, in particular, any conduct of Mr Ongwen that corresponded to symptoms of mental disorders and that "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".[2982] The Appeals Chamber recalls that it has discussed and confirmed the Trial Chamber's finding in this regard elsewhere in this judgment.[2983]

[2977] Appeal Brief, para. 461.
[2978] Conviction Decision, para. 2463.
[2979] Appeal Brief, para. 467, *referring to* D-0042: T-254, p. 15, lines 13-24.
[2980] Appeal Brief, para. 470.
[2981] Conviction Decision, para. 2463, *referring to* Conviction Decision, section IV.D.1.iii.
[2982] Conviction Decision, para. 2501.
[2983] *See* paragraph 1246 above.

1339. The Appeals Chamber is unpersuaded by the Defence's argument that the Trial Chamber failed to recognise that certain symptoms of mental disease or defect may be expressed in culturally sensitive ways, due to limitations in the construction and operation of particular languages.[2984] First, the Appeals Chamber observes that the example from the evidence, that the Defence relies on to support its argument, is misplaced. As noted by Victims Group 2, when D-0041 testified that there was no translation for the word "blues" in many African languages, he was discussing generally the limitations associated with a particular screening instrument called CES-D,[2985] and the various ways that symptoms of mental illness may manifest around the world or across different cultures.[2986] Consequently, language such as "blues" or "feeling blue" was unrelated to any conclusions reached, either by the mental health experts or the Trial Chamber, concerning Mr Ongwen's mental health. Second, and more importantly, the Appeals Chamber notes that the Defence fails to concretely demonstrate, how the purported constraints in the construction and operation of African languages contributed to the Trial Chamber's alleged misinterpretation of relevant symptoms of mental disease or defect in Mr Ongwen at the times material to the charges. Accordingly, the Appeals Chamber finds that the Trial Chamber reasonably dismissed the absence of the word "blues" in many African languages as "trivial and without any serious link to the issue under consideration".[2987] Consequently, the argument is rejected.

(iv) Overall conclusion

1340. Having considered the arguments raised under grounds of appeal 30, 34, 36 and 43 concerning alleged errors in the Trial Chamber's conclusions on mental health and culture, the Appeals Chamber finds that the Trial Chamber did not err (i) by disregarding some cultural issues when assessing Mr Ongwen's mental health under article 31(1)(a) of the Statute; (ii) in concluding that P-0446 and P-0447 had taken cultural factors into consideration; and (iii) in treating certain incidents as trivial when

[2984] Appeal Brief, paras 469-470.
[2985] Victims Group 2's Observations, paras 114-115. The Appeals Chamber notes that CES-D refers to a screening instrument to measure depression which was developed by The Center for Epidemiological Studies.
[2986] D-0041: T-248, p. 47, lines 1-18.
[2987] Conviction Decision, para. 2463.

assessing Mr Ongwen's mental health. As a result, the Appeals Chamber rejects these grounds of appeal.

(e) Ground of appeal 33: Alleged errors in the Trial Chamber's consideration of P-0445's evidence

1341. Under this ground of appeal, the Defence alleges that P-0445's evidence was "selectively used" by the Trial Chamber to reject the ground for excluding criminal responsibility under article 31(1)(a) of the Statute.[2988] In support of its argument, the Defence contends that: (i) P-0445's inculpatory evidence concerning Mr Ongwen's moral development was not adequately based on the evidence;[2989] (ii) P-0445's methodology in formulating her conclusions were disregarded;[2990] and (iii) P-0445's "potentially exculpatory evidence" relating to the adverse environment of the LRA and its impact on Mr Ongwen's "moral development and 'child-like' personality", even as an adult, was disregarded.[2991]

1342. Before turning to the above-mentioned arguments, the Appeals Chamber notes the Defence's claim that in the *Bemba* Appeal Judgment, the Appeals Chamber held that "it is an error for a Trial Chamber to disregard relevant and potentially exculpatory evidence from a witness upon whom it has relied for inculpatory evidence".[2992] The Appeals Chamber considers that the Defence misapprehends the Appeals Chamber's actual finding in the *Bemba* Appeal Judgment. In the particular circumstances of that case, the trial chamber was found to have failed to address both Mr Bemba's uncontested statement that he wrote to the Prime Minister of the Central African Republic, requesting an international commission of inquiry to be set up, and, the testimony of D-48 which attested to the existence and content of the letter.[2993] The Appeals Chamber held that

> [I]f 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

[2988] Appeal Brief, para. 473.
[2989] Appeal Brief, paras 475-483.
[2990] Appeal Brief, paras 484-486.
[2991] Appeal Brief, paras 487-492, 495, 497.
[2992] Appeal Brief, para. 471.
[2993] Bemba Appeal Judgment, paras 174-175.

absence of such reasoning, the Trial Chamber was not at liberty to simply ignore Mr Bemba's claim.[2994]

1343. Thus, the Appeals Chamber found that the trial chamber's reasoning concerning Mr Bemba's factual claim was inadequate and not, as the Defence claims, that "it is an error for a Trial Chamber to disregard relevant and potentially exculpatory evidence from a witness upon whom it has relied for inculpatory evidence".[2995] In light of the Defence's misapprehension, the Appeals Chamber finds that its arguments are not assisted by its reliance on the *Bemba* Appeal Judgment.

(i) Alleged errors with respect to P-0445's inculpatory conclusions on Mr Ongwen's moral development

(a) Summary of the submissions

1344. The Defence argues that P-0445's conclusions as to Mr Ongwen's moral development are not adequately based on the evidence and thus were unreliable.[2996] It argues that for her conclusion that Mr Ongwen had attained the highest level of moral development, P-0445 examined certain quotations in the Defence Experts' First Report that reflected "expressions of remorse" on the part of Mr Ongwen.[2997] The Defence contends that one such quotation omits important context from the Defence Experts' First Report which demonstrates that Mr Ongwen "articulated an awareness of right and wrong after he successfully escaped from the LRA" and not during the period of the charges.[2998] Similarly, the Defence argues that P-0445's quotation from Professor de Jong's Report also omits relevant information concerning Mr Ongwen's expression of regret.[2999] Finally, the Defence argues that the Trial Chamber erred in failing to recognise that Mr Ongwen's expressions of remorse occurred after the charged period and "retroactively appli[ed] his verbalised awareness to the period of 2002-2005".[3000]

1345. The Prosecutor submits that the Defence "fails to show that no reasonable Chamber could have considered [P-0445's] expert opinion of [Mr Ongwen's] moral development to be reliable, or that any error would in any event have materially affected

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[2994] Bemba Appeal Judgment, para. 175. *See also* para. 189.
[2995] Appeal Brief, para. 471.
[2996] Appeal Brief, para. 476.
[2997] Appeal Brief, para. 477.
[2998] Appeal Brief, paras 478-479 (emphasis in original).
[2999] Appeal Brief, para. 480.
[3000] Appeal Brief, paras 482-483.

the [Conviction Decision]".[3001] The Prosecutor further submits that P-0445's view on Mr Ongwen's moral development was not "dispositive for its conclusion as to whether he suffered from a mental disease or defect" at the times relevant to the charges.[3002] In his view, even if one were to accept the relevance of the context concerning Mr Ongwen's expressions of regret, that were apparently omitted in P-0445's evidence, the Defence fails to take into account "*other* material on which [P-0445] also relied […] which shows that at the times material to the charges, [Mr] Ongwen could appreciate the moral value of his conduct".[3003] Lastly, the Prosecutor submits that the Defence's assertion regarding the timing of his remorse and the Trial Chamber's alleged retroactive application of this factor to the charged period, "conflates [P-0445's] reasoning with that of the Chamber".[3004]

1346. Victims Group 1 observe that the Trial Chamber found P-0445's evidence to be "pertinent and valuable for its findings" and that nothing in this conclusion "remotely suggests that it selectively applied [P-0445's] report" to dismiss the ground under article 31(1)(a) of the Statute.[3005] Victims Group 2 observe that P-0445's evidence shows that Mr Ongwen "had managed to attain mental and emotional ability to express remorse since his early childhood".[3006] Thus, in their view, he must have been "able to understand the consequences of his acts and conducts as an adult or, in particular, between the years 2003-2005".[3007] Consequently, they observe that the Trial Chamber was correct in its consideration of P-0445's conclusion on Mr Ongwen's moral development.[3008]

(b) Relevant parts of the Conviction Decision

1347. In assessing P-0445's evidence, the Trial Chamber noted, *inter alia*, that

> Dr Abbo evaluated the moral development attained by [Mr] Ongwen and concluded that he attained the highest level of moral development, the post conventional level. Dr Abbo's report explained that this level of moral

[3001] Prosecutor's Response, para. 289.
[3002] Prosecutor's Response, para. 289.
[3003] Prosecutor's Response, para. 290 (emphasis in original).
[3004] Prosecutor's Response, para. 292.
[3005] Victims Group 1's Observations, para. 142.
[3006] Victims Group 2's Observations, para. 120.
[3007] Victims Group 2's Observations, para. 120.
[3008] Victims Group 2's Observations, para. 120.

> development is 'characterized by the pursuance of impartial interests for each member in society as well as the establishing of self-chosen moral principles'.[3009]

1348. The Trial Chamber considered overall that P-0445's evidence was "pertinent and valuable for use in its findings", in particular in relation to her "assessment of the level of [Mr Ongwen's] moral development.[3010]

(c) Determination by the Appeals Chamber

1349. In essence, the Defence disputes the reliability of P-0445's conclusion that Mr Ongwen had attained the highest level of moral development, on the basis that certain relevant context was omitted from the evidence on which she relied, that calls into question his level of development during the charged period.[3011]

1350. The Appeals Chamber observes that in assessing Mr Ongwen's moral development, P-0445 referred to three documents, namely, the Defence Experts' First Report,[3012] Professor de Jong's Report[3013] and a transcript of Mr Ongwen speaking on the radio.[3014]

1351. The relevant portion of P-0445's Report reads as follows:

> 5.1.2 The quotations below demonstrate that [Mr Ongwen] may have reached the post conventional level of moral development: On page 12 [of the Defence Experts' First Report], [D-0042] reports that *though [Mr Ongwen] says he does not understand any of the charges brought against him at the ICC, he feels deeply remorseful and he regrets his participation in the activities of LRA in the bush on orders from Joseph Kony and other LRA leaders.* Also in [Professor de Jong's Report], *[h]e tells he was mean to his soldiers and gave them 30 strokes, but only when they tortured civilians. He wonders why one would enjoy doing people harm if [they] are not your enemy* ([Professor de Jong's Report], page 6). [REDACTED].

[3009] Conviction Decision, para. 2481 (footnotes omitted), *referring to* P-0445's Report, UGA-OTP-0280-0732, at 0740.
[3010] Conviction Decision, para. 2485.
[3011] Appeal Brief, paras 476, 479.
[3012] P-0445's Report, UGA-OTP-0280-0732, at 0732, *referring to* Defence Experts' First Report, UGA-D26-0015-0154. *See also* P-0445's Report, UGA-OTP-0280-0732, at 0740-0741.
[3013] P-0445's Report, UGA-OTP-0280-0732, at 0732, *referring to* Professor de Jong's Report, UGA-D26-0015-0046-R01. *See also* P-0445's Report, UGA-OTP-0280-0732, at 0740-0741.
[3014] P-0445's Report, UGA-OTP-0280-0732, at 0741, *referring to* a radio transcript cited as "H.11", from the period 2003-2004, discussing the role of "Ojok Kampala" during the attack on Lukodi. *See also* P-0445's Report, UGA-OTP-0280-0732, at 0767, for a list of material provided to P-0455 that reveals that the radio transcript cited as "H.11" is in fact document UGA-OTP-0274-6941 (hereinafter: "Radio transcript, UGA-OTP-0274-6941").

> 5.1.3 **Conclusion**: Evaluating the materials for the level of moral development attained by [Mr Ongwen], it is evidenced that he attained the highest level of moral development, the post conventional level.[3015]

1352. At the outset, the Appeals Chamber notes the Defence's argument that P-0445's conclusion was not unequivocal given her statement at paragraph 5.1.2 of her report that Mr Ongwen "may have reached the post conventional level of moral development".[3016] The Appeals Chamber notes, however, that in paragraph 5.1.3 of her report, which is introduced by the word "Conclusion", P-0445 unequivocally concludes her assessment by stating that Mr Ongwen "attained the highest level of moral development, the post conventional level".[3017] The Appeals Chamber considers that P-0445's use of the word "may" prior to her actual conclusion is inconsequential and, as such, does not affect the reliability of her ultimate conclusion.

1353. In addition, the Appeals Chamber observes that the Defence takes issue with P-0445's quotation from the Defence Experts' First Report to the effect that "*though [Mr Ongwen] says he does not understand any of the charges brought against him at the ICC, he feels deeply remorseful and he regrets his participation in the activities of [the] LRA*".[3018] In the Defence's view, P-0445 left out "important information" that preceded that quote, namely, that

> When asked directly whether he knew that the various acts he saw, participated in or carried out in the bush were 'wrong', [Mr Ongwen] said that when he was in the bush, he did not appreciate the wrongfulness of his acts. However after coming out of the bush he realized that what he saw and did were wrong …[3019]

1354. The Defence argues that the evidence shows that Mr Ongwen "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".[3020] While the Appeals Chamber accepts the relevance of this missing context for Mr Ongwen's statement that "*he feels deeply remorseful and he regrets his participation in the activities of [the] LRA*", the impact of this omission

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[3015] P-0445's Report, UGA-OTP-0280-0732, at 0740-0741 (emphasis in original).
[3016] Appeal Brief, para. 477 (emphasis in original).
[3017] P-0445's Report, UGA-OTP-0280-0732, at 0741.
[3018] Appeal Brief, para. 478 (emphasis added), *referring to* P-0445's Report, UGA-OTP-0280-0732, at 0740.
[3019] Appeal Brief, para. 478, *referring to* Defence Experts' First Report, UGA-D26-0015-0004, at 0014.
[3020] Appeal Brief, para. 479 (emphasis in original).

on P-0445's ultimate conclusion must be assessed in light of all the other evidence that she relied on.

1355. Apart from other statements from the Defence Experts' First Report, which the Defence does not take issue with, the Appeals Chamber notes that P-0445 also quoted a statement recorded in Professor de Jong's Report where Mr Ongwen explained that "*he was mean to his soldiers and gave them 30 strokes, but only when they tortured civilians. He wonders why one would enjoy doing people harm if [they] are not your enemy*".[3021] The Appeals Chamber notes in this regard that the Defence submits that P-0445's quotation from Professor de Jong's Report also omits relevant context, namely, a preceding sentence to the effect that "[…] he acknowledges he abducted people, but regrets he did so, and mentions that the LRA forced them to do so".[3022] The Appeals Chamber rejects this argument given that the Defence does not explain what "relevant context" this particular sentence adds to the statement identified by P-0445 nor does it engage with P-0445's view that Mr Ongwen's recognition that he was only "mean" to his soldiers when he needed to discipline them, was indicative of his moral development.

1356. The Appeals Chamber also notes that P-0445 relied on the transcript of an intercepted LRA radio transmission from 2003-2004, in which a person identified as Mr Ongwen,[3023] denounced those responsible for the killings at Lukodi by saying that [REDACTED].[3024]

1357. Moreover, in her testimony P-0445 identified other incidents from the testimony of witnesses, which, in her view, indicated that Mr Ongwen "had developed to such a level of forming his own values".[3025] For instance, P-0445 considered the testimony of P-0231 who described how, on one occasion, Mr Ongwen intervened and persuaded Joseph Kony not to kill P-0231 and others.[3026] The witness testified that

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[3021] P-0445's Report, UGA-OTP-0280-0732, at 0740-0741, *referring to* Professor de Jong's Report, UGA-D26-0015-0046-R01, at 0051, 0059 (emphasis added).
[3022] Appeal Brief, para. 480.
[3023] P-0142: T-71, pp. 53-55. *See also* UGA-OTP-0283-1386, at 1386-1387.
[3024] P-0445's Report, UGA-OTP-0280-0732, at 0740-0741, *referring to* Radio Transcript, UGA-OTP-0274-6941, at 6947.
[3025] P-0445: T-166, p. 45, lines 7-13. *See also* T-166, p.46, lines 6-19.
[3026] P-0445: T-166, p. 45, lines 1-6.

> [REDACTED].[3027]

1358. P-0445 assessed this testimony as follows:

> And so this – this kind of thinking of – he seems to have had, you know, he had developed to such a level of forming his own values which might have been not so much in line perhaps with the values of Kony himself, but he used this in a way that it was advantageous to other people, but also to him in that perhaps some of the alleged killings that he did could have been, you know, because – because of his values and because that – because of the fact that he had to survive and had to please Kony.[3028]

1359. In the Appeals Chamber's view, it is clear that P-0445's conclusion on Mr Ongwen's level of moral development was informed by more than just her consideration of Mr Ongwen's expression of remorse as recorded in the Defence Experts' First Report when he was interviewed years after the charged period. The Appeals Chamber considers that P-0445's expert analysis of other statements that Mr Ongwen made which relate to the charged period, as evidenced in Professor de Jong's Report, the Radio Transcript and other contemporaneous testimony heard during the trial, sufficiently support her conclusion that at the time material to the conduct charged, Mr Ongwen had "attained the highest level of moral development, the post conventional level".[3029] The reliability of P-0445's conclusion is thus unaffected by her omission, from her report, of Mr Ongwen's statement that, while he was in the bush, he had no appreciation for what was right or wrong. Consequently, the Appeals Chamber finds that it was reasonable for the Trial Chamber to rely on P-0445's conclusion concerning Mr Ongwen's moral development.[3030] The argument is therefore rejected.

1360. Finally, the Appeals Chamber notes the Defence's argument that the Trial Chamber erred in failing to recognise that Mr Ongwen's expressions of remorse occurred after the charged period and "retroactively appli[ed] his verbalised awareness to the period of 2002-2005".[3031] In their view, the Trial Chamber based its conclusion on Mr Ongwen's moral development on "factual errors" and ultimately rejected the ground for excluding criminal responsibility on that basis.[3032] The Appeals Chamber

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[3027] P-0231: T-123, p. 12, lines 16-25, p. 13, lines 1-2.
[3028] P-0445: T-166, p. 45, lines 7-13.
[3029] P-0445's Report, UGA-OTP-0280-0732, at 0741.
[3030] Conviction Decision, para. 2481.
[3031] Appeal Brief, paras 482-483.
[3032] Appeal Brief, para. 483.

finds no merit in this argument. As discussed above, P-0445's conclusion, that, at the time relevant to the charged period, Mr Ongwen had attained the highest level of moral development, was informed not only by her consideration of Mr Ongwen's expression of remorse that was made more than a decade later in the ICC-DC.

1361. Moreover, as noted by the Prosecutor, the Appeals Chamber observes that the Defence's argument conflates P-0445's reasoning with that of the Trial Chamber.[3033] Besides noting that it considered P-0445's evidence to be reliable, the Trial Chamber never indicated that her opinion of Mr 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".[3034] Rather, the Trial Chamber's view of Mr Ongwen's development and mental health was informed by the combined evidence of the mental health experts, including the contemporaneous and corroborative evidence of persons who interacted with Mr Ongwen at the material time. The argument is therefore rejected.

(ii) Alleged error in disregarding P-0445's methodology

(a) Summary of the submissions

1362. The Defence argues that

> Unlike the other two Prosecution experts, P-0445, recognised the limitations of not being able to interview [Mr Ongwen], and instead, relied upon the findings of the Defence Experts and Professor de Jong, all of whom interviewed [him] on multiple occasions.[3035]

1363. In addition, the Defence emphasises testimony of P-0445, where she stated that it was "a little bit more difficult for me" to view Mr Ongwen as an adult in isolation from Mr Ongwen as a child, "because it's a continuous thing".[3036] The Defence argues that for P-0445 "this timeline or continuum started with [Mr Ongwen's] abduction", which, it argues, "makes it difficult to discern how the Chamber could claim to use P-

[3033] Prosecutor's Response, para. 292.
[3034] Prosecutor's Response, para. 289.
[3035] Appeal Brief, para. 484.
[3036] Appeal Brief, para. 485, *referring to* P-0445: T-166, p. 55, line 10 to p. 56, line 2.

0445's evidence in support of its conclusions to inculpate [Mr Ongwen], by rejecting the affirmative defence".[3037]

1364. The Prosecutor submits that the Defence is incorrect when it argues that there was a contradiction in the methodology adopted by P-0445 and the other experts called by the Prosecutor.[3038] He submits that all three experts not only addressed the fact that they were not allowed to conduct a clinical interview with Mr Ongwen in their reports, but also clearly set out "the basis on which they were nonetheless able to carry out their assessment".[3039] Furthermore, the Prosecutor argues that the Defence "wrongly asserts that [P-0445's] view of the link between childhood and adulthood contradicts the Chamber's approach, which 'explicitly excluded' the relevance of Ongwen's abduction".[3040] The Prosecutor further submits that the Conviction Decision "does not exclude the relevance of [Mr Ongwen's] personal history to the experts' assessment of his mental health […] – even if, rightly, the Chamber did not treat any previous trauma as overriding its careful, multi-factored analysis".[3041]

(b) Relevant parts of the Conviction Decision

1365. Before the Trial Chamber, the Defence argued that none of the Prosecutor's Experts acknowledged the shortcoming of not being able to conduct interviews directly with Mr Ongwen in the preparation of their reports.[3042] The Trial Chamber found this argument to be "factually incorrect", as all three experts were found to have explicitly addressed this issue in their respective reports.[3043] Furthermore, the Trial Chamber found that

> 2468. In addition, the Chamber notes that [P-0446], [P-0445] and [P-0447] made use of the information provided by [Mr] Ongwen to mental health experts to whom he did agree to speak, as reflected in the reports of those experts, in particular [D-0042] and [D-0041], and Professor De Jong.
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> 2469. In these circumstances, considering that the clinical interview was not possible due to circumstances beyond the control of the Prosecution experts, that the Prosecution experts addressed this fact in their reports and used the

[3037] Appeal Brief, para. 486.
[3038] Prosecutor's Response, para. 293.
[3039] Prosecutor's Response, para. 293.
[3040] Prosecutor's Response, para. 295.
[3041] Prosecutor's Response, para. 295.
[3042] Defence Closing Brief, para. 657.
[3043] Conviction Decision, paras 2465-2467.

> information provided by [Mr] Ongwen to other experts to whom he did agree to speak, and that they clearly laid out the bases for their reports they otherwise did rely on, the Chamber has no related methodological concerns with regard to the reports in question.[3044]

(c) Determination by the Appeals Chamber

1366. The Appeals Chamber notes that the Defence's argument concerning a purported inconsistency in the methodology adopted by P-0445 and the other experts called by the Prosecutor was addressed squarely by the Trial Chamber in the Conviction Decision.[3045] On appeal, other than repeating its arguments made at trial, the Defence fails to show any error that would call into question the reasonableness of the Trial Chamber's finding. The argument is therefore dismissed for lack of substantiation.

1367. Furthermore, the Defence argues that it was unreasonable for the Trial Chamber to rely on P-0445's evidence, since in her view, the link between Mr Ongwen's development as a child to adulthood "started with [Mr Ongwen's] abduction".[3046] This, the Defence contends, directly contradicts the approach of the Trial Chamber that "explicitly excluded" the relevance of Mr Ongwen's abduction.[3047] For the reasons that follow, the Appeals Chamber finds no merit in this argument.

1368. First, the Appeals Chamber notes that contrary to the Defence's argument, P-0445 did not consider for her assessment that the "timeline or continuum started with [Mr Ongwen's] abduction".[3048] Rather, the evidence shows that P-0445 considered the timeline to include his childhood prior to his abduction. As noted by the Trial Chamber, P-0445 found that

> '[i]It appears like up till the time of [Mr Ongwen's] abduction, the complex interactions between individual, societal, and ecological factors over the course of his life had gone on satisfactorily well'.[3049]

1369. Moreover, the Appeals Chamber notes that in the context of discussing the concept of "free will" as a function of the brain and how this functionality develops, P-0445, stated specifically, that Mr Ongwen "was lucky to have had favourable early

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[3044] Conviction Decision, paras 2468-2469 (footnotes omitted).
[3045] Conviction Decision, paras 2465-2469.
[3046] Appeal Brief, para. 486.
[3047] Appeal Brief, para. 486.
[3048] Appeal Brief, para. 486.
[3049] Conviction Decision, para. 2480, *referring to* P-0445's Report, UGA-OTP-0280-0732, at 0735.

childhood experiences that supported his brain functioning as a child. These favourable early child experiences contributed to his continued resilience throughout his living in the bush".[3050] Finally, in explaining her ultimate conclusion regarding Mr Ongwen's capacity to appreciate the unlawfulness of his conduct, she stated that "[t]he capacity to appreciate unlawfulness of his conduct is largely because he had favourable early childhood development".[3051] In light of P-0445's evidence, the Appeals Chamber rejects the Defence's assertion that her timeline of Mr Ongwen's mental development started with his abduction; as noted above, P-0445 considered the timeline to include his childhood prior to his abduction.[3052]

1370. Second, the Appeals Chamber considers that the Defence misconstrues the Trial Chamber's conclusions regarding the relevance of the evidence concerning Mr Ongwen's abduction to its assessment of his mental health at the times material to the charges. The Appeals Chamber notes that much of the Defence Experts' evidence centred on Mr Ongwen's abduction as being the event and point in time at which his mental illnesses began.[3053] This evidence was carefully considered by the Prosecutor's Experts, including P-0445, and based on their assessments, including evidence heard at trial, the Trial Chamber found that any trauma that Mr Ongwen was exposed to during his childhood and time in the LRA did not necessarily result in him developing PTSD or any other mental disorder at the times material to the charges.[3054]

1371. Thus, contrary to the Defence's argument, the Trial Chamber did not "explicitly exclude" the relevance of Mr Ongwen's abduction from its assessment of his mental health at the time material to the charges.[3055] Hence, the Appeals Chamber considers that the Trial Chamber's reliance on P-0445's evidence, which also considered the relevance of Mr Ongwen's abduction for her assessment, was not incompatible with its conclusion that Mr Ongwen did not suffer from a mental disease or defect at the relevant time.[3056] The Defence's argument is therefore rejected.

[3050] P-0445's Report, UGA-OTP-0280-0732, at 0754.
[3051] P-0445's Report, UGA-OTP-0280-0732, at 0756.
[3052] Appeal Brief, para. 486.
[3053] Defence Experts' First Report, UGA-D26-0015-0004, at 0006.
[3054] *See* paragraph 1301 above.
[3055] Appeal Brief, para. 486.
[3056] Appeal Brief, para. 486.

(iii) Alleged error in disregarding potentially exculpatory evidence given by P-0445

(a) Summary of the submissions

1372. The Defence argues that the Trial Chamber disregarded P-0445's evidence that described the "adverse and unfavourable environment of the LRA and its effects on [Mr Ongwen's] development".[3057] It avers that, according to P-0445, the LRA was a toxic environment over which Mr Ongwen lacked control.[3058] Furthermore, the Defence argues that, based on P-0445's evidence, "one of the results of the toxic environment was [Mr Ongwen's] arrested development".[3059] In the Defence's view, the "most significant" evidence of Mr Ongwen's "arrested 'child-like state' […] was [P-0445's] analysis that [Mr Ongwen] referred to children who were with him as soldiers, reflecting his own experiences".[3060] The Defence submits that by disregarding these factors that "negatively affected [Mr Ongwen's] development", the Trial Chamber unreasonably ascribed criminal responsibility to him as an adult.[3061]

1373. The Prosecutor submits that the Defence "fails to show" that the Trial Chamber disregarded evidence of the adverse environment of the LRA and its effect on Mr Ongwen's development, "or even that it was potentially exculpatory".[3062] In his view, P-0445's statements concerning Mr Ongwen's lack of control over his environment and "that he can't be blamed for failing to escape negative influences in his whole environment", are referred to, by the Defence, out of context.[3063] The Prosecutor submits that P-0445 prefaced these statements with her conclusion that Mr Ongwen "*can be seen as criminally responsible for the crimes he allegedly committed*".[3064] Furthermore, the Prosecutor submits that P-0445 did not conclude that Mr Ongwen's "psychosocial development was arrested at the time of the abduction".[3065] Rather, he argues, "she accepted the possibility that [Mr Ongwen] only had 'criminal capacity at the level of an adolescent [of] 10 to 14 years' as a *starting*

[3057] Appeal Brief, paras 487-492, 495, 497.
[3058] Appeal Brief, paras 488-490.
[3059] Appeal Brief, para. 491, *referring to* P-0445's Report, UGA-OTP-0280-0732, at 0734.
[3060] Appeal Brief, para. 492, *referring to* P-0445: T-166, p. 47, lines 7-9.
[3061] Appeal Brief, para. 497.
[3062] Prosecutor's Response, para. 296.
[3063] Prosecutor's Response, para. 298.
[3064] Prosecutor's Response, para. 298 (emphasis in original).
[3065] Prosecutor's Response, para. 299.

point given the general circumstances of the case – and it was in that light that she stated there '*may* be an indication […] psychosocial development was arrested at the time of abduction'".[3066] Lastly, the Prosecutor submits that, contrary to the Defence's assertion that Mr Ongwen's explanation of the concept of a child was the most significant evidence of his arrested development, P-0445 actually understood his explanation to mean that Mr Ongwen had developed to a level of "metacognition", which is an indication of "higher functioning".[3067]

1374. Victims Group 2 observe that the Defence's claims under this sub-ground of appeal are meritless given the Trial Chamber's holistic assessment of P-0445's evidence.[3068]

(b) Determination by the Appeals Chamber

1375. First, with emphasis on P-0445's evidence of the "adverse and unfavourable environment of the LRA", which is not conducive to the development of a child, the Defence contends that the Trial Chamber ignored the fact that Mr Ongwen "lacked control" over this environment and could not escape its "negative influences".[3069] In this regard, the Appeals Chamber notes that P-0445's evidence about the adverse environment within the LRA and its negative impact on the development of a child was not in dispute during the trial. Furthermore, as discussed above,[3070] P-0445's assessment of Mr Ongwen's development included his early childhood, prior to being abducted, which, she found, *inter alia*, to be a "favourable" factor that "contributed to his continued resilience throughout his living in the bush".[3071] Thus, the adverse environment of the LRA was not the only environment relevant to Mr Ongwen's childhood development.

1376. Furthermore, it is clear from P-0445's Report that her statement concerning Mr Ongwen's lack of control over his environment and his inability to escape its negative influences was preceded by her conclusion that Mr Ongwen "can be seen as

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[3066] Prosecutor's Response, para. 299 (emphasis in original).
[3067] Prosecutor's Response, para. 301.
[3068] Victims Group 2's Observations, para. 121.
[3069] Appeal Brief, paras 487-490.
[3070] *See* paragraphs 1366-1371.
[3071] P-0445's Report, UGA-OTP-0280-0732, at 0754.

criminally responsible for the crimes he allegedly committed".[3072] This portion of P-0445's Report, relied on by the Defence, reads as follows:

> 8.4 **Conclusion**: It is understandable that the crimes [Mr Ongwen] is charged with happened during the time he was an adult, however, his actions cannot be looked at in isolation from the context in which his brain, the organ that controls his thinking, feeling, behaviour was wired. According to the Rome Statute Article 31(1)(a), on which I was required to anchor my assessment, *[Mr Ongwen] can be seen as criminally responsible for the crimes he allegedly committed*. However, important mitigating factors include being abducted during a developmental age, continuing to develop in a bush, unfavourable environment and being under control of [Kony]. Like other children, [Mr Ongwen] as a child and an adolescent had no choice over the environment he lived in when he committed the alleged crimes against humanity. As an adolescent, he was vulnerable and lacked control over his immediate environment. This means, he can't be blamed for failing to escape negative influences in his whole environment.[3073]

1377. In the Appeals Chamber's view, while P-0445's holistic assessment of the evidence concerning Mr Ongwen's childhood development included the impact of his abduction and his lack of control, as an adolescent, over the adverse environment within the LRA, she, nevertheless, acknowledged that these factors did not absolve Mr Ongwen of criminal responsibility, as an adult, for the crimes charged. Indeed, her characterisation of these factors as "important mitigating factors" may be viewed as significant for the purposes of sentencing, but not for the Trial Chamber's determination as to whether Mr Ongwen suffered from a mental disease at the times relevant to the charges.[3074] More specifically, the Appeals Chamber notes that in her ultimate conclusion in section 10.0 of her report, P-0445 notes that, based on the psychiatric reports of the Defence Experts and Professor de Jong, Mr Ongwen "suffers from mental illnesses (PTSD, depression and dissociative disorder)". However, she went on to conclude that "there is no evidence from the materials provided that these illnesses are directly linked to the crimes he allegedly committed".[3075] The Appeals Chamber considers that P-0445's evidence concerning Mr Ongwen's lack of control over the LRA environment as an adolescent was not exculpatory of his criminal responsibility

[3072] P-0445's Report, UGA-OTP-0280-0732, at 0755. *See also* Prosecutor's Response, para. 298.
[3073] P-0445's Report, UGA-OTP-0280-0732, at 0755 (emphasis added).
[3074] P-0445's Report, UGA-OTP-0280-0732, at 0755
[3075] P-0445's Report, UGA-OTP-0280-0732, at 0756.

for the crimes he was found to have committed as an adult. This argument is therefore rejected.

1378. Second, the Defence argues that the Trial Chamber disregarded P-0445's conclusion that Mr Ongwen's psychosocial development was "arrested at the time of abduction".[3076] The Appeals Chamber notes that P-0445 explained in her report that she "chose to assess Mr Ongwen's criminal capacity at the level of an adolescent 10 to 14 years" because

> [REDACTED].
>
> 3.4 The above i-v may be an indication that his psychosocial development was arrested at the time of abduction.[3077]

1379. It is clear, that based on the factors identified by P-0445, that she extracted from the Defence Experts' reports and evidence discussed during the trial about Mr Ongwen's child-like behaviour and perceptions, she concluded, in this context, that there "*may* be an indication that his psychosocial development was arrested at the time of abduction".[3078] P-0445 explained further in her testimony that she had measured Mr 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".[3079]

1380. P-0445 went on to assess Mr Ongwen's: (i) moral development (finding that "he had attained the highest level of moral development");[3080] (ii) his cognitive development (finding that he had "above average intelligence", which was "one of the factors that could have contributed to his resilience");[3081] (iii) his social development (finding that "like street gang socialization, there was bush socialization for [Mr Ongwen] that could have helped him cope");[3082] (iv) his emotional development (finding that whilst at the ICC-DC, Mr Ongwen was reported [REDACTED];[3083] and

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[3076] Appeal Brief, para. 491.
[3077] P-0445's Report, UGA-OTP-0280-0732, at 0734.
[3078] P-0445's Report, UGA-OTP-0280-0732, at 0734 (emphasis added).
[3079] P-0445's Report, UGA-OTP-0280-0732, at 0734 (emphasis added). *See also* P-0445: T-167, p. 42, line 6 to p. 43, lines 10.
[3080] P-0445's Report, UGA-OTP-0280-0732, at 0740-0741.
[3081] P-0445's Report, UGA-OTP-0280-0732, at 0741.
[3082] P-0445's Report, UGA-OTP-0280-0732, at 0744.
[3083] P-0445's Report, UGA-OTP-0280-0732, at 0744

(v) his psychological development (finding that Mr Ongwen's "development of ego and superego correlates with his moral development").[3084]

1381. Consequently, P-0445's holistic assessment of Mr Ongwen's development led to the conclusion that he had developed morally, cognitively, socially, emotionally and psychologically. Ultimately, P-0445 concluded, in general, that Mr Ongwen "would seem to have matured developmentally against all odds with flexibility of moral reasoning which seem to have been not fully exercised before he becomes top commander".[3085] In this regard, the Appeals Chamber notes the Defence's argument that the "most significant" evidence of Mr Ongwen's "arrested 'child-like state' […] was [P-0445's] analysis that [Mr Ongwen] referred to children who were with him as soldiers, reflecting his own experiences".[3086] However, the Defence is not assisted by this testimony of P-0445. P-0445's testimony shows that she actually considered Mr Ongwen's explanation of his concept of a child as "another example" of the notion called "thinking about thinking".[3087] P-0445 explained that

> A. And lastly I would like to say something about thinking about thinking. Thinking about thinking is the individual being able to think about what, or at least to have an idea of what the other person would be thinking about and that we call mentalisation, that helps in terms of understanding the intentions of the other person. It's really a higher functioning, what we call metacognition. And I think what comes through is that Mr Ongwen developed to that level.[3088]

1382. P-0445 further explained, with reference to witness testimony as yet another example of Mr Ongwen's level of metacognition, that

> I'm just looking for another example of thinking about thinking. I think that's – I think, yes. Okay, the last – my last comment is on the last – on the page 19, page 19. I think being, being a commander, he – this document *also comes through as Mr Ongwen exhibiting, you know, authority, power*, and that comes through on number 19, page 18 where this witness made his assessment and he said, after he talked about what he was talking about above, the last – near the last paragraph, he says: "What happened is I assessed his laugh as a sarcastic laugh because he accompanied his laugh with the following words. He assured me was a brigade commander and as such defection or giving up would be the least thing on his mind as he was in charge of his troops and therefore my proposal was out of question." Okay, "out of the question." Okay, then the – that same witness

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[3084] P-0445's Report, UGA-OTP-0280-0732, at 0744.
[3085] P-0445's Report, UGA-OTP-0280-0732, at 0753.
[3086] Appeal Brief, para. 492, *referring to* P-0445: T-166, p. 47, lines 7-9.
[3087] P-0445: T-166, p. 46, lines 19-25 to p. 46, lines 1-5.
[3088] P-0445: T-166, p. 45, line 25 to p. 46, line 5.

> towards the end he requests Mr Ongwen to release the children that were with him, but Mr Ongwen then refused, according to this. *But this could be interpreted as – because he says, he says that, "You call these kids children, but I call them my soldiers. So we are talking about my soldiers. We are not talking about the children you are talking about." So this could be interpreted as his concept, Mr Ongwen's concept of a child which could have been carried on from – from his own experience of having been abducted as a child and he became a soldier then and so his concept of a child is a soldier and not a child because that is what he experienced as himself.* Yeah.[3089]

1383. The Appeals Chamber notes that the Defence's reference to this portion of P-0445's testimony demonstrates that, in her view, Mr Ongwen not only functioned at a high level of cognitive development, but also exhibited "authority" and "power".[3090] In light of P-0445's assessment, the Appeals Chamber finds that Mr Ongwen's psychosocial development at the time of his abduction had no bearing on his criminal responsibility for the crimes he was found to have committed as an adult. This argument is therefore rejected.

(iv) Overall conclusion

1384. Having considered the arguments raised under ground of appeal 33 concerning alleged errors in the Trial Chamber's consideration of P-0445's evidence, the Appeals Chamber finds that the Trial Chamber did not use P-0445's evidence selectively to reject the ground for excluding criminal responsibility under article 31(1)(a) of the Statute.[3091] Accordingly, the Appeals Chamber rejects this ground of appeal.

2. Grounds of appeal 26, 28 (in part), 44, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 58, 61, 62 and 63: Alleged errors regarding findings on duress

(a) Background

1385. On 9 August 2016, the Defence gave notice of its intention to raise grounds excluding Mr Ongwen's criminal responsibility by reason of duress (article 31(1)(d) of the Statute).[3092] The Defence submitted that, at the relevant time, Mr Ongwen was under

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[3089] P-0445: T-166, p. 46, line 19 to p. 47, line 13 (emphasis added).
[3090] P-0445: T-166, p. 46, line 22.
[3091] Appeal Brief, para. 473.
[3092] Defence Notification Pursuant to Rules 79(2) and 80(1) of the Rules, paras 3, 5. On the same day the Defence also gave notice of its intent to raise mental disease or defect as a ground excluding criminal responsibility pursuant to article 31(1)(a) of the Statute. *See* Defence Notification Pursuant to Rule 79(2) of the Rules, para. 1.

"a continuing threat of imminent death and imminent threat of serious bodily harm […] which was beyond [his] control",[3093] and which was "caused by Joseph Kony and his close advisors".[3094]

1386. In its closing brief, the Defence submitted that Mr Ongwen "was under a continuing threat of imminent death and serious bodily harm from Kony and his controlling, military apparatus".[3095]

1387. In the Conviction Decision, the Trial Chamber identified the "essence" of the Defence's argument as being that:

> "the threat which caused [Mr] Ongwen to engage in the conduct underlying the charged crimes originated in Joseph Kony's control of the LRA, which Joseph Kony allegedly maintained through a combination of strict disciplinary rules which severely punished non-compliance with orders, the tight supervision of commanders, and successful assertion of spiritual powers.[3096]

1388. In order to determine whether the defence of duress was applicable, the Trial Chamber considered the following issues: (i) Mr Ongwen's status in the LRA hierarchy and the applicability of LRA disciplinary regime to him; (ii) the executions of senior LRA commanders on Joseph Kony's orders; (iii) the possibility of escaping from or leaving the LRA; (iv) Joseph Kony's alleged spiritual powers; (v) Mr Ongwen's personal loyalty to Joseph Kony and his career advancement; and (vi) the fact that a number of crimes committed by Mr Ongwen were committed "in private".[3097]

1389. After having assessed the above issues and the relevant evidence, the Trial Chamber concluded that :

> […] there is no basis in the evidence to hold that [Mr] 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. In fact, based on the above, the Chamber finds that [Mr] Ongwen was not in a situation of complete subordination vis-à-vis Joseph Kony, but frequently acted independently and even contested orders received from Joseph Kony. The evidence indicates that in the period of the charges, [Mr] Ongwen did not face any prospective punishment by death or serious bodily harm when he disobeyed

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[3093] Defence Notification Pursuant to Rules 79(2) and 80(1) of the Rules, para. 5.c.
[3094] Defence Notification Pursuant to Rules 79(2) and 80(1) of the Rules, para. 5.b.
[3095] Conviction Decision, para. 2586, *referring to* Defence Closing Brief, para. 680.
[3096] Conviction Decision, para. 2586, *referring to* Defence Closing Brief, paras 681-722.
[3097] Conviction Decision, paras 2590-2667.

> Joseph Kony. [Mr] Ongwen also had a realistic possibility of leaving the LRA, which he did not pursue. Rather, he rose in rank and position, including during the period of the charges. Finally, he committed some of the charged crimes in private, in circumstances where any threats otherwise made to him could have no effect. [3098]

1390. The Appeals Chamber notes that under grounds of appeal 26, 28 (in part), 44, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 58, 61, 62 and 63, the Defence challenges several findings of the Trial Chamber underpinning its conclusion that Mr Ongwen was not subject to a "threat of imminent death or of continuing or imminent serious bodily harm" against himself or another person at the time of his conduct underlying the charged crimes, and that therefore duress, as a ground for excluding criminal responsibility pursuant to article 31(1)(d) of the Statute, was not applicable to him.[3099]

1391. In order to address the Defence's relevant submissions, the Appeals Chamber has divided its analysis into sub-sections, each addressing the grounds of appeal challenging a specific finding of the Trial Chamber. The Appeals Chamber will first address ground of appeal 44, challenging mainly the Trial Chamber's interpretation of duress pursuant to article 31(1)(d) of the Statute.[3100] It will then address the Defence's challenges to a number of factual findings which the Trial Chamber relied upon to conclude that the defence of duress was not applicable to Mr Ongwen. In particular, it will start by addressing grounds of appeal 26, 28 (in part), 46, 47, and 48, challenging the Trial Chamber's findings on Mr Ongwen's status in the LRA hierarchy and the applicability of the LRA disciplinary regime to him.[3101] In this section, the Appeals Chamber will also address the Defence's arguments on the Trial Chamber's alleged failure to consider evidence on Mr Ongwen's prior experiences.

1392. The Appeals Chamber will then discuss grounds of appeal 50, 51 and 56, which challenge the relevant findings relating to the execution of senior LRA commanders on Joseph Kony's orders.[3102] It will then turn to grounds of appeal 52, 53 and 54, all challenging the Trial Chamber's findings on the possibility of escaping from or

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[3098] Conviction Decision, para. 2668.
[3099] Conviction Decision, paras 2581-2672.
[3100] Conviction Decision, paras 2581-2584.
[3101] Conviction Decision, paras 2590-2608.
[3102] Conviction Decision, paras 2609-2618.

otherwise leaving the LRA.[3103] Then it will consider ground of appeal 55 that challenges the Trial Chamber's findings on Joseph Kony's alleged spiritual powers,[3104] and ground of appeal 49, challenging the Trial Chamber's conclusions on the relevance of sexual and gender-based crimes committed by Mr Ongwen "in private".[3105]

1393. Finally, given the specificity of the issues raised, the Appeals Chamber will address separately the Defence's arguments regarding Uganda's alleged duty to protect Mr Ongwen, raised under ground of appeal 58, and the arguments raised under grounds of appeal 61, 62 and 63, concerning the Trial Chamber's assessment of the evidence of D-0133 (an expert witness called by the Defence), who testified about child soldiers and the enduring effects of being a child soldier on mental health.[3106]

(b) Ground of appeal 44: Alleged errors in the Trial Chamber's interpretation and application of article 31(1)(d) of the Statute

(i) Summary of the submissions

(a) The Defence's submissions

1394. Under this ground of appeal, the Defence argues that the Trial Chamber erred in its interpretation of article 31(1)(d) of the Statute and in its finding that the defence of duress was not available to the accused in the present case.[3107] The Defence submits that "[m]any errors naturally flowed from the above error of law and fact", and that they materially affected the Conviction Decision on the issue of duress "to the great prejudice" of Mr Ongwen.[3108]

1395. The Defence submits in particular that the Trial Chamber erred in law by "wrongly" interpreting the provision, without providing a reasoned explanation for its conclusion.[3109]

[3103] Conviction Decision, paras 2619-2642.
[3104] Conviction Decision, paras 2643-2658.
[3105] Conviction Decision, paras 2666-2667.
[3106] Conviction Decision, para. 612.
[3107] Appeal Brief, paras 499-513.
[3108] Appeal Brief, para. 499.
[3109] Appeal Brief, paras 500-502.

1396. To support its allegations, the Defence also raises a number of alleged errors in the application of article 31(1)(d) of the Statute, which, according to the Defence, led to several erroneous factual findings.[3110] It argues that the Trial Chamber failed to explain why it did not believe that, in the circumstances, Mr Ongwen could have genuinely feared that he would be killed or seriously harmed if he defied the orders of Joseph Kony.[3111] According to the Defence, the Trial Chamber failed to assess whether the "brutal" disciplinary regime within the LRA "would in fact amount to 'imminent continuous bodily harm'/'in an ongoing manner'".[3112] It contends that any trier of fact "properly" assessing the evidence on the record, would have found that "the fear of the spiritual world, ingrained by indoctrination and by the coercive environment in the LRA",[3113] in addition to the knowledge that "every step of his was being watched by the spirits" as well as the "human intelligence" who "reported back to Kony",[3114] and the fact that Mr Ongwen was not a rational man and was therefore susceptible to threat under article 31(1)(d) of the Statute, subjected him to a threat of imminent death or imminent or continuing serious bodily harm during the period relevant to the charges.[3115]

1397. Under such circumstances, the Defence avers that Mr Ongwen was "always under apprehension of continuing imminent serious bodily harm".[3116] According to the Defence, from the evidence on the record on the disciplinary regime and on the consequences of defying Joseph Kony's orders and from the Trial Chamber's "findings and observations", the "'probability that a dangerous situation might occur' was real".[3117] It submits that Mr Ongwen was "forced to commit the charged crimes", and that those crimes were covered under "clear and unequivocal" LRA standing orders.[3118]

[3110] Appeal Brief, paras 503-513.
[3111] Appeal Brief, para. 503.
[3112] Appeal Brief, para. 504.
[3113] Appeal Brief, para. 506.
[3114] Appeal Brief, paras 506-507.
[3115] Appeal Brief, paras 504-513. *See*, in particular, para. 506.
[3116] Appeal Brief, para. 507 (The Defence argues in this regard that "[e]ven if [Mr Ongwen] did not fear being immediately killed by the lower ranks under him for defying Kony's order during the charged conduct, he might still be killed later on the instruction of Kony.").
[3117] Appeal Brief, para. 510.
[3118] Appeal Brief, para. 511.

(b) The Prosecutor's submissions

1398. The Prosecutor submits that the Trial Chamber correctly interpreted article 31(1)(d) of the Statute, requiring the harm to be imminent or continuing.[3119] He argues that the terms "immediate" and "continuing" in article 31(1)(d) of the Statute indicate that the timing of the materialisation of the threat ("sufficiently soon") "is indeed one of the criteria to be considered" when applying this provision.[3120] In that sense, the Prosecutor contends that the Defence provides no explanation as to why the Trial Chamber's reading of article 31(1)(d) of the Statute was erroneous.[3121]

1399. The Prosecutor further submits that, "[i]n any event, this alleged error of law would have no impact" on the Conviction Decision, since the Trial Chamber found that Mr Ongwen "was not under threat of death or serious bodily harm to himself or another person" and it was "therefore not possible to further discuss specifically the imminence of the threatened harm".[3122] In the Prosecutor's view, the Defence "reargues a number of unsubstantiated purported factual errors, largely based on its own misrepresentations" of the Conviction Decision.[3123] The Prosecutor submits that the Defence fails to show any error, and to articulate how any alleged error had an impact on the Conviction Decision.[3124]

1400. In any event, with regard to the other elements of duress, namely, that the person acts necessarily and reasonably to avoid the harm, and that the person does not intend to cause greater harm than the one sought to be avoided, the Prosecutor submits that they were also not met in this case.[3125]

(c) The Victims' observations

1401. Victims Group 1 and Victim Group 2 submit that the Trial Chamber correctly interpreted article 31(1)(d) of the Statute.[3126] Victims Group 1 aver that the Trial

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[3119] Prosecutor's Response, paras 308-310.
[3120] Prosecutor's Response, para. 310.
[3121] Prosecutor's Response, para. 310.
[3122] Prosecutor's Response, para. 311. *See also* paras 313-317; T-263, p. 58, line 16 to p. 60, line 12.
[3123] Prosecutor's Response, para. 312.
[3124] Prosecutor's Response, paras 313-317.
[3125] Prosecutor's Response to the Amici Curiae Observations, para. 26; T-263, p. 60, lines 19-20, p. 61, lines 14-15.
[3126] Victims Group 1's Observations, para. 159; Victims Group 2's Observations, para. 126. *See also* paras 122-125, 127. 135.

Chamber made "a coherent assessment of the evidence before rejecting the defence of duress as not being applicable to [Mr Ongwen]", noting that there was no reliable evidence suggesting that he was under a threat pursuant to article 31(1)(d) of the Statute.[3127]

1402. Victims Group 2 disagree with the Defence's argument that the word "threat" in the provision must be understood from the perspective of the person receiving it, noting that "no authority support[s] said interpretation".[3128] Instead, they contend that, the jurisprudence of international criminal tribunals requires that "threats constituting duress must be clear and present, real and inevitable".[3129] Concerning the factual errors alleged by the Defence, Victims Group 2 contend that the Defence's arguments should all be rejected.[3130]

(d) The observations of the *amici curiae*

1403. A number of *amici curiae* presented observations, both in writing, and, some of them, orally during the hearing, on the legal elements of duress pursuant to article 31(1)(d) of the Statute and its availability as a defence to international crimes, including on the interpretation of the terms "threat" and "imminent", and whether the existence of a "threat" should be examined objectively or subjectively, taking into account the position of the accused.[3131] Some of the main observations are briefly recalled below.

1404. Dr Behrens submits that following a literal interpretation of article 31(1)(d) of the Statute, the terms "imminent" should not be interpreted restrictively, and a "*favor rei* construction would rather militate in favour of including threats which were 'hanging over the head' of the defendant even if specific details were not conclusively identified".[3132]

[3127] Victims Group 1's Observations, para. 159
[3128] Victims Group 2's Observations, para. 132.
[3129] Victims Group 2's Observations, paras 132-133.
[3130] Victims Group 2's Observations, paras 136-147.
[3131] Observations of Dr Behrens, paras 6-9; T-263, p. 92, lines 3-24; Observations of Minkowitz and Fleischner, para. 47-50; Observations of Arimatsu *et al.*, paras 4-14; Observations of ADC-ICT, paras 3-12; Observations of Gerry *et al.*, paras 6, 39-61; T-263, p. 76, lines 5-12, p. 77, lines 10-12, 21-23; Observations of NIMJ, paras 17-18; Observations of Justice Ssekandi, para. 25.
[3132] Observations of Dr Behrens, paras 7-8; T-263, p. 92, lines 3-24. He further argues that the existence of "threat" should be examined not purely and simply objectively, but it should be examined whether

1405. Minkowitz and Fleischner submit, *inter alia*, that "[a] person who is experiencing intense distress or unusual perceptions, or whose mental processes are otherwise atypical compared with the general population, might understand the existence or seriousness of a threat differently than might be otherwise expected".[3133]

1406. Arimatsu *et al.* note that the Appeals Chamber should be guided by the decisions of the ICTY and ECCC,[3134] as they are "instructive on the development of duress in international criminal law" and consistent with the views of the drafters of the Statute that "if the person has voluntarily exposed himself or herself to a situation which was likely to lead to the threat [made by other persons], the person shall remain responsible."[3135]

1407. The ADC-ICT, after recalling the main findings of the ICTY Appeals Chamber in the *Erdemović* Case, and the impact of this on the drafting history of article 31(1)(d) of the Statute, submit that the intention behind the wording of article 31 was to "set aside the precedent established by the [ICTY] and to reinstate the defence of duress".[3136]

1408. In their brief, Gerry *et al.* submit, *inter alia*, that the Trial Chamber acknowledged Mr Ongwen's victimhood but "did not discuss whether this had a bearing on his subsequent offending",[3137] and that article 31(1)(d) of the Statute encompasses duress

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"the threat appeared real" "to someone in the position of the Accused", and that, in the present case, it would be "simplistic to dismiss any belief [e.g.] in Kony's 'supernatural' knowledge of Ongwen's conduct: if a credible case is made that the Accused's peer group was influenced by such beliefs, it would be appropriate to assume that, to someone in the position of the Accused, the threat appeared real enough." Observations of Dr Behrens, para. 6.

[3133] Observations of Minkowitz and Fleischner, para. 48. The *amici curiae* submit that the existence of distress or unusual perceptions does not automatically exclude criminal responsibility, instead, it may be the ground to negate the mental element of a crime or to establish the mental element of a partial or complete defence such as duress. Observations of Minkowitz and Fleischner, para. 50.

[3134] Observations of Arimatsu *et al.*, paras 1, 8-9, *referring to* *Erdemović* Appeal Judgment; Separate and Dissenting Opinion of Judge Cassese; *Duch* Trial Judgment, para. 557.

[3135] Observations of Arimatsu *et al.*, para. 9. The *amici curiae* further provide submissions on each element of duress, noting, *inter alia*, that "there is a requirement not only of imminence but also of direct causation, and that the Defence's reliance on a general coercive environment is misplaced given that it is unsupported by law and jurisprudence". The *amici curiae* also submit that duress is inapplicable as a defence in sexual and gender-based crimes where an accused created an environment where such crimes were "sustained and/or normalized". Observations of Arimatsu *et al.*, paras 11-13, 17.

[3136] Observations of ADC-ICT, paras 7-9.

[3137] Observations of Gerry *et al.*, para. 48; T-263, p. 76, lines 5-12, p. 77, lines 10-12, 21-23.

of circumstances, including "long-term effects" and "continued compulsion" of recruitment.[3138]

1409. The NIMJ submit that for the defence of duress to be available to an accused, he or she "must have had a (1) 'reasonable apprehension' that (2) '[they] […] or another innocent person' would (3) 'immediately' suffer death or serious bodily injury if the accused 'did not commit the act'."[3139]

(ii) Relevant parts of the Conviction Decision

1410. The Trial Chamber found that duress in article 31(1)(d) of the Statute has three elements:

> 2581. […] The first element is that the conduct alleged to constitute the crime has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person. The threat in question may either be: (i) made by other persons or (ii) constituted by other circumstances beyond that person's control. The threat is to be assessed at the time of that person's conduct.
>
> 2582. From the plain language of the provision, the words "imminent" and "continuing" refer to the nature of the threatened harm, and not the threat itself. It is not an "imminent threat" of death or a "continuing or imminent threat" of serious bodily harm – the Statute does not contain such terms. Rather, the threatened *harm* in question must be either to be killed immediately ("imminent death"), or to suffer serious bodily harm immediately or in an ongoing manner ("continuing or imminent serious bodily harm"). On this understanding, duress is unavailable if the accused is threatened with serious bodily harm that is not going to materialise sufficiently soon. A merely abstract danger or simply an elevated probability that a dangerous situation might occur – even if continuously present – does not suffice.
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> 2583. The second element of duress in Article 31(1)(d) of the Statute is that the person acts necessarily and reasonably to avoid the threat. The person is not required to take all conceivable action to avoid the threat, irrespective of considerations of proportionality or feasibility. The Chamber must specifically consider what, if any, acts could "necessarily and reasonably" avoid the threat, and what the person should have done must be assessed under the totality of the circumstances in which the person found themselves. Whether others in comparable circumstances were able to necessarily and reasonably avoid the same threat is relevant in assessing what acts were necessarily and reasonably available.

[3138] T-263, p. 75, lines 10-12, p. 76, lines 10-12; Observations of Gerry *et al.*, paras 4-61, in particular, paras 53-61.
[3139] Observations of NIMJ, para. 17.

> 2584. Finally, the third element of duress in Article 31(1)(d) of the Statute is that the person does not intend to cause a greater harm than the one sought to be avoided. This is a subjective element – it is not required that the person actually avoided the greater harm, only that he/she intended to do so. The Chamber considers that assessment of whether one intended harm is 'greater' than another depends on the character of the harms under comparison.[3140]

1411. The Trial Chamber subsequently found that, in the present case, "the first element of duress under Article 31(1)(d) of the Statute was not met", and that therefore "it [was] not necessary, or even possible, to consider the remaining elements".[3141]

1412. At the beginning of its analysis, the Trial Chamber noted that, in the present case, the conduct underlying the charges is "not a single discrete act on the part of [Mr] Ongwen, momentary or of a short duration"; rather, such conduct is "complex and spread over the entire period of the charges".[3142]

1413. As mentioned above,[3143] in order to determine whether the defence of duress was met, the Trial Chamber assessed the evidence with respect to a number of issues, dividing its analysis into sub-sections "covering broad topics": Mr Ongwen's "status in the LRA hierarchy and the applicability of LRA disciplinary regime to him";[3144] the "[e]xecutions of senior LRA commanders on Joseph Kony's orders";[3145] the "possibility of escaping from or leaving the LRA" in general and as far as Mr Ongwen was concerned;[3146] "Joseph Kony's alleged spiritual powers" and its connection to a possible threat;[3147] Mr Ongwen's "personal loyalty to Joseph Kony and his career advancement";[3148] and the fact that a number of crimes committed by Mr Ongwen were committed "in private" and, as such, were easy to hide.[3149] In this respect, the Trial Chamber noted that "it must be understood that the issues addressed significantly overlap and inform a single conclusion".[3150]

[3140] Conviction Decision, paras 2581-2584 (emphasis in orginal, footnotes omitted).
[3141] Conviction Decision, para. 2585.
[3142] Conviction Decision, para. 2586.
[3143] *See* paragraph 1388 above.
[3144] Conviction Decision, paras 2590-2608.
[3145] Conviction Decision, paras 2609-2618.
[3146] Conviction Decision, paras 2619-2642.
[3147] Conviction Decision, paras 2643-2658.
[3148] Conviction Decision, paras 2659-2665.
[3149] Conviction Decision, paras 2666-2667.
[3150] Conviction Decision, para. 2589.

1414. As a result of its findings on the issues above, the Trial Chamber concluded that "there is no basis in the evidence to hold that [Mr] 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".[3151] In fact, as recalled, above, the Trial Chamber found that Mr Ongwen "was not in a situation of complete subordination vis-à-vis Joseph Kony, but frequently acted independently and even contested orders received from Joseph Kony".[3152] The Trial Chamber further found that the evidence indicated that in the period of the charges, Mr Ongwen "did not face any prospective punishment by death or serious bodily harm when he disobeyed Joseph Kony"; that he had "a realistic possibility of leaving the LRA, which he did not pursue"; that he instead "rose in rank and position, including during the period of the charges"; and that "he committed some of the charged crimes in private, in circumstances where any threats otherwise made to him could have [had] no effect".[3153]

1415. In light of the above, the Trial Chamber considered that "[i]t [was] not possible to further discuss specifically the imminence of the threatened harm", and that it was "also conceptually not possible to discuss the other requirements of Article 31(1)(d) of the Statute, namely the necessity and reasonableness of the act undertaken to avoid the threat, and the requirement that the person did not intend to cause a greater harm than the one sought to be avoided".[3154]

(iii) Determination by the Appeals Chamber

1416. The Defence submits that the Trial Chamber erred in its interpretation of article 31(1)(d) of the Statute. It also argues that the Trial Chamber made a number of errors of law and fact when considering whether the defence of duress applied to Mr Ongwen.[3155] In the Defence's view, the Trial Chamber "failed to properly assess and evaluate evidence on the Article 31 affirmative defences, based on the peculiar individual circumstances of [Mr Ongwen] immediately before, during and after the charged period".[3156]

[3151] Conviction Decision, para. 2668.
[3152] Conviction Decision, para. 2668.
[3153] Conviction Decision, para. 2668.
[3154] Conviction Decision, para. 2669.
[3155] *See* paragraphs 1396-1397 above; Appeal Brief, paras 503-510.
[3156] Appeal Brief, para. 512.

1417. The Appeals Chamber notes that the Defence's arguments broadly challenge the Trial Chamber's determination of whether article 31(1)(d) of the Statute was applicable in the present case. The arguments as presented, however, amount mostly to disagreements with the Trial Chamber's findings and fail to identify errors in the Trial Chamber's reasoning and conclusions. To the extent that these arguments overlap with, and are further elaborated in, other grounds of appeal, they will be addressed thereunder, provided that they are properly substantiated.[3157]

1418. As a result, in this section, the Appeals Chamber will focus on the Defence's challenge to the Trial Chamber's interpretation of article 31(1)(d) of the Statute.

(a) Alleged error in the interpretation of article 31(1)(d) of the Statute

1419. Article 31(1)(d) of the Statute provides, in relevant parts, as follows:

> In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:
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> […]
>
> (d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:
>
> (i) Made by other persons; or
>
> (ii) Constituted by other circumstances beyond that person's control.

1420. Duress, as set out in article 31(1)(d) of the Statute, covers situations in which a person is compelled to commit a crime by a threat of imminent death or of continuing or imminent serious bodily harm against him or her or another person. In this case, the Defence challenges the Trial Chamber's interpretation of "threat of imminent death or of continuing or imminent serious bodily harm", and submits that Mr Ongwen's "peculiar individual circumstances" amounted to that level of threat.[3158]

[3157] *See* grounds of appeal 26, 28, 46-56 below.
[3158] Appeal Brief, paras 500-513.

1421. In particular, the Defence submits that the Trial Chamber "summarily" ruled that the defence of duress under article 31(1)(d) of the Statute was not met, and that the Trial Chamber did so because it failed to properly interpret the provision "after adopting a wrong analytical approach".[3159] It argues that instead of reading this provision pursuant to its "clear wordings and totality", the Trial Chamber erred in its interpretation and application of the terms "imminent" and "continuing" as referring to the "nature of the threatened harm, and not the threat itself", without providing a reasoned explanation for its conclusion.[3160] The Appeals Chamber notes that the Trial Chamber held 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" and explained that "the threatened *harm* in question must be either to be killed immediately ('imminent death'), or to suffer serious bodily harm immediately or in an ongoing manner ('continuing or imminent serious bodily harm')".[3161] The Appeals Chamber finds that the Trial Chamber properly interpreted the provision. The terms "imminent" and "continuing" in article 31(1)(d) of the Statute refer to the threatened harm, *i.e.* death or serious bodily harm. The plain language of the provision is clear and, contrary to the Defence's submissions,[3162] no further explanations by the Trial Chamber were required.

1422. The Defence further argues that by finding that duress is not available if the threatened harm is not going to materialise "sufficiently soon", the Trial Chamber erroneously imposed a criterion unforeseen in article 31(1)(d) of the Statute.[3163] It submits that the threat should be interpreted to include a threat to be killed at a later point in time, and that the threat may emanate from the "perpetual hostile and violent environment" which ruled Mr Ongwen's life at the relevant time of the charges.[3164] As noted above, and based on the understanding that the threatened harm in question must be either to be killed immediately, or to suffer serious bodily harm immediately or in an ongoing manner,[3165] the Trial Chamber found that "duress is unavailable if the accused is threatened with serious bodily harm that is not going to materialise

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[3159] Appeal Brief, para. 500.
[3160] Appeal Brief, paras 500-502. *See also* T-263, p. 62, lines 7-12
[3161] Conviction Decision, para. 2582 (emphasis in original).
[3162] Appeal Brief, paras 500-503..
[3163] Appeal Brief, para. 509.
[3164] Appeal Brief, paras 503, 507.
[3165] Conviction Decision, para. 2582.

sufficiently soon", and that "[a] merely abstract danger or simply an elevated probability that a dangerous situation might occur – even if continuously present – does not suffice".[3166] The Appeals Chamber notes that article 31(1)(d) of the Statute does not expressly include the terms "sufficiently soon"; it considers, however, that the timing of the materialisation of the threat is linked to the terms "imminent"[3167] and "continuing"[3168] and that it is one of the criteria to take into account in the assessment of the existence of a threat.[3169]

1423. Moreover, the Appeals Chamber is of the view that, while article 31(1)(d) of the Statute also encompasses threats of "continuing" harm, which may occur at a later point in time, for a person to be compelled to commit a crime under the jurisdiction of the Court, the threat must be "present" and real at the time of the charged conduct, "that is, the materialization of the danger cannot lie too far in the future".[3170] It is insufficient for an accused to assert that he or she faced a general or blanket threat to his or her life. In this regard, it has been correctly stated that "[a]n abstract danger or a mere increased general probability of harm, as is typical for dictatorial or war-torn societies, is […] not

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[3166] Conviction Decision, para. 2582.

[3167] In English, the *Oxford English Dictionary* defines the term "imminent" as: "impending threateningly, hanging over one's head; ready to befall or overtake one; close at hand in its incidence; coming on shortly". *See The Oxford English Dictionary*, 2d ed (OED Online). In French, the *Dictionnaire de l'Académie française* defines the word "imminent" as *"[q]ui menace de survenir très prochainement. […] Un danger imminent. Par extension. Qui est tout près de se faire, de se produire. […] Leur arrivée est imminente". See Dictionnaire de l'Académie française, 9e édition* (actuelle).

[3168] In English, the *Oxford English Dictionary* defines the term "continuing" as: "[t]hat continues (in various senses of the verb); abiding, lasting; persistent, persevering". *See The Oxford English Dictionary*, 2d ed (OED Online). In French, the *Dictionnaire de l'Académie française* defines the word "continue" as "*[d]ont la durée ne connaît pas d'interruption*". *See Dictionnaire de l'Académie française, 9e édition* (actuelle).

[3169] *See also* Prosecutor's Response, para. 310.

[3170] *See also* K. Ambos, *Treatise on International Criminal Law Volume 1: Foundations and General Part* (2nd ed.) (Oxford University Press, 2021), p. 473: ("the threat must be present, that is, the materialization of the danger cannot lie too far in the future. […]. Otherwise, alternative countermeasures would suffice to avert the danger and thus the necessity requirement, that is, the criterion that there are no alternative, less intrusive measures at the disposal of the investigator, would not be fulfilled. In effect, a threat can only be considered to be "imminent" if a later countermeasure would not be possible any more or only with much greater risk. Subparagraph (d) also encompasses *continuing threats* which may result in death or serious harm at any time. An abstract danger or a mere increased general probability of harm, as is typical for dictatorial or war-torn societies, is, however, not sufficient".) (emphasis in original); A. Eser and K. Ambos, "Article 31: Grounds for excluding criminal responsibility" in K. Ambos (ed.) *Rome Statute of the International Criminal Court, Article by Article* Commentary (Beck *et al.*, 4th ed., 2022), p. 1373. *See also* for the conditions of duress, *Erdemović* Sentencing Judgment, paras 17-18 (it is noted that the ICTY Appeals Chamber held that "duress does not afford a complete defence to a soldier charged with a crime against humanity and/or a war crime involving the killing of innocent human beings"); Erdemović Appeal Judgment, para.19; Separate and Dissenting Opinion of Judge Cassese.

sufficient".[3171] In light of the above, the Appeals Chamber finds that the Trial Chamber did not err in finding that duress is not available if the accused is threatened "with serious bodily harm that is not going to materialise sufficiently soon", and that "[a] merely abstract danger or simply an elevated probability" that a dangerous situation might occur, "even if continuously present", does not suffice.[3172]

1424. With regard to the Defence's argument that under article 31(1)(d)(i) and (ii) of the Statute, the "threat must be understood from the perspective of the person receiving it", and that there is a situation of duress as long as "the recipient of the threat genuinely fears these consequences",[3173] the Appeals Chamber notes that the Defence misreads the provision. Article 31(1)(d) of the Statute clearly sets out the elements of duress, the only subjective element being that "the person does not intend to cause a greater harm than the one sought to be avoided". The Appeals Chamber also notes that the Defence does not provide any authority to support its interpretation. The Appeals Chamber observes, as submitted by Prosecutor, that the existence of the threat must be objectively assessed and "exist in reality and not merely on the perpetrator's mind",[3174] and that "[i]t is not sufficient that a threat is simply believed to exist by the accused, […] it must be established at least that a reasonable person in those circumstances would nonetheless apprehend the risk of serious harm […] irrespective of whether the accused genuinely but mistakenly believed to be under threat".[3175]

1425. This notwithstanding, the Appeals Chamber notes that any prior traumatic experiences of an accused person that may have an impact on him or her at the time relevant to the charges, which does not satisfy the threshold required for excluding the

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[3171] *See also* K. Ambos, *Treatise on International Criminal Law Volume 1: Foundations and General Part* (2nd ed.) (Oxford University Press, 2021), p. 473. *See also* Confirmation Decision, para. 153 where the Pre-Trial Chamber held that "[d]uress is not regulated in the Statute in a way that 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". It is also noted that Judge Antonio Cassese, in his dissenting opinion to the *Erdemović* Sentencing Judgment, stated that "the situation leading to duress must not have been voluntarily brought about by the person coerced". (Separate and Dissenting Opinion of Judge Cassese, paras 16-17.). Similarly, the ECCC Trial Chamber in the *Duch* Case held that "[d]uress cannot […] be invoked when the perceived threat results from the implementation of a policy of terror in which [the accused] has willingly and actively participated." *Duch* Trial Judgment, para. 557. *See also* paras 555-558.
[3172] Conviction Decision, para. 2582.
[3173] Appeal Brief, para. 508.
[3174] Prosecutor's Response to the Amici Curiae Observations, paras 31-32, in particular para. 31, *referring to* K. Ambos, "Volume 1: Foundations and General Part" in OSAIL (ed.) *Treatise on International Criminal Law* (2013), p. 357.
[3175] T-263, p. 59, lines 1-21.

criminal responsibility of the accused under article 31(1)(d) of the Statute, may nonetheless be relevant for the purposes of sentencing in case of a conviction, as provided for in rule 145 of the Rules. This is, however, without prejudice to the determination of the appeal lodged by the Defence against the Sentencing Decision.

1426. With regard to the Defence's arguments concerning spirituality in the Acholi culture, and more specifically the impact of Joseph Kony's purported spiritual powers on Mr Ongwen, the Appeals Chamber notes, as will be discussed more in detail below, that the Trial Chamber addressed similar arguments in its determination of whether Mr Ongwen was acting under a threat pursuant to article 31(1)(d) of the Statute. The Appeals Chamber will address below the relevant arguments raised by the Defence on appeal. The Appeals Chamber finds it important to state at this stage that its analysis will be guided by article 21(3) of the Statute, which provides that "[t]he application and interpretation of law pursuant to [article 21 of the Statute] must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as […] religion or belief […]".[3176] While specific aspects of a religion or belief, as part of a certain culture may be considered, this cannot result in an unequal interpretation or application of the law.

(b) Conclusion

1427. For the reasons mentioned above, the Appeals Chamber does not find an error in the Trial Chamber's interpretation of article 31(1)(d) of the Statute and therefore rejects ground of appeal 44.

(c) Grounds of appeal 26, 28 (in part), 46, 47 and 48: Alleged errors regarding Mr Ongwen's status in the LRA hierarchy, the applicability of the LRA disciplinary regime to him, and related findings

1428. The Appeals Chamber finds it appropriate to address the arguments raised under grounds of appeal 26, 28 (in part), 46, 47 and 48 together as, in the Appeals Chamber's understanding, they all challenge different aspects of the Trial Chamber's findings about Mr Ongwen's status in the LRA structure and the applicability of its disciplinary

[3176] *See also* *Al Hassan* Confirmation Decision, paras 181, 243-244.

regime to Mr Ongwen for the purpose of determining whether he acted under duress within the meaning of article 31(1)(d) of the Statute.[3177]

1429. The Appeals Chamber will therefore address the Defence's arguments concerning: (i) Joseph Kony's control over Mr Ongwen and the latter's role in the LRA (ground of appeal 46); (ii) the alleged existence of a spy network (ground of appeal 48); and (iii) the alleged impact of Mr Ongwen's abduction, indoctrination and experiences in the LRA (grounds of appeal 26, 28 (in part) and 47).

(i) Summary of the submissions

1430. Under ground of appeal 46, the Defence submits that the Trial Chamber failed to provide reasoning regarding "the command and control of Kony over [Mr Ongwen]", which "disregards and is totally detached from" his personal circumstances.[3178]

1431. Under ground of appeal 48, the Defence argues that the Trial Chamber "overlooked or completely dismissed key evidence" on the existence of a network of spies/informants within the LRA.[3179]

1432. Under grounds of appeal 26, 28 (in part), and 47, the Defence challenges the manner in which the Trial Chamber assessed or failed to assess, the evidence related to "the impact of the age, abduction, and indoctrination of [Mr Ongwen] and his childhood development within the LRA; together with the enduring effects of the same" when evaluating whether Mr Ongwen acted under duress.[3180]

1433. The Prosecutor submits that the Trial Chamber was correct and reasonable in its approach to the evidence on Mr Ongwen's abduction.[3181] He argues that the Trial Chamber considered all the relevant evidence and provided adequate reasoning for its conclusions, and that the Defence, by misrepresenting the Conviction Decision and the evidence, fails to show any error in the Trial Chamber's analysis.[3182] According to the

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[3177] Conviction Decision, paras 2590-2608.
[3178] Appeal Brief, para. 514.
[3179] Appeal Brief, para. 533.
[3180] Appeal Brief, para. 307. *See also* paras 310-319, 420-429.
[3181] Prosecutor's Response, paras 262-266 (grounds of appeal 26 (in part), 28, 47 (in part), 321 (grounds of appeal 26 (in part), 46, 47 (in part) and 48).
[3182] Prosecutor's Response, paras 262-265. *See also* T-263, p. 57, lines 14-19.

Prosecutor, the Defence also fails to articulate what impact, if any, the alleged errors had on the Conviction Decision.[3183]

1434. Victims Group 1 submit that, as framed, the grounds of appeal amount to mere disagreement with the Trial Chamber's findings and that the Defence does not identify any errors of law or fact.[3184] They further argue that when Mr Ongwen committed the crimes, he was not a child soldier[3185] and there is no evidence that "the alleged indoctrination and/or childhood experience had the effect of bringing about the circumstances identified in Article 31(1)(d) [of the Statute]".[3186]

1435. Victims Group 2 submit that the Trial Chamber properly reasoned its findings and conclusions.[3187] More specifically, they stress that the charges brought against Mr Ongwen concern the crimes committed between 2002 and 2005 when he was already an adult and commanding officer in the LRA.[3188] They further contend that the Defence's arguments that the Trial Chamber "chose to ignore or disregard the evidence about the age, abduction and childhood development of [Mr Ongwen] in the LRA are erroneous and therefore without merit".[3189]

(ii) Relevant part of the Conviction Decision

1436. As recalled above, in its assessment of whether Mr Ongwen, at the time of the relevant conduct, was subject to a threat pursuant to article 31(1)(d) of the Statute, the Trial Chamber first addressed Mr Ongwen's status in the LRA's hierarchy and the applicability of the LRA disciplinary regime to him.[3190] After assessing the relevant evidence, it concluded, *inter alia*, that:

> it transpires from the above that the relationship between Joseph Kony and [Mr] Ongwen was not characterised by the complete dominance of the former and subjection of the latter. On the contrary, what results clearly from the […]

[3183] Prosecutor's Response, para. 331.
[3184] Victims Group 1's Observations, paras 116-118 (grounds of appeal 26 and 47), 160 (ground of appeal 46), 164 (ground of appeal 48).
[3185] T-263, p. 34, lines 4-8.
[3186] T-267, p. 22, line 25 to p. 23, line 2.
[3187] Victims Group 2's Observations, paras 80-84, 136-139.
[3188] Victims Group 2's Observations, para. 84; T-263, p. 36, lines 15-16.
[3189] Victims Group 2's Observations, para. 83.
[3190] Conviction Decision, paras 2590-2608.

> witness testimonies is that [Mr] Ongwen was a self-confident commander who took his own decisions on the basis of what he thought right or wrong.[3191]

1437. Other parts to the Conviction Decision are referred to in the Appeals Chamber's determination of the respective grounds of appeal.

(iii) Determination by the Appeals Chamber

(a) Joseph Kony's control over Mr Ongwen and the latter's role in the LRA (ground of appeal 46)

1438. The Defence challenges the Trial Chamber's findings related to Joseph Kony's control and authority over Mr Ongwen. The Defence submits that the Trial Chamber "impermissibly inferred that [Mr Ongwen] exercised free will and was not subjected to duress in the execution of the orders of Kony" and that this conclusion is "unsubstantiated" and based on "inaccurate assessments".[3192] In particular, it submits that the Trial Chamber's "findings on the hierarchical nature of the LRA structure under an effective command" and Mr Ongwen's role therein "are inconsistent [with] and contradict the confirmed charges".[3193] It further submits that the Trial Chamber "did not provide a reasoned statement on the central issues on the command-and-control authority of Kony".[3194] The Appeals Chamber will address the Defence's arguments in turn.

1439. The Appeals Chamber notes that a number of arguments are more fully developed in other grounds of appeal, and it will therefore address them there. In particular, the Defence's arguments related to the relevance, if any, of Mr Ongwen's circumstances of "abduction, initiation […] indoctrination" or the general environment in the LRA[3195] will be addressed under grounds of appeal 26, 28 (in part) and 47.[3196] Its arguments concerning the alleged spiritual powers of Joseph Kony will be addressed under ground of appeal 55.[3197] Those related to the Trial Chamber's assessment of the execution of

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[3191] Conviction Decision, para. 2602.
[3192] Appeal Brief, para. 515.
[3193] Appeal Brief, paras 516-519 (footnotes omitted). *See also* paras 530-531.
[3194] Appeal Brief, p. 115 (heading (c)).
[3195] Appeal Brief, paras 521-522.
[3196] *See* section VI.F.2(c)(iii)(c) (Alleged failure to consider evidence on the impact of Mr Ongwen's abduction, indoctrination and experiences in the LRA (grounds of appeal 26, 28 (in part) and 47) below.
[3197] Appeal Brief, para. 522. *See also* section VI.F.2(f) Ground of appeal 55: Alleged errors in relation to Joseph Kony's purported spiritual powers) below.

other senior LRA members will be addressed under grounds of appeal 50, 51 and 56.[3198] Finally, the Defence's arguments concerning the Trial Chamber's assessment of evidence concerning the distribution of women and Mr Ongwen's related responsibility have been addressed under the relevant grounds of appeal.[3199] The Appeals Chamber will now address the following Defence's arguments: (i) the alleged inconsistencies between the Trial Chamber's findings and the charges; and (ii) alleged errors concerning the findings on control authority of Joseph Kony.

(i) Alleged inconsistencies with the Confirmation Decision

1440. With respect to the Defence's challenge that the Trial Chamber's findings on the structure of the LRA and Mr Ongwen's role therein was inconsistent with the charges,[3200] the Appeals Chamber notes that the Defence refers to the following finding of the Pre-Trial Chamber in the Confirmation Decision:

> The evidence demonstrates that, at the relevant time, the LRA was an organised entity disposing of a considerable operational capacity. The undisputed leader of the organisation was Joseph Kony, from whom emanated all important decisions. To maintain his tight grip on the organisation, Joseph Kony also successfully invoked possession of mystical powers. Directly under Joseph Kony were a central organ known as Control Altar and a so-called Division, which was also an operational unit. Most importantly, however, the operational units of the LRA were its four brigades: Sinia, Gilva, Trinkle and Stockree. These brigades were composed of a considerable number of individuals under an effective command structure, which ensured that orders were executed. A strict system of discipline was used for this purpose, which included capital punishment and imprisonment as sanctions for disobedience. The Chamber notes the argument of the Defence that the LRA was not a proper army and that Joseph Kony frequently bypassed the chain of command […], but does not consider dispositive this objection to the charges. The evidence overwhelmingly shows that the hierarchical structure was effective, notwithstanding the possibility of deviations as described by the Defence.[3201]

[3198] Appeal Brief, paras 524-531. *See also* section VI.F.2(d) (Grounds of appeal 50, 51 and 56: Alleged errors regarding threats by Joseph Kony and his killing of senior commanders, and Mr Ongwen's contacts with Salim Saleh) below.
[3199] Appeal Brief, para. 532. *See also* section VI.E.1(b) (Alleged error in finding that Mr Ongwen was one of the commanders who developed and implemented the LRA policy of abduction and abuse of civilian women and girls) above.
[3200] Appeal Brief, paras 516-519 (footnotes omitted). *See also* paras 530-531.
[3201] Appeal Brief, para. 519, *referring to* Confirmation Decision, para. 56. *See also* para. 54.

1441. The Appeals Chamber notes that the above paragraph appears in the analysis section of the Confirmation Decision and not in the section setting out the confirmed charges. The binding character of the confirmed charges on the Trial Chamber is limited to the "facts and circumstances described in the charges", while other information contained in a decision on the confirmation of the charges may be subject to change as the trial evolves.[3202]

1442. The Appeals Chamber notes that in the present case, the Trial Chamber's factual findings generally overlap with the Pre-Trial Chamber's analysis. According to the Pre-Trial Chamber, the LRA was an organised entity led by Joseph Kony; there was "[a] strict system of discipline"; Joseph Kony maintained a tight grip over the structure, including by invoking mystical powers, and that while the "hierarchical structure was effective" deviations were also possible; and Mr Ongwen's performance as commander was highly valued by Joseph Kony.[3203] The Trial Chamber, when discussing the LRA as an organisation in 2002-2005, found, as recalled above, that "[a]t the time relevant for the charges, *i.e.* from 1 July 2002 to 31 December 2005, the LRA had a hierarchical structure",[3204] that Joseph Kony's orders were "generally complied with", but that, "[a]t the same time, in particular when Joseph Kony was geographically removed from LRA units, brigade and battalion commanders took their own initiatives".[3205]

1443. The Appeals Chamber further notes that the Trial Chamber also found that, while having a "functioning hierarchy", the LRA also relied on the "independent actions and initiatives of commanders at division, brigade and battalion levels", and that "[f]or the organisation to operate and sustain itself, coordinated action by its leadership, including the brigade and battalion commanders, was necessary".[3206] It further added that "[i]n other words, the LRA was a collective project", and that it did not accept the Defence's proposition that the LRA should be equated with Joseph Kony alone, and all its actions attributed to him only.[3207]

[3202] *See* *Ruto and Sang* Order on Content of the Charges, paras 8-10.
[3203] Confirmation Decision, paras 56, 58. *See also* Confirmation Decision, Charges, paras 10-13.
[3204] Conviction Decision, para. 123.
[3205] Conviction Decision, para. 124. *See also* paras 866, 869, 871, 873.
[3206] Conviction Decision, para. 873.
[3207] Conviction Decision, para. 873.

1444. In light of the above, the Appeals Chamber considers that the Defence fails to show that the Trial Chamber's findings contradicted, or were inconsistent with, the Confirmation Decision. The Defence's argument is accordingly rejected.

(ii) Alleged errors on control authority of Joseph Kony

1445. The Defence argues that the evidence establishes that the LRA disciplinary regime was applied by Joseph Kony to Mr Ongwen, the same as it was on everyone in the LRA, and that the decision of the Trial Chamber to the contrary was not consistent with the evidence or with other findings made by the Trial Chamber.[3208] According to the Defence, as a result of its failure to provide a reasoned statement for its conclusions, the Trial Chamber's findings were not proven beyond a reasonable doubt, making the judgment "unfair and unsafe", ultimately leading to a miscarriage of justice.[3209]

1446. The Appeals Chamber considers that the Trial Chamber properly assessed the evidence and provided sufficient reasoning for its conclusion about Mr Ongwen's status and role within the LRA and the applicability of the disciplinary regime in the LRA to him.[3210] In its evidentiary assessment supporting its findings on the LRA's structure and disciplinary system, the Trial 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 […] there is indication in the evidence that they were at least occasionally able to do so. In addition […] the commanders possessed a degree of autonomy on which also the operation of the LRA as such depended. 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.[3211]

[3208] Appeal Brief, paras 513, 523-532.
[3209] Appeal Brief, paras 522, 532.
[3210] Conviction Decision, paras 2590-2591.
[3211] Conviction Decision, para. 970.

1447. In reaching the above conclusion, the Trial Chamber relied in particular on the testimony of several insider witnesses, who explained the basic rules applicable to soldiers within the LRA and whether, during their time in the LRA, they were in a position to refuse orders,[3212] as well as testimony of witnesses who explained how Joseph Kony's orders were received and implemented and the degree of autonomy possessed by commanders.[3213]

1448. Consistent with these conclusions, in the context of determining whether Mr Ongwen acted under duress,[3214] the Trial Chamber found, mostly on the basis of the evidence from insider witnesses,[3215] that while the mechanisms used in the LRA to ensure obedience in its ranks were characterised by their "brutality", there was a "difference between the status of low-ranking LRA members and the higher commanders", such as Mr Ongwen, and that "whereas the LRA was an effective, hierarchically structured organisation, it was not under the absolute control of Joseph Kony, and Joseph Kony relied on the co-operation of various LRA commanders to execute LRA policies". [3216]

1449. As recalled above, the Trial Chamber further found, based on its assessment of the relevant evidence,[3217] that Mr Ongwen was not in a situation of complete subordination, and that, due to his status as a battalion and brigade commander, his situation was "fundamentally" different from that of low-level members or recent abductees, who were "frequently placed in situations where they had to perform certain actions under threat of imminent death or physical punishment" and that Mr Ongwen was also personally the source of such threats.[3218] It further found that Mr Ongwen, as one of the high-ranking commanders of the LRA, did not always execute Joseph Kony's orders.[3219] Accordingly, on the basis of the evidence before it,[3220] the Trial Chamber

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[3212] Conviction Decision, paras 950-967.
[3213] Conviction Decision, paras 863-873.
[3214] Conviction Decision, paras 2590-2608.
[3215] Conviction Decision, paras 866-873.
[3216] Conviction Decision, para. 2590, *referring to* paras 866-873.
[3217] *See* Conviction Decision, Section IV.C.2.ii.d., paras 950-970.
[3218] Conviction Decision, paras 2591, *referring to* Section IV.C.2.ii.d., para. 964-966. *See also* para. 2668.
[3219] Conviction Decision, para. 2593.
[3220] *See* Conviction Decision, paras 866-873, *referring to* the testimony of P-0070, P-0205, D-0056, P-0016, D-0027, P-0440). *See also* paras 2593-2601.

concluded that the relationship between Joseph Kony and Mr Ongwen "was not characterised by the complete dominance of the former and subjection of the latter", but rather that Mr Ongwen was a "self-confident commander who took his own decisions on the basis of what he thought right or wrong".[3221] The Defence's argument is thus rejected.

1450. The Defence further argues that for its finding that the LRA commanders, including Mr Ongwen, did not always execute Joseph Kony's orders, the Trial Chamber "misrepresented or equated" this to disobedience with Joseph Kony's orders or the LRA standing rules[3222] and that the Trial Chamber "cherry-picked" examples, and relied on "untested and unauthenticated logbooks summaries" to support its conclusion, or to make impermissible inferences against Mr Ongwen.[3223] The Appeals Chamber finds these arguments to be without merit. The Defence challenges in particular the Trial Chamber's reliance on the evidence of P-0231 and P-0440.[3224]

1451. The Trial Chamber based its conclusion on the testimony of several witnesses, most of whom were insider witnesses, including P-0440, P-0070, P-0231, P-0016, P-0226, [REDACTED],[3225] and whose testimony was corroborated by logbooks and transcripts of intercepted radio communications,[3226] the reliability of which had been assessed by the Trial Chamber.[3227]

1452. The Appeals Chamber notes that, on the basis of the evidence, the Trial Chamber considered the evidence to show that Mr Ongwen did not always execute Joseph Kony's orders, and that he also intervened, if he deemed it necessary.[3228] In that regard, the Trial Chamber found, on the basis of, *inter alia*, P-0231's evidence, that the interactions between Mr Ongwen and Joseph Kony were incompatible with a situation of threat of

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[3221] Conviction Decision, para. 2602.
[3222] Appeal Brief, para. 526, *referring to* Conviction Decision, para. 2593.
[3223] Appeal Brief, paras 521, 526, *referring to* Conviction Decision, paras 2594-2597. *See also* Appeal Brief, paras 723-726.
[3224] Appeal Brief, paras 526-530.
[3225] Conviction Decision, paras 2594-2601, 2605.
[3226] Conviction Decision, paras 2603-2606. *See also* paras 866-873, 950-970.
[3227] *See* Conviction Decision, paras 614-810. *See also* sections VI.C.2 (Alleged errors in the Trial Chamber's assessment of intercept evidence) and VI.C.3 (Alleged erroneous findings based on chains of inferences drawn from the intercept evidence) above.
[3228] Conviction Decision, paras 2593-2606, in particular, para. 2597.

imminent death or imminent or continuing serious bodily harm.[3229] The Appeals Chamber notes that P-0231 testified not only that Mr Ongwen addressed Joseph Kony "to get more information" on the orders received but also that Mr Ongwen intervened to spare the life of people that were supposed to be executed and that in general he would "always intervene in what he believes is a bad order".[3230] The Appeals Chamber finds that the Trial Chamber's findings on this point are reasonable and consistent with its findings on the status, role and actions of Mr Ongwen, as discussed under grounds of appeal 65.[3231]

1453. Turning to the Defence's argument that the Trial Chamber "mischaracterised" P-0440's evidence, the Defence submits that, contrary to the Trial Chamber's finding that Mr Ongwen did not always obey the orders of Joseph Kony, P-0440 testified that Joseph Kony and Vincent Otti "were happy" because Mr Ongwen would implement their orders, and that they complained about the performance of two members of the LRA and praised Mr Ongwen as an example of a well-performing commander.[3232]

1454. The Appeals Chamber observes that the Trial Chamber noted that in response to the question of whether subordinate commanders obeyed Joseph Kony's order to stop abductions, P-0440 stated that "some people could violate the orders",[3233] and that some commanders, like Onen Unita and Odongo, disobeyed orders.[3234] The Trial Chamber also noted that according to the witness, this was possible, as commanders could delegate the tasks to subordinates, but could also "make up excuses […] not to go on mission", such as "pretend[ing] to be ill".[3235] Also, contrary to the Defence's suggestion that Onen Unita and Odongo may have ceased to be commanders as a result of them violating Joseph Kony's order,[3236] the Appeals Chamber observes that P-0440 testified that by the time he left the LRA, Odongo and Onen were still commanders, but that he

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[3229] Conviction Decision, para. 2597, *referring to* P-0231: T-123, p. 83, line 6 to p. 84, line 9.
[3230] T-123, p. 83, line 6 to p. 84, line 9.
[3231] *See* section VI.D.1(c)(iii) (Alleged errors in the Trial Chamber's findings regarding the structure of the LRA and Mr Ongwen's role) above.
[3232] Appeal Brief, paras 526-528, *referring to* P-0440: T-40, p. 20, lines 4-8, p. 40, lines 9-15, p. 41, lines 16-18.
[3233] Conviction Decision, para. 871, *referring to* P-0440: T-39, p. 84, lines 10-14.
[3234] Conviction Decision, paras 871, 2594.
[3235] Conviction Decision, paras 871, 2594, *referring to* P-0440: T-40, p. 6, line 18 to p. 7, line 9.
[3236] Appeal Brief, para. 527.

could not say what happened to them afterwards.[3237] The Appeals Chamber is therefore not persuaded by the Defence's argument that the Trial Chamber mischaracterised the evidence of P-0440, thereby rendering its finding that commanders did not always execute Joseph Kony's orders unreasonable. The Defence's argument is thus rejected.

1455. Finally, the Defence challenges the Trial Chamber's conclusion that Mr Ongwen took his own initiatives in the commission of the charged crimes, "a majority of which were alleged to have been committed in a common plan with Kony", and submits that the manner of pleading in the Prosecutor's article 58 application showed that "Kony [was] fully in control of the crimes which were committed during the charged period and [Mr Ongwen was] fully subordinated and functioned as a victim, not [as] a perpetrator".[3238] The Trial Chamber found that, while Joseph Kony's orders were generally complied with, brigade and battalion commanders took their own initiatives when Joseph Kony was geographically removed – and this was the case during the period of the charges, when Joseph Kony was in Sudan.[3239] The Appeals Chamber notes that the Defence's contentions are undeveloped and, in any event, erroneous, as it has been explained above, and in particular under ground of appeal 65.[3240]

1456. As a result, the Appeals Chamber considers that the Defence fails to show that the Trial Chamber's assessment of the evidence and its conclusions were unreasonable. Accordingly, the Defence's arguments under ground of appeal 46 are rejected.

(b) Alleged existence of a spy network (ground of appeal 48)

1457. The Defence challenges the Trial Chamber's finding that the "evidence in the trial does not provide any basis for consideration of spies, or a spy network, as a separate phenomenon" and its consideration that the "issue folds [*sic*] entirely within the

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[3237] P-0440: T-40, p. 41, lines 14 to 21 ("A. […] When I escaped they were still in the bush and they were commanders leading the different units that they were assigned to command. […] When I returned home […] they remained there, so it was not easy for me to know that they were still commanders or they were no longer commanders. Q. […] Had you heard anything about them no longer being commanders? A. […] Since then I never heard anything.").
[3238] Appeal Brief, para. 523.
[3239] Conviction Decision, para. 124.
[3240] *See* section VI.D.1(c)(iii) (Alleged errors in the Trial Chamber's findings regarding the structure of the LRA and Mr Ongwen's role) above.

analysis of the nature of the hierarchical relationship between Joseph Kony and the LRA commanders, including [Mr] Ongwen".[3241]

1458. The Defence submits that the Trial Chamber "overlooked or completely dismissed key evidence" on the existence of a "network of spies/informants" within the LRA "with the objective of reporting on the actions of those within the LRA", particularly those who were contemplating escape, to Joseph Kony and his intelligence officers.[3242] According to the Defence, this error "negatively impacted on [Mr Ongwen's] affirmative defence of duress".[3243] The Defence adds that "[t]his network of spies/informants created an atmosphere of danger and duress within the ranks of the LRA", including among the senior commanders.[3244] The Defence further submits that the network was "real, known and reported to the Chamber on many occasions by many witnesses".[3245] The Defence further argues that, while this network was not very developed, "[it] played a significant role in the duress exuded by Kony in the LRA" – a role which, "[w]hile not independently sufficient to meet the criteria of Article 31(1)(d) of the Statute, […] compounded the hardships which everyone […] had in order to escape from the LRA".[3246]

1459. The Appeals Chamber notes that the Trial Chamber referred to the parties' submissions on the issue of "whether Joseph Kony employed spies in order to control his subordinate commanders, in particular [Mr] Ongwen", and it referenced in a footnote the relevant submissions in their respective closing briefs.[3247] In its closing brief, the Defence limited itself to mention the "omnipresent surveillance by selected individuals within the LRA, who reported to Kony", as one of the factors that would guarantee the "imminence of severe harm or death" in the LRA (together with "forcing abductees to witness or participate in brutality against those who violated rules or

[3241] Conviction Decision, para. 2607.
[3242] Appeal Brief, para. 533.
[3243] Appeal Brief, para. 535.
[3244] Appeal Brief, paras 533-535.
[3245] Appeal Brief, para. 534.
[3246] Appeal Brief, para. 535.
[3247] Conviction Decision, para. 2607, *referring to* Prosecutor's Closing Brief, paras 492-494; Defence Closing Brief, paras 691, 717.

commands" and "the belief that Kony could predict the future and read LRA abductees' minds").[3248]

1460. The Appeals Chamber observes that, as noted by the Trial Chamber, the Defence provided no support in its closing brief for the claim that there was "omnipresent surveillance by selected individuals within the LRA who reported to Kony".[3249]

1461. The Appeals Chamber further notes the testimony of witnesses referred to by the Defence in the Appeal Brief. The Defence refers to the testimony of P-0172, P-0144 and P-0138 to support its claim that "[t]he LRA, through Kony, maintained a spy network of informants with the purpose of reporting actions which Kony deemed undesirable".[3250] In the portions of the testimony identified by the Defence, P-0172 stated, *inter alia*, that he "came to know" that Joseph Kony strategically placed trusted people within the groups to spy on its leaders and report back directly to him.[3251] P-0144 testified that in order to enable Joseph Kony to know what was happening at the level of the units, intelligence officers would report to their commanders, who in turn would "forward this information to their leader".[3252] P-0138 stated that "[i]n the LRA there [is] intelligence [in] the brigade […] in the battalion [and] also […] in the coy" and that "[t]here is a senior intelligence who is in the Control Altar who is in charge of all the brigades and would talk directly with Kony [b]ut information trickles down from the intelligence in coy, up to the time it reaches the Control Altar".[3253]

1462. The Defence also makes reference to the testimony of several witnesses to support its claim that the "principal reason for the spy network was to report on persons who were contemplating escape".[3254] By way of example, the Appeals Chamber notes that the Defence refers to the testimony of P-0264, who was an escort of a commander in the LRA, and who testified that "[b]eing an escort of a commander in the LRA, if somebody [or any] of the wives of the commander […] has an ill plan or wants to

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[3248] Defence Closing Brief, para. 691.
[3249] Conviction Decision, para. 2607, *referring to* Defence Closing Brief, para. 691, fn. 6963.
[3250] Appeal Brief, para. 534.
[3251] P-0172: T-114, p. 11, line 16 to p. 12, line 1.
[3252] P-0144: T-92, p. 26, lines 6-15.
[3253] P-0138: T-121, p. 32, line 19 to p. 33, line 3.
[3254] Appeal Brief, para. 534, *referring, inter alia, to* P-0045, T-64, p. 26, lines 18-24; T-104, p. 61, line 24 to p. 62, line 6; P-0070, T-107, p.13, lines 5-20; P-0233, T-112, p. 30, line 14 to p. 31, line 15; P-0172, T-114, p. 11, line 16 to p. 12, line1; D-0026, T-182, p. 26, line 1 to p. 27, line 5.

escape, you should alert the commander if you know about it".[3255] The witness confirmed that it would be correct to say that "an escort also worked as a spy".[3256] The Defence also refers to D-0060, who testified that

> I can testify that spying, indeed, was an important element within the functioning of the LRA. For example, the initial family I talked about, or the initial household where an abductee was placed, did not only have the function of learning the rules, but also, well, seeing how this person functions and spying. And people […] or, combatants within the LRA were spying on each other. They were supposed to report if somebody tries to escape, and if somebody hasn't reported and was supposed to be aware of this, the person could be punished. So, yes, spying was part of LRA.[3257]

1463. The Appeals Chamber considers that the evidence referred to by the Defence merely confirms that in the LRA, like in many hierarchical structures, there were intelligence officers monitoring the conduct of its members, both of low and high rank, and reporting to the higher commanders, and that these officers reported also on those who intended to escape.[3258] The Appeals Chamber finds that contrary to the Defence's submissions, there is no indication that the Trial Chamber "overlooked or completely dismissed" such evidence. In any event, the Defence does not show that this evidence is such as to render unreasonable the Trial Chamber's finding that the evidence "does not provide any basis for consideration of spies, or a spy network, as a separate phenomenon",[3259] and that the Trial Chamber erred in considering that this issue fell instead within "the analysis of the nature of the hierarchical relationship between Joseph Kony and the LRA commanders".[3260]

1464. The Appeals Chamber finds that the Defence fails to show any error in the Trial Chamber's conclusion, and accordingly rejects its arguments under this ground of appeal.

[3255] P-0264: T-64, p. 26, lines 19-23.
[3256] P-0264: T-66, p. 50, line 23 to p. 51, line.
[3257] D-0060: T-197, p. 53, line 15-23.
[3258] *See also* Prosecutor's Response, para. 329.
[3259] Conviction Decision, para. 2607.
[3260] Conviction Decision, para. 2607.

(c) Alleged failure to consider evidence on the impact of Mr Ongwen's abduction, indoctrination and experiences in the LRA (grounds of appeal 26, 28 (in part) and 47)

1465. Under grounds of appeal 26 and 47, the Defence submits that the Trial Chamber's conclusion that the defence of duress was not applicable to Mr Ongwen was unreasonable due to its failure to consider evidence of the impact of Mr Ongwen's age, abduction, indoctrination and childhood development in the LRA, together with the enduring effects of the same, when assessing the defences under article 31(1)(a) and (d) of the Statute, especially the defence of duress.[3261]

1466. The Defence argues that the evidence shows that Mr Ongwen "spent the first nine of his 27 years in the LRA as a child soldier", which, it argues, were "the childhood development and formative years of his life"; they were also "some of the years when [the] LRA war machinery, [was] steeped in spiritualism and [the] application of the LRA brutal disciplinary regime".[3262] The Defence emphasises that "[t]he accused […] was just a child when he was abducted, brutalised and made into a fighter machine without a mind of his own".[3263] It claims that "[a] human being cannot be detached from his past" and that it was therefore "pathetic, insensitive and factually and legally erroneous" for the Trial Chamber to focus its assessment of the applicability of duress only on Mr Ongwen's situation as battalion and brigade commander during the period relevant to the charges, stating that his "childhood experience in the LRA is not central to the issue".[3264]

1467. The Defence therefore submits that to properly assess the conduct of Mr Ongwen during the relevant period, the Trial Chamber should have considered the background experiences of Mr Ongwen, in particular: (i) his childhood "immediately before and after his abduction";[3265] (ii) the "vicissitudes and vacillations of his life under the coercive environment";[3266] and (iii) his "peculiar cum special attributes and the attention he was given, leading to his spectacular rise in rank".[3267] The Defence argues

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[3261] Appeal Brief, para. 307. *See also* paras 309-319.
[3262] Appeal Brief, para. 309.
[3263] T-263, p. 16, lines 2-4.
[3264] Appeal Brief, para. 310, *referring to* Conviction Decision, para. 2592.
[3265] Appeal Brief, paras 311-315.
[3266] Appeal Brief, paras 311, 316-317.
[3267] Appeal Brief, paras 311, 318-319.

that had the Trial Chamber considered this evidence, it would have found that it "impacted" and left an "indelible mark" on Mr Ongwen, and that at least informed part of his conduct during the charged period.[3268]

1468. Under ground of appeal 28, the Defence avers that the Trial Chamber's "decision […] that the evidence of the abduction, indoctrination and childhood experience of [Mr Ongwen] is not central to the issues was unreasonable and unwarranted".[3269] The Defence further claims that the Trial Chamber provided no reasoned statement substantiating its decision.[3270] It submits, *inter alia*, that the Trial 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 [Mr Ongwen's] conviction", and that all members of the LRA, including Mr Ongwen, were tools at the disposal of Joseph Kony.[3271] The Appeals Chamber notes that some of these arguments have already been addressed and rejected above.[3272]

1469. The Appeals Chamber further notes that the arguments raised under the above grounds of appeal overlap significantly. Indeed, they challenge the Trial Chamber's alleged failure to consider evidence on Mr Ongwen's abduction, including his age when this occurred, indoctrination and life and service within the LRA from his childhood onwards, and the enduring impact of these experiences on his mental health and his free will as an adult. According to the Defence, had the Trial Chamber "correctly considered the impact" of those circumstances, it would have reached a different conclusion, finding that the defences pursuant to article 31(1)(a) and (d) were applicable in the present case.[3273]

1470. At the outset, the Appeals Chamber notes that while some of the Defence's arguments also concern the Trial Chamber's findings in relation to the ground for

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[3268] Appeal Brief, paras 314, 315, 317, 319.
[3269] Appeal Brief, para. 420, *referring to* Conviction Decision, paras 27, 2592.
[3270] Appeal Brief, para. 421. *See also* paras 426-429.
[3271] Appeal Brief, para. 420. *See also* paras 423-429.
[3272] *See* section VI.D.1(c)(iv) (Alleged errors regarding evidence of Mr Ongwen's abduction, initiation, training, and service in the LRA) above.
[3273] Appeal Brief, para. 312.

excluding criminal responsibility by way of mental disease, they are addressed here given the Defence's focus on the following finding of the Trial Chamber:

> In its assessment, the Chamber focuses on the situation of [Mr] Ongwen as battalion and brigade commander during the period of the charges. [Mr] Ongwen's childhood experience in the LRA is not central to the issue. The Defence relies on certain evidence relating to [Mr] Ongwen's life in the LRA in the period immediately following his abduction in the 1980s, when [Mr] Ongwen was a child. However, this evidence is not as such relevant for the determination whether a threat relevant under Article 31(1)(d) of the Statute existed at the time of the conduct relevant for the charges, many years after [Mr] Ongwen's abduction, when he was an adult and in a commanding position.[3274]

1471. The Appeals Chamber first notes that the confirmed charges against Mr Ongwen concern crimes he allegedly committed as an adult between 1 July 2002 and 31 December 2005. Therefore, any finding about Mr Ongwen's abduction when he was a child, his childhood or alleged indoctrination within the LRA cannot, in itself, be sufficient and thus determinative of the central issues of the case. In this context, the Appeals Chamber finds that it was not unreasonable for the Trial Chamber to consider that Mr Ongwen's childhood experience in the LRA was "not central to the issue".[3275]

1472. In any event, contrary to the Defence's assertion that the Trial Chamber "chose to ignore [Mr Ongwen's] early childhood background",[3276] the Appeals Chamber notes that the Trial Chamber did take into account evidence about Mr Ongwen's age and abduction.[3277] It also considered his childhood experiences in its holistic assessment of the evidence relevant to the ground for excluding criminal responsibility by way of mental disease or defect, in particular the evidence from P-0045.[3278] The Trial Chamber

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[3274] Conviction Decision, para. 2592 (footnotes omitted).
[3275] Conviction Decision, para. 2592 (footnotes omitted).
[3276] Appeal Brief, para. 313, *referring to* the testimony of D-0008, D-0012, D-0007, and D-0006.
[3277] Conviction Decision, paras 27-30, 432 (D-0006), 590 (D-0007) 591 (D-0008), 592 (D-0012).
[3278] In relation to the assessment of evidence relevant to the ground for excluding criminal responsibility under article 31(1)(a) of the Statute, the Trial Chamber considered evidence from P-0445 indicating that, until the time of his abduction, "the complex interactions between individual, societal, and ecological factors over the course of [Mr Ongwen's] life had gone on satisfactorily well" and his "average intelligence and 'bush socialisation'" could have helped him to cope with his situation. and that Mr Ongwen seemed to have "matured developmentally against all odds with flexibility and moral reasoning". In this regard, the Trial Chamber found that the expert report and testimony, in particular in relation to her assessment of the level of Mr Ongwen's moral development, were "pertinent and valuable" for use in its findings. Conviction Decision, paras 2480, 2485. *See also* section VI (E) (e) (Alleged errors in the Trial Chamber's consideration of P-0445's evidence) above.

also took into account the evidence from P-0142, who testified about Mr Ongwen's personal growth in the LRA, before reaching the position of commander.[3279]

1473. Furthermore, at the end of its analysis on the applicability of article 31(1)(d) of the Statute, the Trial Chamber explicitly noted the Defence's "legally unspecified submissions emphasising that [Mr] Ongwen was himself a victim of crimes, on account of his abduction at a young age by the LRA".[3280] It recalled that it had "duly considered" the facts underlying these submissions, and also noted the "potential relevance" of these facts to both "grounds excluding criminal responsibility".[3281] While acknowledging that Mr Ongwen had been abducted at a young age by the LRA, the Trial Chamber noted that the accused "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 […]".[3282]

1474. With regard to the Defence's arguments on Joseph Kony's "command, control, and spiritual powers", his influence over Mr Ongwen, and the "enduring effects" of the abductions and conditions in which persons were initiated into and served in the LRA,[3283] as discussed elsewhere in the judgment, these issues were considered by the Trial Chamber.[3284] In light of the above, the Appeals Chamber finds that the Trial Chamber did not disregard the evidence referred to by the Defence

1475. Accordingly, the Appeals Chamber does not find any error in the Trial Chamber's determination to focus on the situation of Mr Ongwen as battalion and brigade commander during the period of the charges and in considering that his childhood experience in the LRA was "not central to the issue".[3285] Accordingly, the Defence's arguments are rejected.

[3279] Conviction Decision, para. 2506.
[3280] Conviction Decision, para. 2672, *referring to* Defence Closing Brief, paras 11-21; Defence Closing Statement: T-258, p. 5, lines 13-19, p. 27, lines 5-20; Defence Closing Brief, paras 6, 487-488, 494-496, 715; Prosecution Closing Statement: T-256, p. 12, line 21 to p. 14, line 15.
[3281] Conviction Decision, para. 2672. *See also* para. 2671 (" […] the Chamber recognises that similar discussion of facts and evidence partly underlies the analysis of both grounds excluding criminal responsibility discussed in the present case").
[3282] Conviction Decision, para. 2672.
[3283] Appeal Brief, paras 309-317, 423-424, 426.
[3284] Conviction Decision, paras 2590-2606, 2643-2658.
[3285] Conviction Decision, para. 2592.

(d) Conclusion

1476. Having rejected the totality of the Defence's arguments, the Appeals Chamber rejects grounds of appeal 26, 28 (in part), 46, 47 and 48.

(d) Grounds of appeal 50, 51 and 56: Alleged errors regarding threats by Joseph Kony and his killing of senior commanders, and Mr Ongwen's contacts with Salim Saleh

(i) Summary of the submissions

1477. Under grounds of appeal 50 and 56, the Defence submits that the Trial Chamber erred in "disregarding and misrepresenting" evidence relating to threats by Joseph Kony and the killing of senior commanders on his orders.[3286] The Defence contends that one of its central arguments on duress was that the threats by Joseph Kony were "imminent".[3287] The Defence argues that Joseph Kony "repeatedly demonstrated swift and severe consequences to those who broke his rules", and that a number of senior commanders (Otti Lagony and Okello Can Odonga, Vincent Otti, and James Opoka) were arrested and executed for breaking those rules and failing to follow Joseph Kony's orders.[3288]

1478. Under ground of appeal 51, the Defence challenges the Trial Chamber's assessment of the evidence on the threats faced by Mr Ongwen for his contacts with Lt General Salim Saleh.[3289] The Defence submits that a trier of fact having "duly considered" the evidence regarding the killing of senior LRA commanders would have reached a different decision and ultimately confirmed that Mr Ongwen was "truly under an imminent threat from Kony during the relevant period".[3290]

1479. The Prosecutor submits that the Defence disagrees with the Trial Chamber's conclusion on this point, but fails to explain how it was unreasonable.[3291] He argues that the Trial Chamber reasonably assessed the execution of senior LRA commanders on Joseph Kony's order and concluded that it could not infer from this evidence that Joseph Kony inevitably and immediately ordered the killing of commanders who did

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[3286] Appeal Brief, p. 121.
[3287] Appeal Brief, para. 542.
[3288] Appeal Brief, para. 542.
[3289] Appeal Brief, para. 545.*See also* paras 546-557; T-264, p. 80, lines 16-20.
[3290] Appeal Brief, para. 544.
[3291] Prosecutor's Response, paras 334-342.

not execute his orders.[3292] The Prosecutor further avers that the Trial Chamber did not err by deciding not to rely on the UPDF intelligence report and, therefore, the Defence's submission in this regard should be rejected.[3293]

1480. Victims Group 1 submit that the Defence's arguments are a mere disagreement with the findings of the Trial Chamber, and that they do not identify any error of law or fact.[3294]

(ii) Relevant parts of the Conviction Decision

1481. In the Conviction Decision, the Trial Chamber noted that "[e]ven though, with the exception of the killing of James Opoka, [the killings of Otti Lagony, Okello Can Odonga and Vincent Otti] all occurred outside the period of the charges", they were all relevant to the question of whether Mr Ongwen acted under a threat within the meaning of article 31(1)(d) of the Statute.[3295] After assessing the relevant evidence on the record, the Trial Chamber concluded that:

> 2614. […] the evidence in relation to all three instances of killings of senior LRA commanders on the orders of Joseph Kony does not indicate that the commanders were executed for failing to execute orders to engage in operations, by remaining passive. Rather, they were caused by these commanders challenging 'politically' the power of Joseph Kony as the exclusive leader of the LRA *i.e.* by seeking to take more general decisions in relation to the goals and priorities of the LRA. This is why the Chamber does not see a basis in this evidence to draw the conclusion that Joseph Kony inevitably and immediately ordered the killing of commanders who did not execute his orders.
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> 2615. In fact, […] there is strong evidence to the effect that Joseph Kony could not always rely on the unconditional compliance with his orders by the commanders under him. There is evidence that during the period of the charges, Joseph Kony at most demoted or threatened to demote non-performing commanders. This is demonstrated by two entries in the logbooks of intercepted radio communications from the period of the charges.[3296]

(iii) Determination by the Appeals Chamber

1482. Under these grounds of appeal, the Appeals Chamber understands the Defence to argue that the Trial Chamber disregarded or misinterpreted evidence related to the

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[3292] Prosecutor's Response, paras 334-336.
[3293] Prosecutor's Response, paras 337-342.
[3294] Victims Group 1's Observations, 168-172.
[3295] Conviction Decision, para. 2610.
[3296] Conviction Decision, paras 2614-2615.

threats allegedly faced by Mr Ongwen emanating from Joseph Kony and from Mr Ongwen's contacts with Lt General Salim Saleh.

1483. In this regard, the Appeals Chamber understands the Defence to allege errors in the Trial Chamber's assessment of: (i) the reasons for the killing of certain high-ranking commanders;[3297] and (ii) Mr Ongwen's contacts with Lt General Salim Saleh and his subsequent arrest.[3298] The Appeals Chamber will address these arguments in turn.

(a) Alleged errors related to the killing of senior LRA commanders

1484. The Defence submits that the Trial Chamber "mischaracterised" the evidence on the record when finding that the "senior commanders killed on Kony's orders were killed because of political power, thereby occasioning a miscarriage of justice".[3299]

1485. The Appeals Chamber notes that the Trial Chamber relied on the evidence of several witnesses (including P-0231, P-0205, P-0233, D-0018, D-0032, and D-0092), who all "had some sort of personal knowledge about the events", in making findings with regard to the execution of LRA commanders on Joseph Kony's orders.[3300] It found that Otti Lagony and Okello Can Odonga, who "occupied senior positions in the LRA",[3301] were executed because "they were challenging Kony's authority as the exclusive leader of the LRA".[3302] It further found that James Opoka was executed because "he 'ha[d] an arrangement to escape from the LRA with […] former LRA soldiers so that he – they would take them back to Uganda'"[3303] and Vincent Otti was

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[3297] Appeal Brief, paras 542-543.
[3298] Appeal Brief, paras 545-577.
[3299] Appeal Brief, para. 542.
[3300] Conviction Decision, paras 2610-2613.
[3301] Conviction Decision, para. 2611, *referring to* D-0032: T-199, p. 30, line 14 to p. 31, line 3; P-0231: T-123, p. 43, line 1 to p. 44, line 1; P-0172: T-113, p. 44, lines 10-11.
[3302] Conviction Decision, para. 2611, *referring to* D-0032: T-199, p. 31, lines 9-11 (testifying that Joseph Kony stated that the two men were "competing" and did not have the desire to stay in the LRA, and for these reasons should be killed); P-0231: T-123, p. 43, lines 7-14 (explaining that he at first heard that they had been trying to connect with the Ugandan government so that they may defect, and later also that Otti Lagony "had ordered for abduction of women and he distributed them to some of his officers without telling Kony" and that this meant that "he wanted to sway all the soldiers to respect him so that he becomes the overall boss"); D-0018: T-185, p. 45, lines 6-16 (stating that Otti Lagony was "executed because he went directly to deal with Arabs, the Sudan government"); D-0020 Statement, UGA-D26-0010-0382, paras 11-12 (explained that he had heard that Okello Can Odongo and Otti Lagony were planning "a coup").
[3303] Conviction Decision, para. 2612, *referring to* D-0032: T-199, p. 35, line 13 to p. 36, line 2; D-0092: T-208, p. 33, line 20 to p. 34, line 3. *See also* D-0092: T-208, p. 34, lines 10-14.

executed because "there was a 'divergence between what Otti stood for and what Kony was standing for'".[3304]

1486. On the basis of this evidence, the Trial Chamber concluded that these senior LRA commanders were killed on the orders of Joseph Kony not "for failing to execute orders to engage in operations, by remaining passive"; rather, they were killed for "challenging 'politically' the power of Joseph Kony as the exclusive leader of the LRA *i.e.* by seeking to take more general decisions in relation to the goals and priorities of the LRA".[3305]

1487. The Defence contends that the Trial Chamber "mischaracterised the evidence" and that these LRA senior commanders were executed "for breaking rules and not towing Kony's strict edits".[3306] The Defence further submits that there was an "unquestionable obligation to follow Joseph Kony's orders, failure of which would result in death or serious consequences".[3307] The Appeals Chamber notes that in support of its contention, the Defence refers to parts of testimony largely indicating that these three senior LRA commanders were arrested and killed on Joseph Kony's orders,[3308] and that disobeying Kony's orders could result in being killed or, in any event, being punished.[3309]

1488. The Appeals Chamber notes, however, that the Defence does not challenge the reliability of the evidence based on which the Trial Chamber reached its conclusion. Nor does the Defence explain why it was unreasonable for the Trial Chamber to conclude that the above-mentioned senior commanders were killed "for challenging 'politically' the power of Joseph Kony as the exclusive leader of the LRA", and, as a result, that it could not infer from the evidence related to the execution of these senior

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[3304] Conviction Decision, para. 2613, *citing* P-0233: T-112, p. 20, lines 8-10. *See also* T-112, p. 20, line 10 to p. 21, line 25.
[3305] Conviction Decision, para. 2614.
[3306] Appeal Brief, para. 542, *referring, inter alia, to* D-0027, T-202, p. 24, lines 8-12, p. 27, lines 23-25; D-0092, T-208 p. 29, line 9 to p. 31, line 25.
[3307] Appeal Brief, paras 542-543.
[3308] Appeal Brief, para. 542, fns 623-624, *referring, inter alia, to* P-0205 T-49, p. 29 lines 5-9; P-0233: T-112, p. 13 lines 17-23; D-0032: T-199, p. 35, line 15 to p. 36, line 2; D-0027: T-202, p. 24, line 21 to p. 25, line 1; D-0092: T-208, p. 34, lines 12-14.
[3309] Appeal Brief, para. 543, fn. 625, *referring, inter alia, to* P-0235: T-17, p. 65, lines 6-15; P-0172: T-113, p. 44 line 6; P-0138: T-121, p. 36 lines 12-18; D-0027: T-202, p. 19, lines 1-19, p. 23, line 18, p. 61, lines 15-18; D-0032: T-199, p. 41, line 8; D-0060: T-197, p. 41, line 25 to p. 42, line 4.

LRA commanders that "Kony inevitably and immediately ordered the killing of commanders who did not execute his orders".[3310] The Appeals Chamber considers that the Defence's argument amounts to a mere disagreement and does not show that the Trial Chamber's conclusion was unreasonable.

1489. The Appeals Chamber notes in this regard that the Trial Chamber's conclusion was further supported by its previous finding that there is "strong evidence" that Joseph Kony could not always rely on the "unconditional compliance with his orders by the commanders under him".[3311] The Trial Chamber stated that there is evidence that Joseph Kony "at most demoted or threatened to demote non-performing commanders",[3312] as demonstrated by two entries in the logbook of intercepted radio communications recording Joseph Kony "blast[ing]" Mr Ongwen for being a weak commander and threatening to demote him, and ordering the separation of two commanders because they defied his orders and to prevent them from continuing to do that.[3313]

1490. In light of the foregoing, the Appeals Chamber rejects the Defence's arguments.

(b) Alleged errors related to Mr Ongwen's contacts with Lt General Salim Saleh

1491. The Defence submits that the Trial Chamber "mischaracterised, misrepresented and disregarded favourable evidence on the threats faced by [Mr Ongwen] for his contacts with Lt General Salim Saleh of the UPDF in relation to his attempts to escape from the LRA while in the sickbay recovering from an injury".[3314] In support of its argument, the Defence submits that the Trial Chamber erred in: (i) rejecting a UPDF intelligence report;[3315] and (ii) its assessment of Mr Ongwen's rise within the LRA,[3316] and of how Mr Ongwen's arrest increased the threat against him.[3317]

[3310] Conviction Decision, paras 2611-2614.
[3311] Conviction Decision, para. 2615. *See also* paras 2593-2606 .
[3312] Conviction Decision, para. 2615.
[3313] Conviction Decision, paras 2616-2617, *referring, inter alia,* to two entries in the ISO logbook; ISO Logbook (Gulu), UGA-OTP-0063-0002, at 0124 and ISO Logbook (Gulu), UGA-OTP-0061-0206, at 0309.
[3314] Appeal Brief, para. 545.
[3315] Appeal Brief, paras 546-551.
[3316] Appeal Brief, paras 553-555.
[3317] Appeal Brief, paras 556-557.

1492. In relation to the first argument, the Defence submits that the Trial Chamber erred in deciding not to rely on the UPDF intelligence report, dated August 2003, stating that "Comdr Odomi [*i.e.* Mr Ongwen] narrowly escaped firing squad when he […] reportedly received some bags and money from Saleh".[3318] In particular, it submits that the Trial Chamber failed to provide credible reasons for the rejection of the UPDF report, which, in its view, described the gravity of the threat on the life of Mr Ongwen due to his contacts with Lt General Salim Saleh.[3319]

1493. The Appeals Chamber observers that the Trial Chamber, at the end of its analysis of the evidence on the execution of senior LRA commanders, noted the Defence's allegation that Mr Ongwen "himself came close to execution for getting in touch with and receiving money from Lt General Salim Saleh", and it recalled that it did not rely on the UPDF report, referring to its decision to this effect taken elsewhere in the judgment.[3320]

1494. The Trial Chamber's decision not to rely on the UPDF report was made in the context of its detailed evidentiary assessment concerning Mr Ongwen's brief arrest in April 2003, in which it found that the arrest "did not interrupt the exercise of his authority for any significant period".[3321] Notably, the Trial Chamber stated that

> […] it does not base its findings on the issue of [Mr] Ongwen's arrest on the UPDF intelligence report referred to by the Defence. The report, dated August 2003, and signed by a UPDF intelligence officer, states that "Comdr Odomi narrowly escaped firing squad when he was [*sic*] reportedly received some bags and money from Saleh". However, it is not possible to ascertain the source from which the UPDF obtained the information. For this reason, the Chamber does not rely on the UPDF intelligence report and instead relies on the available reliable evidence of events surrounding [Mr] Ongwen's arrest, in particular the logbook evidence and the testimony of P-0231.[3322]

[3318] Conviction Decision, para. 1054, *referring to* UPDF Report, UGA-OTP-0255-0943, at 0945.
[3319] Appeal Brief, paras 543-552, *referring to* UPDF Report, UGA-OTP-0255-0943, at 0945.
[3320] Conviction Decision, para. 2618, *referring to* para. 1054.
[3321] Conviction Decision, p. 351, *referring to* para. 135.
[3322] Conviction Decision, para. 1054 (footnotes omitted), *referring, inter alia, to* UPDF Report, UGA-OTP-0255-0943, at 0945. *See also* Conviction Decision, paras 1050-1063.

1495. After recalling that it would not rely on the UPDF report,[3323] the Trial Chamber further noted that "there is no other evidence to the same effect" and concluded that "there is no basis in the evidence to reach the conclusion proposed by the Defence".[3324]

1496. The Defence submits that the decision is inconsistent with the evidence on the record,[3325] that it is "inaccurate and prejudicial",[3326] and that the Trial Chamber did not provide a reasoned statement in this regard.[3327] It submits that the UPDF report, which was "a reliable account of the arrest and grave threat to the life" of Mr Ongwen due to his contacts with Lt General Salim Saleh, was corroborated by an eyewitness and other evidence which was ignored or disregarded.[3328] In particular, it argues that "[t]he sources of intelligence reports in this case were disclosed by a witness whom the Chamber credited and characterised as a core witness".[3329] In support of this, the Defence refers to a specific portion of the testimony of P-0003, one of the Prosecutor's core intercept witnesses,[3330] in which, the Appeals Chamber notes, the Presiding Judge addresses some security concerns raised by the witness.[3331] The Defence further submits that "[i]t was also provided by a key Prosecution witness who analysed and presented a report of the Prosecution evidence in the case", referring to a specific portion of a report submitted by P-0403 describing the intercept evidence collection.[3332] As noted above, the Trial Chamber found that P-0403's evidence "was of limited value to [its] consideration of the charges", since "he only analysed a collection of evidence given to him by the Prosecution" and that he "[was] not able to say anything about how this evidence was created beyond what other witnesses said".[3333] The Appeals Chamber notes that the relevant portion of P-0403's report (*i.e.* UGA-OTP-0272-0446, at 0473) does not provide the sources of the UPDF report or even refer to the specific portion of the UPDF report, referred to by the Defence.

[3323] Conviction Decision, para. 2618, *referring to* para. 1054.
[3324] Conviction Decision, para. 2618.
[3325] Appeal Brief, paras 546-547.
[3326] Appeal Brief, p.123 (heading (c)).
[3327] Appeal Brief, para. 551.
[3328] Appeal Brief, paras 548-552.
[3329] Appeal Brief, para. 549.
[3330] Conviction Decision, para. 555.
[3331] Appeal Brief, para. 549, *referring to* P-0003: T-44, p. 94, line 17 to p. 95, line 1.
[3332] Appeal Brief, para. 549, *referring to* UGA-OTP-0272-0446, at 0473, para. 89.
[3333] *See* paragraphs 566-567 above.

1497. The Appeals Chamber finds that the evidence referred to by the Defence does not in itself establish the source of the information and that, therefore, the Defence fails to show that the Trial Chamber's determination that it was not possible to ascertain the source from which the UPDF obtained the information contained in the report was unreasonable.

1498. Turning to the Defence's argument that the UPDF report was corroborated by other evidence on the record, and its reference to the testimony of P-0205, the Appeals Chamber notes that while the witness testified about Okwonga Alero purportedly being sent to shoot Mr Ongwen, the witness clearly stated that he could only testify to hearing about General Salim Saleh giving Mr Ongwen money and uniforms, and that he did not know anything about how the communication between Mr Ongwen and Lt General Salim Saleh came about and whether Joseph Kony ever found out about it.[3334] P-0205 further testified that "[a]t that time an order was issued that [Mr] Ongwen should be attacked"; that "Okwonga should have gone to shoot [Mr] Ongwen"; "[b]ut whatever happened that stopped that from being done I cannot tell, because at that time I was just at the bay near [Mr] Ongwen".[3335] However, the Appeals Chamber notes that the witness never testified, as the Defence seems to suggest,[3336] that Okwonga Alero was sent to shoot Mr Ongwen because of his contact with Lt General Salim Saleh.

1499. Furthermore, the Defence submits that the UPDF report and the account described therein is further corroborated by the testimony of D-0013, "who was an eye witness when the plan to escape" by Mr Ongwen was found out and he was arrested.[3337] First, the Appeals Chamber notes that the Defence fails to refer to any specific part of the witness's testimony. Second, as also noted by the Prosecutor,[3338] D-0013's testimony regarding Mr Ongwen's arrest in 2003 does not suggest that Mr Ongwen's life was threatened.[3339] On the basis of the evidence before it, the Trial Chamber found that Mr Ongwen's arrest resulted from his contact with government forces,[3340] and not,

[3334] P-0205: T-49, p. 38, line 4 to p. 42, line 13.
[3335] P-0205: T-49, p. 42, lines 16-21.
[3336] Appeal Brief, para. 548.
[3337] Appeal Brief, para. 551.
[3338] Prosecutor's Response, para. 341.
[3339] D-0013: T-244, p. 52, line 24 to p. 58, line 6.
[3340] Conviction Decision, para. 2620.

as D-0013 testified,[3341] because he tried to escape. Moreover, D-0013 explained that Mr Ongwen was "summoned" by Vincent Otti,[3342] that she did not know whether Mr Ongwen was threatened by Vincent Otti,[3343] and that his "arrest" resulted in his weapons being "removed" and his escorts taken away for about two weeks, while his "wives" remained with him.[3344]

1500. In the Appeals Chamber's view, the above evidence referred to by the Defence does not call into question the Trial Chamber's decision not to rely on the UPDF report insofar as it does not corroborate its contents. The Defence's argument is therefore rejected.

1501. Moreover, in light of the evidence and findings that (i) Mr Ongwen's arrest resulted from his contact with government forces;[3345] (ii) at the time of his arrest Mr Ongwen was not detained and his arrest did not significantly interrupt the exercise of his command authority;[3346] (iii) only a few months later Mr Ongwen was promoted;[3347] and (iv) as recalled above, Joseph Kony could not always rely on compliance with his orders and that evidence shows that he at most demoted or threatened to demote non-performing commanders,[3348] the Defence fails to show that it was unreasonable for the Trial Chamber not to have relied upon the evidence of the UPDF report, and to consider that the evidence above did not show that Mr Ongwen was under threat of death at the time relevant to the charges.

1502. The Defence further submits that the Trial Chamber "misinterpreted" the fact that Mr Ongwen was not executed and was subsequently promoted, to find that the consequence of being on the wrong side of Joseph Kony was not necessarily grave.[3349] According to the Defence, this finding "undermined" the fact that several LRA commanders were executed for being on Joseph Kony's "wrong side".[3350] The Defence

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[3341] D-0013: T-244, p. 52, line 24 to p. 58, line 6.
[3342] D-0013: T-244, p. 54, lines 5, 11, p. 56, line 20.
[3343] D-0013: T-244, p. 56, lines 22-23.
[3344] D-0013: T-244, p. 54, lines 6 to p. 58, line 6.
[3345] Conviction Decision, para. 2620.
[3346] Conviction Decision, paras 1055-1063, 2620.
[3347] Conviction Decision, paras 136, 1062, 1071-1074, 2620.
[3348] Conviction Decision, paras 2590-2617.
[3349] Appeal Brief, para. 553.
[3350] Appeal Brief, para. 553.

submits that the Trial Chamber "mischaracterised" the evidence by finding that Joseph Kony promoted Mr Ongwen when the evidence "stated clearly that it was the spirits who made the promotion".[3351] It argues that this finding is inconsistent with the evidence. In support of its contention, the Defence refers to the testimony of P-0440, who was among those who were promoted and who testified that Joseph Kony, Vincent Otti, Ocan Labongo, Mr Ongwen and several other commanders were promoted by the spirits.[3352]

1503. The Appeals Chamber notes that the Trial Chamber based its finding that Mr Ongwen was promoted by Joseph Kony on a number of records of intercepted radio communications.[3353] The Trial Chamber also heard several witnesses, who testified about Mr Ongwen's "promotion to the top of Sinia brigade", including P-0205, P-0070, P-0231, and P-0264.[3354]After having carefully assessed this evidence, it was not unreasonable for the Trial Chamber to conclude that Mr Ongwen was promoted by Joseph Kony, and not to rely on the testimony of one single witness (P-0440), who had stated that it was the spirits that promoted him.

1504. In light of the above, the Appeals Chamber finds no error in the Trial Chamber's finding that Mr Ongwen was promoted by Joseph Kony, and in taking this factor into account as a further indication that the consequences of defying Joseph Kony did not mean to be killed and that the consequences of being on the wrong side of Joseph Kony "were not necessarily grave".[3355]

1505. With regard to the Defence's further broad arguments that the Trial Chamber "wrongly assessed and evaluated" the gravity of the threats against Mr Ongwen,[3356] that Mr Ongwen "was placed in constant surveillance", that "he was aware that he was closely monitored", and that "[t]his awareness increased his threat level making it hard for him to attempt to escape",[3357] and its request that the Appeals Chamber "assess the gravity of the threats within the context in which it was executed and the coercive

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[3351] Appeal Brief, paras 553-555.
[3352] Appeal Brief, paras 554-555.
[3353] *See e.g.* Conviction Decision, paras 1071-1079, *referring to* relevant evidence.
[3354] Conviction Decision, paras 1076-1083.
[3355] Conviction Decision, para. 2620.
[3356] Appeal Brief, paras 556-557.
[3357] Appeal Brief, para. 556.

environment",[3358] the Appeals Chamber notes that these arguments are raised also under other grounds of appeals and, to the extent that they are sufficiently substantiated, it refers to its analysis therein.

(c) Conclusion

1506. Having rejected the totality of the Defence's arguments, the Appeals Chamber rejects grounds of appeal 50, 51 and 56.

(e) Grounds of appeal 52, 53 and 54: Alleged errors regarding the possibility of escaping from or leaving the LRA

(i) Summary of the submissions

1507. Under ground of appeal 52, the Defence submits that the Trial Chamber erred in law and in fact by not applying the "beyond reasonable doubt" standard to its conclusions about the possibility of escape in the LRA, and rejecting credible evidence that escape occurred because of "opportunity".[3359]

1508. Under ground of appeal 53, the Defence argues that the Trial Chamber erred in law and in fact by concluding that escaping from or otherwise leaving the LRA was a realistic option available to Mr Ongwen.[3360]

1509. Under ground of appeal 54, the Defence submits that the Trial Chamber erred in law and fact by failing to give a reasoned statement as to why the possibility of collective punishment for escape did not apply to Mr Ongwen, especially in light of the alleged Trial Chamber's contradictory finding that "explicitly acknowledged that members of the LRA were threatened that their home areas would be attacked by the LRA if they escaped".[3361]

1510. The Prosecutor submits that the Trial Chamber reasonably found that escaping from or otherwise leaving the LRA was a realistic option to Mr Ongwen, based on evidence presented at trial.[3362] He submits that the Defence's "sparse and unsupported"

[3358] Appeal Brief, para. 557.
[3359] Appeal Brief, paras 559-562.
[3360] Appeal Brief, paras 563-575.
[3361] Appeal Brief, paras 576-579.
[3362] Prosecutor's Response, para. 343.

arguments that the Trial Chamber erred in law and fact should be rejected.[3363] According to the Prosecutor, "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', or in other circumstances".[3364]

1511. Victims Group 1 submit that the Defence's arguments under these grounds of appeal amount to mere disagreement with the Trial Chamber's findings, and that the Defence fails to identify an error of law or fact.[3365]

(ii) Relevant parts of the Conviction Decision

1512. When discussing the possibility of escaping from or leaving the LRA, upon assessing the relevant evidence, the Trial Chamber concluded that

> escaping from or otherwise leaving the LRA was a realistic option available to [Mr] Ongwen at the time of the conduct relevant for the charges, as it was for many others who successfully escaped. The fact that he did not take this option is further indicative that he was not under serious threat when engaging in the conduct relevant for the charges.[3366]

1513. More detailed references to the Conviction Decision are discussed in the Appeals Chamber's determination.

(iii) Determination by the Appeals Chamber

1514. At the outset, the Appeals Chamber recalls that the Trial Chamber discussed the possibility of Mr Ongwen or LRA members of comparable status and authority escaping from or leaving the LRA, noting that the possibility for Mr Ongwen to escape or leave the LRA would "militate[] against the conclusion that threat of imminent death or imminent or continuing serious bodily harm to himself or another person caused him to engage in conduct underlying the charged crimes."[3367] The Trial Chamber assessed the evidence and concluded that escaping from or otherwise leaving the LRA was a "realistic option" available to Mr Ongwen at the time of the conduct relevant to the

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[3363] Prosecutor's Response, paras 343-353.
[3364] Prosecutor's Response, para. 344.
[3365] Victims Group 1's Observations, paras 173-174 (ground 52), 175-176 (ground 53), 177-179 (ground 54). *See also* Victims Group 2's Observations, para. 146.
[3366] Conviction Decision, para. 2635.
[3367] Conviction Decision, para. 2619.

charges, and the fact that he did not take this option was "further indicative that he was not under serious threat" when engaging in that conduct.[3368]

1515. The Trial Chamber based its conclusion on the following findings. It first recalled its finding, made elsewhere in the judgment, that "escape from the LRA was relatively common".[3369] It further noted that Mr Ongwen's "arrest" in 2003 and subsequent promotion demonstrated to him that "defying Joseph Kony did not mean to be killed, and that the consequences […] were not necessarily grave".[3370] The Trial Chamber further found, based on the evidence on the record, that persons of "relatively high rank and position in the LRA successfully escaped, including some proximate to [Mr] Ongwen",[3371] and that escapes occurred also among persons in low hierarchical positions "under much tighter control" than Mr Ongwen.[3372] Finally, the Trial Chamber relied upon evidence showing that Mr Ongwen refused to surrender in September 2006,[3373] and spoke with P-0172, who tried to convince him to surrender.[3374]

1516. Under these grounds of appeal, the Defence challenges the Trial Chamber's finding that escaping from or otherwise leaving the LRA was a "realistic option" for Mr Ongwen, and in this regard, it mainly submits that the Trial Chamber erred (i) in disregarding evidence that escape from the LRA in most cases occurred because of "opportunity";[3375] (ii) in relying on Mr Ongwen's refusal to surrender to the UPDF to support its finding that he was under no threat;[3376] (iii) in its assessment of the evidence;[3377] and (iv) in its assessment of the evidence on "collective punishment".[3378]

(a) Alleged error in disregarding evidence that escape mostly occurred because of "opportunity"

1517. The Defence argues that the Trial Chamber erred by disregarding purported "exculpatory" evidence that escape occurred because of "opportunity", for example

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[3368] Conviction Decision, para. 2635.
[3369] Conviction Decision, para. 2619, *referring to* para. 972.
[3370] Conviction Decision, para. 2620, *referring to* paras 1050-1063, 1071.
[3371] Conviction Decision, para. 2621.
[3372] Conviction Decision, para. 2632.
[3373] Conviction Decision, paras 2636-2640.
[3374] Conviction Decision, para. 2641.
[3375] Appeal Brief, paras 559-562.
[3376] Appeal Brief, paras 564-568.
[3377] Appeal Brief, paras 569-575.
[3378] Appeal Brief, paras 569, 571-575.

when there was cross fire between the UPDF and the LRA, and not voluntarily.[3379] The Defence claims that the Trial Chamber erred when it relied on "inculpatory" evidence of some witnesses (P-0209, P-0138, P-0018, D-0118, and D-0119), and disregarded their "exculpatory" evidence indicating that they escaped from the LRA through "opportunity" when they were attacked by the UPDF, and that the testimony of other witnesses (P-0340, P-0352, P-0101, and D-0032) was "ignored".[3380] The Defence further submits that some of the witnesses, whose testimony the Trial Chamber relied on (including [REDACTED], D-0134, and P-0045) seized the opportunity of escaping while in sickbay and were of relatively high rank.[3381]

1518. The Appeals Chamber first recalls that "while individual items of evidence, when seen in isolation, may be reasonably open to different interpretations, including interpretations favourable to the accused, this does not necessarily mean that a trial chamber's interpretation of an item of evidence that is unfavourable to the accused is unreasonable in light of all the relevant evidence".[3382]

1519. In the present case, the Trial Chamber considered "whether and to what extent escape from or otherwise leaving the LRA was possible for [Mr] Ongwen",[3383] and contrary to the Defence's assertion, found that it was immaterial whether fighters left the LRA "because of opportunity, for example when there was cross fire between the UPDF and the LRA",[3384] or in other circumstances. In fact, the Trial Chamber found that there was "overwhelming" evidence that during the period relevant to the charges, persons of relatively high rank and position in the LRA successfully escaped (including P-0231, D-0134, P-0070, P-0440, and P-0085) .[3385] It also noted that it heard "dozens of personal escape stories" from witnesses who testified in court, in particular from persons of "low hierarchical position in the LRA".[3386] In this respect, the Trial Chamber expressly noted as "examples" of escape, the testimony of a number of witnesses,

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[3379] Appeal Brief, paras 559-562.
[3380] Appeal Brief, paras 559-560.
[3381] Appeal Brief, para. 561.
[3382] *Bemba et al.* Appeal Judgment, para. 912.
[3383] Conviction Decision, para. 2619.
[3384] Appeal Brief, para. 559.
[3385] Conviction Decision, paras 2621, 2631, 2632.
[3386] Conviction Decision, para. 2632.

including P-0209, P-0138, P-0018, D-0118, and D-0119.[3387] These witnesses, as well as the others mentioned by the Defence, testified, as submitted by the Defence,[3388] that they escaped when being attacked by the UPDF or while in sickbay.

1520. The Trial Chamber did not ignore purported "exculpatory" evidence or disregard evidence. Rather, from its analysis it is clear that the Trial Chamber was aware of and considered the circumstances surrounding the escape of the witnesses, even though it did not refer to all the evidence mentioned by the Defence. The Trial Chamber reasonably found that "escaping or otherwise leaving the LRA was a realistic option for Mr Ongwen, as it was for many others who successfully escaped",[3389] regardless of the circumstances in which other LRA members left. The Appeals Chamber finds that it was not unreasonable for the Trial Chamber to reach this conclusion. The Defence's argument is therefore rejected.

(b) Alleged error in relying on Mr Ongwen's refusal to surrender in September 2006

1521. The Defence argues, *inter alia*, that the Trial Chamber erred by relying on Mr Ongwen's refusal to surrender to the UPDF in September 2006, which occurred outside of the temporal scope of the charges.[3390] It also submits that the Trial Chamber failed to explain the impact of this event on the charged crimes, which occurred between 1 July 2002 and 31 December 2005.[3391]

1522. The Trial Chamber found that Mr 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 to the charges, not under threat of death or physical harm".[3392]

1523. The Appeals Chamber notes that, contrary to the Defence's assertion, the Trial Chamber did not punish Mr Ongwen "for refusing to surrender under circumstances which were not linked to the charged crimes", nor was the Trial Chamber required to

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[3387] Conviction Decision, paras 2628, 2632.
[3388] Appeal Brief, para. 559.
[3389] Conviction Decision, para. 2635.
[3390] Appeal Brief, para. 564.
[3391] Appeal Brief, paras 565-566.
[3392] Conviction Decision, para. 2640.

show any impact of Mr Ongwen's decision not to surrender in 2006 on the commission of the charged crimes.[3393] Rather, the Trial Chamber considered Mr Ongwen's refusal to surrender in 2006 as part of its assessment of whether he had the possibility to escape from the LRA at the time of his conduct underlying the charged crimes, in order to conclude that during the time of his conduct relevant to the charges, he was not under threat of death or physical harm.[3394] The Appeals Chamber therefore finds that the Trial Chamber did not commit any error and rejects the Defence's argument. The Appeals Chamber notes that the Defence's further argument that Mr Ongwen's right to a fair trial was violated[3395] is unsubstantiated. It is, therefore, dismissed.

1524. The Defence also submits that the Trial Chamber erred by reaching its conclusions based on "impermissible inferences".[3396] It refers, in this context, to alternative inferences, which could allegedly be discerned from the evidence, including from the evidence of P-0359.[3397]

1525. In this regard, the Defence submits that Mr Ongwen 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.[3398] Referring to the evidence of P-0359, the Defence argues that Mr Ongwen "did not trust the UPDF soldiers against whom he had been fighting" and "[h]e might have reasonably thought they were entrapping to capture and kill him".[3399] The Appeals Chamber notes that the Trial Chamber addressed similar submissions of the Defence, and found them to be irrelevant to the issue of whether Mr Ongwen could have left the LRA, and the issue of duress. It reasoned as follows:

> The Chamber also rejects the argument of the Defence that following the ambush and killing of Raska Lukwiya by the UPDF a short time before, 'it could not reasonably be expected for Mr Ongwen to surrender' to the UPDF. The argument is irrelevant to the question of whether it was possible for [Mr] Ongwen to leave

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[3393] Appeal Brief, para. 566.
[3394] Conviction Decision, para. 2635. *See also* paras 2619-2639, 2642; *Ntaganda* Appeal Judgment, para. 1127; paragraph 305 above.
[3395] Appeal Brief, para. 564.
[3396] Appeal Brief, para. 567.
[3397] Appeal Brief, para. 568, *referring to* Conviction Decision, paras 9, 278, 433, 447, 448, 515, 522, 2638, fns 345, 770, 772.
[3398] Appeal Brief, para. 568.
[3399] Appeal Brief, para. 568.

> the LRA, or more broadly to the question whether he was under threat of death or physical harm if he did not engage in the conduct underlying the charges. Equally irrelevant to the issue of duress is the Defence argument – which is speculative in nature – that [Mr] Ongwen could not have been expected to contribute through his escape to the collapse of peace talks between the Ugandan government and the LRA.[3400]

1526. With regard to the evidence of P-0359, the Appeals Chamber notes that the relevant part of the witness's testimony referred to by the Defence concerns a letter from Mr Ongwen requesting safe passage, and the fact that there were some commanders who had been captured during the ceasefire period, although the witness further stated that Mr Ongwen would not be arrested because of the ongoing peace talks.[3401]

1527. The Appeals Chamber notes that apart from suggesting alternative inferences, the Defence fails to identify any error in the Trial Chamber's assessment and conclusion. Accordingly, this argument is rejected.

(c) Other alleged errors in the Trial Chamber's assessment of the evidence

1528. The Defence submits that the Trial Chamber mischaracterised "[t]he logbook summaries of intercepted LRA radio communications" and reached "impermissible inferences".[3402]

1529. The Appeals Chamber observes that the Defence's arguments are mostly based on its challenges to the Trial Chamber's assessment of intercept evidence raised under grounds of appeal 72, 73 and 60, which have been addressed and rejected above.[3403] The Appeals Chamber notes that apart from the above, the Defence only refers to three paragraphs of the Conviction Decision concerning Mr Ongwen's loyalty to Joseph Kony and his career advancement, in which the Trial Chamber considered that the evidence on the accused's performance was "another important factor" to take into

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[3400] Conviction Decision, para. 2639.
[3401] Appeal Brief, para. 568, *referring to* P-0359: T-110, p. 54, lines 10-15
[3402] Appeal Brief, para. 569.
[3403] *See* sections VI.C.2(b)VI.C.2 (Alleged errors in the Trial Chamber's assessment of intercept evidence) and VI.C.3 (Alleged erroneous findings based on chains of inferences drawn from the intercept evidence) above.

account in establishing whether the accused was under any threat.[3404] In the paragraphs identified by the Defence the Trial Chamber considered information contained in specific logbooks concerning Mr Ongwen's performance during the period relevant to the charges.[3405] However, the Defence does not present any specific arguments, which would warrant any further determination by the Appeals Chamber. Accordingly, the Defence's submission that the Trial Chamber erred in its assessment of intercepted LRA communications is unsubstantiated and therefore dismissed.

1530. The Defence further submits that the Trial Chamber gave no reasons for its finding that Mr Ongwen's rank placed him in a better position to escape, that it did not discuss the circumstances of the escape by each escapee, and that it "cherry-picked" a few cases of escape, thus making "unmotivated" comparisons between commanders "who escaped due to opportunities".[3406]

1531. At the outset, the Appeals Chamber finds that the Trial Chamber did not "cherry-pick" examples that fit "preconceived characteristics", but rather found that the evidence in this case was largely consistent.[3407] As recalled above, the Trial Chamber received "overwhelming" evidence that during the period relevant to the charges "persons of relatively high rank and position in the LRA successfully escaped, including some proximate to [Mr] Ongwen".[3408] In particular, the Trial Chamber assessed the evidence of several witnesses – including those with high ranks[3409] – who testified about their escape, and their evidence was further supported by intercepted radio communications.[3410] The Trial Chamber further 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 [Mr] Ongwen".[3411] Taking into account all the evidence, in particular the evidence of escapes by several senior commanders, and having considered that "[t]here can be no doubt" that Mr Ongwen was aware of escapes occurring in the LRA, including "in his

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[3404] Conviction Decision, para. 2659.
[3405] Appeal Brief, para. 569, *referring to* Conviction Decision, paras 2660, 2661, 2663.
[3406] Appeal Brief, para. 571.
[3407] Appeal Brief, para. 572.
[3408] Conviction Decision, paras 2621-2631.
[3409] Conviction Decision, paras 2621-2628, 2632.
[3410] Conviction Decision, paras 2629, 2631, 2633.
[3411] Conviction Decision, para. 2632.

proximity", noting in particular "the measures aimed at preventing escape that he contributed to maintaining", [3412] the Trial Chamber found that "[Mr] Ongwen's high rank and position placed him in a relatively better position to escape, as compared to lower-ranking LRA members".[3413]

1532. As recalled above, the Trial Chamber was aware of the circumstances surrounding the instances of escape described by the witnesses, and found that escaping or otherwise leaving the LRA was a realistic option for Mr Ongwen, irrespective of the circumstances in which this occurred for other LRA members.[3414] The Appeals Chamber considers that in light of this finding, the Trial Chamber was not required, as argued by the Defence,[3415] to discuss the circumstances of the escape by each escapee. Furthermore, as recalled above, the Trial Chamber noted that there was a difference between the status of low-ranking LRA members and higher ranking commanders in terms of the disciplinary regime to which they were subjected.[3416] The Appeals Chamber finds that this further supports the Trial Chamber's finding that Mr Ongwen, as a higher ranking commander, was less likely to be subjected to disciplinary measures, and therefore had a realistic option to escape or otherwise leave the LRA.

1533. In light of the foregoing, the Appeals Chamber finds that the Defence fails to show that it was unreasonable for the Trial Chamber to reach the above findings, including the conclusion that he did not avail himself of this option was further indicative of the fact that he was not under any threat at the time of the conduct relevant to the charges.

1534. Further, and contrary to the Defence's submission that the Trial Chamber misinterpreted the evidence of D-0013[3417] and D-0018,[3418] the Appeals Chamber considers that the Trial Chamber properly assessed the evidence and provided adequate reasoning as to why it found that their testimony did not affect its conclusion as to the

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[3412] Conviction Decision, para. 2634.
[3413] Conviction Decision, para. 2634.
[3414] *See* paragraphs 1518 above.
[3415] Appeal Brief, para. 573.
[3416] Conviction Decision, paras 2590.
[3417] Conviction Decision, para. 2620.
[3418] Conviction Decision, para. 2630. As noted by the Prosecutor, the Defence erroneously refers to "D-0008". *See also* Notice of Appeal, p. 18 ("Ground 53").

possibility of Mr Ongwen escaping from or leaving the LRA. The Trial 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' as part of negotiations with various other actors in the conflict"[3419] – and because, in any event, in his testimony there was no indication that D-0018 "had difficulties in leaving Joseph Kony after meeting with him".[3420] As for D-0013, as discussed above,[3421] the Trial Chamber did not rely on this witness's testimony that Mr Ongwen was arrested in April 2003 because he tried to escape, in light of other reliable evidence indicating that the arrest followed contact with the government forces. In any event, the Trial Chamber stated that this incident showed that the consequences of defying Joseph Kony's orders were not necessarily grave.[3422] The Defence's argument is therefore rejected.

1535. Finally, the Appeals Chamber considers that the Defence's submission regarding the reversal and misapplication of the burden of proof and the evidentiary standard[3423] amount to a mere disagreement with the Trial Chamber's findings. The Appeals Chamber refers in this respect to its findings above about the requisite standard of proof.[3424] As the Defence fails to show any error in the Trial Chamber's application of the requisite evidentiary standard, its arguments are rejected.

(d) Alleged error in the assessment of evidence on "collective punishment"

1536. The Defence argues that the Trial Chamber "merely outlined the facts of the incident at Mucwini as a basis for distinguishing it from other instances of escape", but failed to provide a reasoned statement as to why the possibility of collective punishment for escape did not apply to Mr Ongwen.[3425] The Defence argues that while the Trial Chamber "explicitly acknowledged" that members of the LRA were threatened with their home areas being attacked should they attempt to escape, "it erred in fact and law

[3419] Conviction Decision, para. 2630.
[3420] Conviction Decision, para. 2630.
[3421] *See* paragraphs 1499 above.
[3422] Conviction Decision, para. 2620.
[3423] Appeal Brief, paras 574-575.
[3424] *See* sectionVI.B.6 (Alleged errors regarding legal standards and application of the burden of proof) above.
[3425] Appeal Brief, paras 576-579.

by concluding that the possibility of collective punishment was not a factor contributing to a threat under Article 31(1)(d) of the Statute".[3426]

1537. The Appeals Chamber considers that the Defence mischaracterises the Trial Chamber's findings. Contrary to the Defence's suggestion, the Trial Chamber did not 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".[3427] Rather, in the context of its general analysis of the organisational features of the Sinia brigade, it assessed the relevant evidence, and found that its "[m]embers were also threatened that their home areas would be attacked by the LRA if they escaped".[3428]

1538. However, in the context of its assessment as to whether Mr Ongwen acted under duress pursuant to article 31(1)(d) of the Statute, the Trial Chamber rejected the Defence's submission that this threat was sufficiently "imminent" and "constant"[3429] noting that: (i) "punitive attacks on escapees' home areas occurred mostly before the relevant period";[3430] (ii) the sole exception, regarding D-0157 and the LRA attack in Mucwini in 2002, was distinguishable since it resulted from one person stealing a weapon and opening fire on LRA soldiers;[3431] and (iii) there was no evidence that these incidents had any impact on Mr Ongwen.[3432] The Appeals Chamber considers that the Trial Chamber provided sufficient reasons for its conclusion that collective punishment was not applicable to Mr Ongwen. The Appeals Chamber finds that the Defence fails to identify an error in the Trial Chamber's conclusions. Its arguments are, accordingly, rejected.

(e) Conclusion

1539. In light of the above, and having rejected the Defence's arguments, the Appeals Chamber rejects grounds of appeal 52, 53 and 54.

[3426] Appeal Brief, para. 576.
[3427] Appeal Brief, para. 577.
[3428] Conviction Decision, paras 132, 991-998, 2642.
[3429] Conviction Decision, para. 2642, *referring to* Defence Closing Brief, para. 690.
[3430] Conviction Decision, paras 993, 2642.
[3431] Conviction Decision, paras 994-998, 2642.
[3432] Conviction Decision, para. 2642.

(f) Ground of appeal 55: Alleged errors in relation to Joseph Kony's purported spiritual powers

(i) Summary of the submissions

1540. Under this ground of appeal, the Defence submits that the Trial Chamber failed to give due regard to evidence of Joseph Kony's spiritual powers, and its effects on Mr Ongwen, and therefore erred in concluding that LRA spiritualism is not a factor contributing to a threat pursuant to article 31(1)(d) of the Statute.[3433] The Defence argues that the present case features an "unprecedented complexity", with traditional cultural beliefs playing a central role, and that spiritualism was used as a means of indoctrinating LRA members, in particular child soldiers.[3434] According to the Defence, there is a "need to avoid adopting a simplistic view on spiritualism which would result in an assessment of evidence which reflects one's own personal beliefs rather than the subjective beliefs of [Mr Ongwen] at the time" relevant to the charges.[3435] The Defence avers that spiritualism in the context of this case was "inextricably interwoven" with duress.[3436] It adds that the Trial Chamber failed to consider "cultural factors, the effects of spirits specifically on abducted children, including [Mr Ongwen], and how this impacted their view towards escape".[3437]

1541. The Prosecutor submits that the Defence disagrees with the Trial Chamber's findings and reargues its prior submissions, failing to show that these findings were unreasonable.[3438] In particular, the Prosecutor argues that the Trial Chamber gave due consideration to the substantial body of evidence related to Joseph Kony's alleged spiritual powers,[3439] and that the Defence's contention in this regard is "inconsistent with the evidence".[3440]

1542. Victims Group 1 argue that the Defence merely disagrees with the Trial Chamber's findings and fails to identify any error.[3441] Victims Group 2 submit that the

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[3433] Appeal Brief, paras 599-603.
[3434] Appeal Brief, para. 581.
[3435] Appeal Brief, para. 581.
[3436] T-263, p. 16, lines 9-18.
[3437] Appeal Brief, para. 582 (footnotes omitted).
[3438] Prosecutor's Response, paras 354-364.
[3439] Prosecutor's Response, para. 354.
[3440] Prosecutor's Response, para. 358.
[3441] Victims Group 1's Observations, paras 180-182.

Trial Chamber did not err in its findings.[3442] Both groups of victims submit that the Trial Chamber correctly assessed the evidence to conclude, *inter alia*, that the belief in Joseph Kony's purported spiritual powers was stronger in the young and impressionable abductees, but it subsided and disappeared in those who had long served in the LRA.[3443]

(ii) Relevant parts of the Conviction Decision

1543. The Trial Chamber discussed Joseph Kony's purported spiritual powers and their alleged impact on Mr Ongwen for its assessment on the applicability of article 31(1)(d) of the Statute.[3444]

1544. The Trial Chamber noted that during the trial it had heard from a number of former LRA members who testified about the effect of LRA spiritualism on them, and that "[t]his evidence inform[ed] [its] view on whether spiritualism was in some way used to create or sustain a threat relevant under Article 31(1)(d) of the Statute".[3445] The Trial Chamber found that "[t]he fact that Joseph Kony acted also as a spiritual leader, building on Acholi traditions, is uncontroversial and well-attested in the evidence".[3446] However, it also found that "[w]hereas there is evidence that some persons did believe in the spiritual powers of Joseph Kony", the evidence consistently showed that for "many persons who stayed in the LRA longer their belief followed a pattern: it was stronger in the young, new and impressionable abductees and then subsided and disappeared in those who stayed in the LRA longer".[3447] The Trial Chamber also found that "LRA members with some experience in the organisation did not generally believe that Joseph Kony possessed spiritual powers", and that there is "no evidence indicating that the belief in Joseph Kony's spiritual powers played a role for [Mr] Ongwen, and in fact the evidence of [Mr] Ongwen defying Joseph Kony, discussed above, speaks clearly against any such influence".[3448] The Trial Chamber ultimately concluded that

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[3442] Victims Group 2's Observations, para. 140.
[3443] Victims Group 1's Observations, paras 181-182; T-267, p. 26, lines 2-8; Victims Group 2's Observations, para. 140.
[3444] Conviction Decision, paras 2643-2658.
[3445] Conviction Decision, para. 2644.
[3446] Conviction Decision, para. 2643.
[3447] Conviction Decision, para. 2645.
[3448] Conviction Decision, para. 2658.

"the issue of LRA spirituality [was not] a factor contributing to a threat relevant under Article 31(1)(d) of the Statute".[3449]

(iii) Determination by the Appeals Chamber

1545. The Defence challenges the Trial Chamber's findings about Joseph Kony's purported spiritual powers and their effect on Mr Ongwen.[3450] In particular, the Defence argues that the Trial Chamber disregarded evidence on "how [Joseph] Kony portrayed himself as a medium and the rules that flowed from his alleged spiritual power", as well as cultural factors, "the effects of spirits specifically on abducted children", and how this impacted their view about escape.[3451] The Defence submits that "there is a plethora of evidence […] detailing how spiritual beliefs within Acholi culture helped to bolster [Joseph] Kony's claim of being a medium which he used […] to control the LRA", [3452] and that the Trial Chamber "failed to properly assess evidence on the record regarding Acholi society".[3453]

1546. In essence, the Defence argues that the Trial Chamber (i) failed to properly assess the evidence concerning spiritual beliefs within the Acholi society;[3454] and (ii) disregarded "exculpatory" evidence, failed to provide a reasoned opinion, and erred in concluding that spiritualism was not a factor contributing to a threat within the meaning of article 31(1)(d) of the Statute.[3455] The Appeals Chamber will address these arguments in turn below.

(a) Alleged failure to consider evidence on spiritual beliefs within the Acholi society

1547. As a preliminary matter, the Appeals Chamber notes that the Defence refers to arguments and evidence set out in its closing brief.[3456] As held above, the Appeals

[3449] Conviction Decision, para. 2658.
[3450] Appeal Brief, paras 580-603.
[3451] Appeal Brief, para. 582, *referring to* Defence Closing Brief, paras 702-715.
[3452] Appeal Brief, para. 583.
[3453] Appeal Brief, para. 585.
[3454] Appeal Brief, para. 585.
[3455] Appeal Brief, paras 590-603.
[3456] Appeal Brief, para. 582, *referring to* arguments raised in the Defence Closing Brief, paras 702-715.

Chamber will address only those arguments that are properly developed in the Appeal Brief.[3457]

1548. With respect to the argument that the Trial Chamber failed to properly assess the evidence concerning spiritual beliefs within the Acholi society, the Defence first submits that "people in Northern Uganda […] believed that [Joseph] Kony possessed some spiritual powers" and that these "spiritual beliefs" impacted on the everyday interactions of people.[3458] In support of this argument, the Defence refers to the evidence of P-0205, P-0070 and D-0032, testifying that the LRA was using witchcraft, which had to be countered by Joseph Kony's spirits, and of P-0172 testifying that people in Acholi and Lango grew up knowing about spirits.[3459]

1549. At the outset, the Appeals Chamber notes that the evidence of P-0205, P-0070 D-0032 and P-0172 is not inconsistent with the Trial Chamber's finding that Joseph Kony "acted also as a spiritual leader, building on Acholi traditions",[3460] and that "there is evidence that some persons did believe in the spiritual powers of Joseph Kony.[3461] For this finding the Trial Chamber relied upon the evidence of several witnesses, including P-0264, P-0144, P-0045, P-0233, and D-0079.[3462] It also referred to the Defence Closing Brief, which made reference to the testimony of 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.[3463] In the Appeals Chamber's view, the Trial Chamber did indeed assess the relevant evidence in this regard, and the Defence fails to show an error in this regard.

[3457] *See* paragraph 97 above. *See also* section V.D. (Substantiation of arguments) above.
[3458] Appeal Brief, paras 584-585.
[3459] *See* Appeal Brief, para. 584, *referring to* P-0205: T-49, p. 26, line 19 to p. 27, line 8; P-0070: T-107, p. 28, lines 24-25; D-0032: T-199, p.61, line 18 to p.63, line 1; P-0172: T-114, p. 16, line 24 to p. 17, line 3.
[3460] Conviction Decision, para. 2643.
[3461] Conviction Decision, para. 2645. *See also* fn. 7047 *referring to* P-0142, T-72, p. 20, lines 17-22; P-0233, T-112, p. 8, line 24 to p. 10, line 7; D-0024, T-192, p. 15, lines 5-9; D-0027, T-202, p. 14, line 24 to p. 15, line 10; D-0049, T-243, p. 22, lines 7-23; D-0056, T-228, p. 44, line 25 to p. 45, line 4; D-0074, T-187, p. 15, line 25 to p. 16, line 9; T-188, p. 19, lines 9-15.
[3462] Conviction Decision, fn. 7045, *referring, for example, to* P-0264: T-65, p. 73, lines 8-10; P-0144: T-92, p. 22, line 24 to p. 23, line 5; P-0045: T-104, p. 41, lines 24-25; P-0233: T-112, p. 9, lines 2-9; D-0079: T-189, p. 16, lines 8-12.
[3463] Conviction Decision, fn. 7045, *referring to* Defence Closing Brief, para. 710.

1550. In addition, the Defence argues that the Trial Chamber failed to properly assess the evidence of D-0060, D-0150, and D-0111.[3464] The Appeals Chamber first recalls that a "trial chamber has the primary responsibility to determine the reliability and credibility of the evidence received in the course of the trial and then comprehensively assess the weight of the evidence".[3465] The Appeals Chamber further notes that, contrary to the Defence's submissions, the Trial Chamber properly considered and assessed the testimony of these witnesses, providing reasons as to why it decided not to rely on their evidence.

1551. In particular, with regard to D-0111, a "spiritual healer […] who testified about her work as a traditional herbalist in Northern Uganda", the Appeals Chamber notes that, apart from arguing that the Trial Chamber considered her testimony "not to be of direct relevance to the charges",[3466] "despite" the witness's testimony about spiritual traditions;[3467] her knowledge of the treatments for different ailments;[3468] and "her experience of providing exorcisms on former LRA members who felt they hosted bad spirits resulting from their time in the LRA",[3469] the Defence fails to identify any error in the Trial Chamber's conclusion. The argument is therefore rejected.

1552. In relation to D-0150, a farmer in Northern Uganda, who testified about Acholi spiritual traditions, "the phenomenon of spirit possession and his beliefs about Joseph Kony's alleged possession", the Trial Chamber considered that "the witness had no direct knowledge about Joseph Kony's alleged spirits or Joseph Kony himself", nor did he express any knowledge of Mr Ongwen.[3470] It thus found that his testimony was going to facts not directly relevant to the disposal of the charges. The Defence argues that, in so concluding, the Trial Chamber not only "show[ed] a [disregard] for the fundamental role of Acholi culture, it also ignore[d] the probative value of this exonerating circumstantial evidence".[3471] The Defence fails, however, to explain how this witness's

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[3464] Appeal Brief, paras 586-589.
[3465] *Ntaganda* Appeal Judgment, para. 40; *Gbagbo and Blé Goudé* Appeal Judgment, para. 69.
[3466] Conviction Decision, para. 518.
[3467] Appeal Brief, para. 587, *referring to* T-183, p. 19, line 5-16.
[3468] Appeal Brief, para. 587, *referring to* T-183, p. 7, lines 1-4.
[3469] Appeal Brief, para. 587.
[3470] Conviction Decision, para. 608.
[3471] Appeal Brief, para. 586.

evidence was "exonerating", and how that would render the Trial Chamber's assessment and conclusion unreasonable. The argument is therefore rejected.

1553. With respect to D-0060, the Defence limits itself to stating that, "considering that spiritual beliefs are subjective, [the witness's] response is entirely appropriate and recognises how the faith of all LRA members cannot be categorically determined".[3472] The Trial Chamber explained why it found his evidence to be of "limited value",[3473] noting that he "did not question the statements made to him about the spiritual influence on LRA fighters and did not consider it to be his role to make a judgment about the truthfulness or falsity of the statements".[3474] The Trial Chamber further noted that the witness's evidence was of "very limited value", "especially given the abundance of direct evidence" by LRA witnesses on these matters.[3475] Besides attempting to provide a justification for the witness not questioning the statements made to him,[3476] the Defence does not identify any error in the Trial Chamber's assessment of this witness's evidence. This argument is therefore rejected.

1554. The Appeals Chamber further notes the Defence's submission that on the basis of the evidence of the above-mentioned witnesses "any reasonable trier of fact should have come to the conclusion that according to Acholi culture there is a likelihood that children, like [Mr Ongwen], may believe that they remain under the spirit's spell as the effects of indoctrination endure into adulthood and the charged period".[3477] The Appeals Chamber notes that the Trial Chamber, while acknowledging that there was evidence that some persons did believe in the spiritual powers of Joseph Kony,[3478] found that the evidence of several LRA witnesses (P-0231, P-0379, P-0070, P-0145, P-0205, P-0209, Simon Tabo, Kenneth Banya, Charles Lokwiya, Joseph Okilan, and D-0092),[3479] was consistent in showing that for "many persons who stayed in the LRA

[3472] Appeal Brief, para. 588. *See also* Conviction Decision, para. 597.
[3473] Conviction Decision, paras 596-597.
[3474] Conviction Decision, para. 597.
[3475] Conviction Decision, para. 597.
[3476] Appeal Brief, para. 588.
[3477] Appeal Brief, paras 586-589. The Defence further argues that "the circumstantial evidence of local and cultural practices demonstrates the spiritual ideology of Acholi society and how these permeated into the LRA environment to increase the believability of Kony's claims to be a medium and Acholi nationalist sent by God". Appeal Brief, para. 589.
[3478] Conviction Decision, para. 2645.
[3479] Conviction Decision, paras 2646-2657.

longer their belief followed a pattern: it was stronger in the young, new and impressionable abductees and then subsided and disappeared in those who stayed in the LRA longer".[3480] The Appeals Chamber finds no error in the Trial Chamber's approach. The argument is therefore rejected.

(b) Alleged disregard of "exculpatory" evidence, failure to provide a reasoned opinion and alleged error in finding that spiritualism is not a factor contributing to a threat

1555. The Defence argues that the Trial Chamber failed to consider the key role that spiritualism played in the LRA when assessing the relevant evidence.[3481] It further argues that the Trial Chamber "violated article 74(5) of the Statute by disregarding "exculpatory" evidence and by failing to provide a reasoned opinion as to why spiritualism in the LRA was found not to apply to Mr Ongwen.[3482]

1556. The Appeals Chamber notes that the Defence refers to the Trial Chamber's finding that initiation rituals were "a stable feature of the LRA", and that they were intended "to instil obedience and prevent escape." [3483] The Defence notes that there is "consistent evidence that soon after abduction new recruits underwent an initiation ceremony which used symbolic elements of Acholi culture, namely being anointed with shea butter and warned against escape or disobeying the rules",[3484] and submits that the Trial Chamber disregarded the evidence of D-0060 and D-0074.[3485] With regard to D-0060,[3486] the Appeals Chamber has already found that the Trial Chamber reasonably explained why it found his evidence to be of "limited value".[3487]

1557. Regarding D-0074, the Defence submits that this witness testified that "the most important set of rules in the LRA were the 10 Commandments which were established by the Holy Spirit, with Kony acting as the medium".[3488] The Defence argues that, despite being deemed a credible witness who "provided details in keeping with what

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[3480] Conviction Decision, para. 2645.
[3481] Appeal Brief, paras 590-593.
[3482] Appeal Brief, p. 134, paras 590-598.
[3483] Conviction Decision, paras 906-915.
[3484] Appeal Brief, para. 591 (footnotes omitted).
[3485] Appeal Brief, paras 591-592.
[3486] Appeal Brief, paras 591-592.
[3487] *See* paragraph 1555 above.
[3488] Appeal Brief, para. 591, *referring to* D-0174: T-187, p. 38, lines 11-20, p. 39, line 18.

could be expected of a witness who spent a significant amount of time in the LRA",[3489] the Trial Chamber failed to mention D-0074's evidence regarding spiritualism, apart from "noting at the end of footnote 7047 that D-0074 testified that he believed in Kony's spirits and that 'everybody [within the LRA] believed' [in them]".[3490]

1558. Contrary to the Defence's submissions, the Appeals Chamber considers that the Trial Chamber did not disregard D-0074's evidence. The Trial Chamber relied upon his evidence, together with the evidence of several other witnesses, when concluding that it is uncontroversial that Joseph Kony acted as a spiritual leader, building on Acholi traditions,[3491] and that some persons believed in his spiritual powers.[3492] The fact that the Trial Chamber did not refer to the part of the testimony identified by the Defence does not, on its own, show that it failed to consider that evidence. As recalled above, the Trial Chamber, in its analysis, acknowledged and considered the issue of Joseph Kony's spiritual powers, and how the belief in those powers had an impact, especially on young abductees.[3493] The Defence's arguments are therefore rejected.

1559. With respect to the Defence's submissions that Mr Ongwen's spiritual beliefs and the impact of Joseph Kony's alleged spiritual powers on Mr Ongwen was different from that of the witnesses relied upon by the Trial Chamber, because, unlike them, he "spent a lifetime in the LRA due to the early age at which he was abducted",[3494] the Appeals Chamber considers them to be speculative. Furthermore, the Appeals Chamber considers that the evidence on Mr Ongwen's abduction at a young age, his presence at initiation rituals and his blessing prayer prior to an attack[3495] is not indicative, as suggested by the Defence, of a "genuine spiritual belief which created an imminent and continuing threat of serious bodily harm in the mind of the [Mr Ongwen]".[3496] These

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[3489] Conviction Decision, para. 286.
[3490] Appeal Brief, para. 591, *referring to* D-0174: T-187, pp. 15-16; T-188, p. 19, lines 9-15.
[3491] Conviction Decision, para. 2643. As noted above, in footnote 7045, the Trial Chamber refers to a number of witnesses, whose evidence it relied on to reach its conclusion, as well as to the Defence Closing Brief, which contains reference to other witnesses, including D-0074's testimony.
[3492] Conviction Decision, para. 2645, *referring inter alia to* D-0074, T-187, p. 15, line 25 to p. 16, line 9; T-188, p. 19, lines 9-15 (testifying that he believed in Joseph Kony's spirits and that "[e]verybody [within the LRA] believed").
[3493] Conviction Decision, para. 2645.
[3494] Appeal Brief, paras 596-598.
[3495] Appeal Brief, para. 597, *referring to* Conviction Decision, paras 907, 1404.
[3496] Appeal Brief, para. 597.

facts, which were considered by the Trial Chamber,[3497] are not inconsistent with the Trial Chamber's findings that the belief in Joseph 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".[3498] The Appeals Chamber notes that some of the witnesses relied upon by the Trial Chamber for this finding were abducted at a young age.[3499] The Trial Chamber further found that there was no evidence indicating that the belief in Joseph Kony's purported spiritual powers played a role for Mr Ongwen, noting that in fact the evidence of Mr Ongwen defying Joseph Kony, as discussed above, "sp[oke] clearly against any such influence".[3500] The Defence fails to show that the Trial Chamber's conclusion was unreasonable.

1560. The Defence further argues that the Trial Chamber's above-mentioned finding [3501] was an "impermissible inference detached from the evidence on the trial record", and that it "[wa]s not the only reasonable conclusion that may be drawn from the evidence, which contradicts this finding on a number of occasions and raises substantial reasonable doubt".[3502] In support of its claim, the Defence refers to the evidence of P-0209, Charles Lokwiya and Joseph Okilan.[3503]

1561. However, the Appeals Chamber observes that the Trial Chamber relied upon their evidence, and noted that these witnesses did not believe in Joseph Kony's purported spiritual powers, but accepted "based on Acholi traditional culture, that Joseph Kony could have been a chief and possessed some capacity for that reason," and that other people could believe in such powers.[3504] The Appeals Chamber finds, again, that contrary to the Defence's suggestion, the Trial Chamber's finding that, while some persons did believe, LRA members with some experience did not generally believe in Joseph Kony's alleged spiritual powers, is consistent with the evidence. It also does not render unreasonable the Trial Chamber's conclusion that there was no evidence indicating that the belief in Joseph Kony's purported spiritual powers played a role for

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[3497] *See for e.g.*Conviction Decision, paras 27, 907, 1404.
[3498] Conviction Decision, para. 2645.
[3499] Conviction Decision, paras 2646-2648, *referring, inter alia, to* P-0231, P-0379 and P-0070.
[3500] Conviction Decision, para. 2658.
[3501] Conviction Decision, para. 2645.
[3502] Appeal Brief, paras 599, 601.
[3503] Appeal Brief, para. 602.
[3504] Conviction Decision, paras 2652, 2655, 2656.

Mr Ongwen,[3505] and, ultimately, that the "LRA spirituality [was not] a factor contributing to a threat relevant under Article 31(1)(d) of the Statute".[3506] The Defence fails to show any error on the part of the Trial Chamber and its argument is therefore rejected.

(c) Conclusion

1562. Accordingly, having rejected all of the Defence's arguments above, the Appeals Chamber rejects ground of appeal 55.

(g) Ground of appeal 49: Alleged errors in relation to Mr Ongwen's commission of crimes "in private"

(i) Summary of the submissions

1563. The Defence argues that the Trial Chamber erred in law and in fact by "disregarding and misrepresenting" relevant evidence on the distribution of women, and "by accepting the Prosecution argument that evidence on [sexual and gender-based crimes] had 'persuasive force' for the Chamber's conclusion that duress does not apply".[3507] According to the Defence, it was erroneous for the Trial Chamber to consider that the alleged commission of sexual and gender-based crimes "in private" was "indicative" of the fact that Mr Ongwen "had not been subjected to a threat".[3508] The Defence further argues that the Trial Chamber disregarded evidence on "wife distribution" and the absence of choice to refuse to accept a partner when distributed by Joseph Kony,[3509] and that "the so-called 'wives' were not exclusive to the person to whom they were assigned",[3510] but that they were held "at the pleasure and behest of the LRA high command".[3511]

1564. According to the Prosecutor, the Defence misunderstands the Trial Chamber's finding.[3512] He argues that the Defence's submissions that the so-called "wives" were distributed by Joseph Kony, that Mr Ongwen had to obey "orders regarding women

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[3505] Conviction Decision, para. 2658.
[3506] Conviction Decision, para. 2658.
[3507] Appeal Brief, p. 120 (heading A.A.), paras 536-541.
[3508] Appeal Brief, para. 536.
[3509] Appeal Brief, para. 539.
[3510] Appeal Brief, para. 540.
[3511] Appeal Brief, para. 540.
[3512] Prosecutor's Response, para. 333.

possession", and that the so-called "wives" were not exclusive to the person to whom they were assigned, do not undermine the Trial Chamber's finding that Mr Ongwen personally committed sexual and gender-based crimes "in private", "where any threat arguably made to him could have no effect".[3513] Noting that Mr Ongwen "engaged in this conduct, when, had he not, it would have been relatively easy to hide that fact", the Prosecutor avers that the Trial Chamber's finding was reasonable.[3514]

1565. Victims Group 1 submit that the Defence's arguments are a mere disagreement with the Trial Chamber's findings and that the Defence fails to identify any error of law or fact.[3515] They submit that the evidence before the Trial Chamber "supports the reliance on the persuasive submissions and evidence" from the Prosecutor that sexual and gender-based crimes were committed in the privacy of Mr Ongwen's household and that he was "at liberty to refrain from participating in the conduct charged".[3516]

1566. Victims Group 2 submit, *inter alia*, that the Defence is "mischaracterising" the Trial Chamber's finding.[3517] They aver that the fact that the Trial Chamber mentioned a part of the Prosecutor's closing statement in the section of the judgment dealing with the applicability of duress to sexual and gender-based crimes committed by Mr Ongwen "is not representative of the totality of its factual findings and legal rulings on the matter".[3518]

(ii) Relevant parts of the Conviction Decision

1567. The Trial Chamber stated as follows:

> 2666. During the closing statements, the Prosecution made the following argument, which relates to the portion of the charges concerning direct perpetration of sexual and gender-based violence by [Mr] Ongwen:
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> > They want to persuade your Honours that after having caused these young girls to be beaten into submission and then having brought them to the privacy of his tent, it would have been impossible on the pain of death for him to have said quietly to them, 'Actually, I am not so wicked and monstrous as to rape a young girl like you. I have only done this to satisfy

[3513] Prosecutor's Response, para. 333; T-263: p. 29, lines 18-19.
[3514] Prosecutor's Response, para. 332, *referring to* Conviction Decision, para. 2667.
[3515] Victims Group 1's Observations, para. 166.
[3516] Victims Group 1's Observations, para. 167.
[3517] Victims Group 2's Observations, para. 155.
[3518] Victims Group 2's Observations, para. 155.

> Joseph Kony. But if you lie here quiet and safe, we can pretend in the morning that we had sex.' He didn't do that.
>
> 2667. The Chamber finds this argument persuasive. As found above in the relevant section, the conduct underlying the crimes charged under counts 50-60 includes to a large extent conduct performed in the relative privacy of [Mr] Ongwen's household, or even in complete privacy of his sleeping place. The fact that [Mr] Ongwen engaged in this conduct, when, had he not, it would have been relatively easy to hide that fact, further indicates that his actions were not caused by threat. Even though this argument specifically relates only to one section of the charges, it also has persuasive force for the Chamber's broader conclusion.[3519]

(iii) Determination by the Appeals Chamber

1568. The Defence argues that the Trial Chamber erred in law and in fact by "disregarding and misrepresenting evidence that neither men nor women had choice when partners were distributed" in the LRA, and by accepting the Prosecutor's argument that evidence on sexual and gender-based crimes had "persuasive force" for the conclusion that duress does not apply.[3520]

1569. The Appeals Chamber first notes that, while the Trial Chamber referred to an argument made by the Prosecutor in its closing statement,[3521] finding it "persuasive",[3522] this reference is not, as noted by Victims Group 2, representative of the totality of its factual and legal findings on the matter. Indeed, the Trial Chamber expressly referred to the relevant section in the Conviction Decision dealing with sexual and gender-based crimes directly committed by Mr Ongwen during the period relevant to the charges,[3523] noting that "[a]s found above […], the conduct underlying the crimes charged under counts 50-60 includes to a large extent conduct performed in the relative privacy of [Mr] Ongwen's household, or even in complete privacy of his sleeping place".[3524]

1570. With respect to the Defence's arguments that Joseph Kony was the one distributing women; that there were "strict orders […] regarding women possession";

[3519] Conviction Decision, paras 2666-2667 (footnotes omitted).
[3520] Appeal Brief, p. 120 (heading A.A.), paras 536-541.
[3521] *See* Conviction Decision, para. 2666 (footnotes omitted), *referring to* Prosecution Closing Statement: T-256, p. 19, lines 12-17. *See also* Prosecution Closing Brief, para. 518.
[3522] Conviction Decision, para. 2667.
[3523] Conviction Decision, fn. 7080, *referring to* section IV.C.10.
[3524] Conviction Decision, para. 2667 (footnotes omitted).

and that the "so-called 'wives' were not exclusive to the person to whom they were assigned",[3525] the Appeals Chamber finds that they have no bearing on the Trial Chamber's finding because, as correctly found by the Trial Chamber, Mr Ongwen personally committed sexual and gender-based crimes in the privacy of his household and sleeping place, where any threat made to him could have had no effect.[3526] Therefore, the Appeals Chamber finds that it was not unreasonable for the Trial Chamber to consider the fact that Mr Ongwen "engaged in this conduct, when, had he not, it would have been relatively easy to hide that fact", as a "further indicat[ion] that his actions were not caused by threat".[3527] Accordingly, the Defence's arguments are rejected.

(iv) Conclusion

1571. In light of the above, the Appeals Chamber rejects ground of appeal 49.

(h) Ground of appeal 58: alleged failure to address the Defence's argument regarding Uganda's duty to protect Mr Ongwen as a child

(i) Summary of the submissions

1572. The Defence argues that the Trial Chamber "erred by failing to respond to [its] arguments that Uganda had a legal duty to protect" Mr Ongwen as a child.[3528] More specifically, the Defence argues that Mr Ongwen was a child, who was abducted at the age of nine years, because the government of Uganda, as well as the international community, failed to protect him against Joseph Kony and the LRA.[3529] In the Defence's view, Uganda was legally bound by its obligations under international law to have protected Mr Ongwen as a child.[3530] Relying on the continuous nature of

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[3525] Appeal Brief, paras 537, 540.
[3526] Conviction Decision, para. 2667.
[3527] Conviction Decision, para. 2667 (footnotes omitted).
[3528] Appeal Brief, para. 610.
[3529] T-263, p. 10, lines 5-14.
[3530] Appeal Brief, paras 604-605. According to the Defence, Uganda is bound by article 38(2) of the UN Children's Rights Convention to ensure that children under the age of fifteen "do not take a direct part in hostilities", and article 4 of the Optional Protocol to the UN Children's Rights Convention, which provides that "[a]rmed groups, distinct from the armed forces of a State, should not under any circumstances, recruit or use in hostilities persons under the age of 18 years". The Defence further submits that although Uganda has not signed the Vienna Convention, its legal responsibilities should be interpreted in light of the principles of the Vienna Convention. Appeal Brief, paras 605-606. *See also* T-267, p. 4, lines 21 to p. 5, line 10. The Defence refers to article 26 of the Vienna Convention, according to which, States Parties must perform the legally binding provisions in good faith, and to article 31 of the Vienna Convention that extends the application of good faith to the interpretation of the treaty itself,

abduction, the Defence submits that Uganda's obligation to protect Mr Ongwen began the day he was abducted in 1987 and continued throughout his captivity until he escaped in 2015, or in any event until Mr Ongwen turned 18 years.[3531]

1573. The Prosecutor submits that this ground of appeal should be dismissed. He avers that the Trial Chamber "properly addressed and correctly rejected" the Defence's submission, and that, in any event, it's submissions have no impact on the Conviction Decision.[3532]

1574. Victims Group 1 refer to their observations on ground of appeal 28.[3533] Victims Group 2 submit that the Defence failed to substantiate the alleged error or explain how it would affect the outcome of the Conviction Decision, and request the dismissal of this ground of appeal.[3534]

(ii) Relevant parts of the Conviction Decision

1575. At the end of its analysis on the applicability of article 31(1)(d) of the Statute,[3535] the Trial Chamber stated as follows:

> The separate and more specific Defence assertion that 'Article 21(3) prohibits charging a victim of a crime with the same crime' is equally without merit: 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. […].[3536]

(iii) Determination by the Appeals Chamber

1576. The Appeals Chamber first notes that, contrary to the Defence's assertions, and as recalled above at the end of its analysis of whether Mr Ongwen was subjected to a threat pursuant to article 31(1)(d) of the Statute at the time of his conduct underlying the charged crimes, the Trial Chamber noted that it had "duly considered" the facts underlying the Defence's submissions arguing that Mr Ongwen was himself a victim

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which is to be done in light of its object and purpose. Appeal Brief, para. 606. *See also* T-267, p. 4, lines 21-25.

[3531] Appeal Brief, paras 608-609.

[3532] Prosecutor's Response, paras 376-379, T-263: p. 23, lines 13-16, p. 29, lines 20-25.

[3533] Victims Group 1's Observations, para. 183.

[3534] Victims Group 2's Observations, para. 3.

[3535] *See* paragraphs 700 and 1473 above.

[3536] Conviction Decision, para. 2672 (footnotes omitted).

of crimes, on account of his abduction at a young age by the LRA.[3537] However, while acknowledging that Mr Ongwen had been abducted at a young age by the LRA, the Trial Chamber also noted that the accused "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".[3538]

1577. The Appeals Chamber further notes that the Trial Chamber also rejected the Defence's submissions made in its closing brief regarding Uganda's alleged failure to protect Mr Ongwen as a child and that "Article 21(3) prohibits charging a victim of a crime with the same crime".[3539] The Trial Chamber specifically referred to the relevant part of the Defence Closing Brief, in which these arguments had been raised.[3540] In that regard, the Trial Chamber found the Defence's assertion to be without merit and held 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".[3541] Contrary to the Defence's submissions, the Appeals Chamber notes that the Trial Chamber did in fact respond to the Defence's arguments. Moreover, the Appeals Chamber considers that the Defence fails to show what impact, if any, the Trial Chamber's alleged failure to respond to these arguments would have had on the Conviction Decision.

1578. Finally, while the Appeals Chamber acknowledges that signatories to the UN Children's Rights Convention are under a general obligation to "take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities",[3542] it, nevertheless, notes that the question of whether the Government of Uganda was obliged under international law to protect Mr Ongwen

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[3537] Conviction Decision, para. 2672 (footnotes omitted).
[3538] Conviction Decision, para. 2672 (footnotes omitted).
[3539] Conviction Decision, para. 2672, *referring to* Defence Closing Brief, paras 494-496; heading B, p. 134.
[3540] Conviction Decision, para. 2672, fn. 7084.
[3541] Conviction Decision, para. 2672.
[3542] Article 38(2) of the UN Children's Rights Convention. *See also* Article 4(2) of the Optional Protocol to the UN Children's Rights Convention.

from abduction, has no bearing on the Trial Chamber's conclusion mentioned in the preceding paragraph.[3543]

(iv) Conclusion

1579. Accordingly, the Appeals Chamber rejects ground of appeal 58.

(i) Grounds of appeal 61, 62 and 63: Alleged errors concerning the assessment of the evidence of witness D-0133

(i) Summary of the submissions

1580. Under grounds of appeal 61, 62 and 63, the Defence argues that the Trial Chamber erred in law in fact and in procedure regarding the evidence of D-0133,[3544] "a retired military official in the NRA/UPDF and also a lawyer", who "testified as a Defence expert on child soldiers".[3545] The Defence argues that the Trial Chamber erred in: (i) rejecting D-0133's "general conclusions which he made as an expert", in particular, the conclusions contained in his report that "the experiences of being a child soldier endure and affect a person throughout his or her life"; (ii) finding that D-0133's testimony on escape was "incredible"; and (iii) finding that the remainder of his testimony "did not go to the issues relevant to the charged crimes".[3546]

1581. The Defence further argues that the Trial Chamber "[did] not refer to D-0133's testimony for any purposes", and "totally ignore[d]" his evidence, including the evidence considered credible.[3547] According to the Defence, D-0133's report and testimony provided "relevant and probative" evidence to support the elements of the affirmative defence of duress, including "the lack of free will in child soldiers, and […] the effects of child soldiering beyond the actual years in an army or militia".[3548] The Defence further argues that the Trial Chamber's misrepresentation of D-0133's evidence on escape contributed to an error in finding that the elements of the defence of duress were not satisfied.[3549]

[3543] Conviction Decision, para. 2672.
[3544] Appeal Brief, paras 611-650.
[3545] Appeal Brief, para. 611.
[3546] Appeal Brief, para. 612, *referring to* Conviction Decision, para. 612.
[3547] Appeal Brief, para. 613.
[3548] Appeal Brief, para. 614.
[3549] Appeal Brief, paras 615, 650.

1582. The Prosecutor submits that the Trial Chamber properly assessed the evidence of D-0133 and that the Defence fails to show any error in this respect.[3550] He contends that in his conclusions D-0133 addressed some legal questions arising from article 31(1)(a) or (d) of the Statute, matters which could only be determined by the Trial Chamber, and therefore the Trial Chamber was correct not to rely on D-0133's conclusions regarding these issues.[3551] He further contends that whether D-0133 was categorised as an "expert witness" or within the category of "other witnesses" "was immaterial to the Chamber's assessment of D-0133's substantive testimony".[3552] In his view, "the key question is not about his *status* (whether an expert or a fact witness)", as the Defence appears to argue, "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".[3553]

1583. Victims Group 1 submit that the arguments raised under these grounds are "simply a disagreement with the conclusions of the Chamber" and that "[t]here is no error of law or fact identified in which the Chamber erred in its conclusions and reliance on D-0133's evidence".[3554] They further submit that the Defence fails to show that the Trial Chamber's exercise of discretion led to an error of law, fact or procedure.[3555]

1584. Victims Group 2 submit that the Trial Chamber did not err in the assessment of the evidence of D-0133.[3556] They submit, *inter alia*, that "the Chamber never treated D-0133 as a fact witness"[3557] and that "it is for the Chamber to accept or reject, in whole or in part, the contribution of an expert witness since its decision with respect to evaluation of expert evidence is a discretionary one".[3558] Victims Group 2 further argue that the Trial Chamber's assessment of D-0133's testimony was "correct and reasonable" and that "there is no showing that the exercise of the Chamber's discretion with regard to this witness amounted to an abuse of discretion".[3559]

[3550] Prosecutor's Response, paras 365-375.
[3551] Prosecutor's Response, para. 365.
[3552] Prosecutor's Response, para. 366 (footnotes omitted).
[3553] Prosecutor's Response, para. 366 (footnotes omitted).
[3554] Victims Group 1's Observations, para. 184.
[3555] Victims Group 1's Observations, para. 185.
[3556] Victims Group 2's Observations, paras 157-171.
[3557] Victims Group 2's Observations, para. 159.
[3558] Victims Group 2's Observations, para. 161.
[3559] Victims Group 2's Observations, paras 169, 171.

(ii) Relevant part of the Conviction Decision

1585. In relation to the evidence of witness D-0133, the Trial Chamber stated as follows:

> […] The witness testified about having been abducted as a child and integrated in the National Resistance Army and about the experiences of persons who were forced to be soldiers as children. He testified about his own experience, provided evidence on children in the LRA and wrote a report on this issue, which was submitted into evidence. Pollar Awich answered in a clear and structured manner. The Chamber deems his testimony to be credible. However, the Chamber also notes Pollar Awich's general conclusions concerning the enduring effect on the mental health of having been a child soldier, the conditions within the LRA on abductees and the influence on their free will as a grown up and whether they are, ultimately, responsible for any of their actions undertaken as an adult. First, Pollar Awich is not a mental health expert and, more importantly, the question of whether Article 31(1)(a) or (d) of the Statute are fulfilled can only be determined by the Chamber. Lastly, the Chamber finds Pollar Awich's statement that 'there are no cases where children escaped […] voluntary' incredible considering the ample evidence received to the contrary. The remainder of Pollar Awich's testimony does not go to issues of relevance to the disposal of the charged crimes.[3560]

(iii) Determination by the Appeals Chamber

1586. As a preliminary matter, the Appeals Chamber notes that the Defence incorporates by reference submissions on the evidence by D-0133, which were included in the Defence Closing Brief.[3561] As stated above, the Appeals Chamber will only address arguments that are properly developed in the Appeal Brief.[3562]

1587. Under these grounds of appeal, the Defence challenges the Trial Chamber's assessment of D-0133's evidence on child soldiers. The Appeals Chamber understands the submissions of the Defence to be as follows: (i) the Trial Chamber "violated its own procedure in respect to expert witnesses";[3563] (ii) the Trial Chamber failed to provide a

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[3560] Conviction Decision, para. 612 (footnotes omitted).
[3561] Appeal Brief, fn. 748, *referring to* Defence Closing Brief, paras 566-567, 572, 577, 621, 663, 693, 724-725.
[3562] *See* paragraph 97 above. *See also* section V.D. (Substantiation of arguments) above.
[3563] Appeal Brief, paras 616-618, *referring, inter alia, to* Directions on the Conduct of the Proceedings, paras 32-33 ("All expert witnesses must be clearly identified on the witness list. As a general rule, challenges to a witness's expertise should be made in writing so that they can be resolved prior to the start of testimony. No later than 30 days before the anticipated testimony of an expert witness, any non-calling participant may file a notice indicating whether it challenges the qualifications of the witness as an expert. […] Submitted expert reports must satisfy the procedural prerequisites of Rule 68 of the Rules unless no such objections to the submission are raised").

reasoned opinion for rejecting the evidence;[3564] (iii) the Trial Chamber's finding that the remainder of the witness evidence was irrelevant was erroneous; [3565] and (iv) the Trial Chamber erred in finding that the witness evidence on escape from the LRA was "incredible".[3566] The Appeals Chamber will address these arguments in turn.

1588. The Appeals Chamber first notes that expert witnesses are persons "who, by virtue of some specialised knowledge, skill or training can assist the Chamber in understanding or determining an issue of a technical nature that is in dispute".[3567] It is for the trial chamber to decide whether the person qualifies as an expert,[3568] and, just as for any other evidence presented, to assess the reliability and probative value of any report prepared by the expert and his or her testimony.[3569] Furthermore, it is for the trial chamber to accept or reject, in whole or in part, the testimony of an expert witness, provided that the reasons for its decision are reasonable.[3570]

1589. In the present case, the Trial Chamber assessed the evidence of D-0133 in the section of the Conviction Decision setting out its general considerations of each witness who provided evidence in the proceedings,[3571] among "[o]ther witnesses",[3572] and not as "expert witness". In this regard, the Appeals Chamber notes that the Trial Chamber stated at the outset of its analysis that

> [it] 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,

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[3564] Appeal Brief, paras 619-633.
[3565] Appeal Brief, paras 634-638.
[3566] Appeal Brief, paras 639-650.
[3567] *See e.g. Al Hassan* Decision on Prosecution's Proposed Expert Witnesses, para. 14, *referring, inter alia, to Ntaganda* Decision on Defence Preliminary Challenges to Prosecution's Expert Witnesses, para 7; *Ruto and Sang* Expert Report Exclusion Decision, para. 11.
[3568] *See e.g. Al Hassan* Decision on Prosecution's Proposed Expert Witnesses, para. 15, *referring to Ruto and Sang* Expert Report Exclusion Decision, para. 12.
[3569] *See e.g. Simba* Appeal Judgment, para. 174. *See also Ntaganda* Appeal Judgment, para. 40; *Gbagbo and Blé Goudé* Appeal Judgment, para. 69; *Al Hassan* Judgment on the Introduction of Evidence pursuant to Rule 68(2)(b) of the Rules, para. 77.
[3570] *See Kayishema and Ruzindana* Appeal Judgment, para. 210. *See also Strugar* Appeal Judgment, para. 58.
[3571] Conviction Decision, para. 261 ("[…] the Chamber sets forth its general considerations with respect to each of the witnesses who provided evidence in these proceedings. The Chamber emphasises that these assessments – which are based on the totality of the evidence before the Chamber and not only on each witness's evidence alone – must be read in conjunction with the evidentiary discussion further below in the present judgment.").
[3572] Conviction Decision, paras 603-612.

> and it is also noted that many witnesses could in fact be included in more than one category.[3573]

1590. The Appeals Chamber observes that regardless of the above, the Trial Chamber noted the content of D-0133's testimony, namely his abduction as a child and the integration into the NRA and the experiences of other children, who were forced to be soldiers in the LRA, and found the witness's testimony on these issues to be credible.[3574] With regard to some of his general conclusions,[3575] the Trial Chamber noted that "[the witness was] not a mental health expert and, more importantly, the question of whether Article 31(1)(a) or (d) of the Statute are fulfilled can only be determined by the Chamber".[3576]

1591. As recalled above, it is for the Trial Chamber to assess the reliability and probative value of the evidence presented, including of any expert report or testimony. The Defence's suggestion that the Trial Chamber was not free to make its own assessment and that it could not "decide, *sua sponte*, on expert status, in the absence of challenges from non-calling parties",[3577] is without merit. The Appeals Chamber therefore finds that the Defence's argument that the Trial Chamber violated its own procedures in respect to expert witnesses is unfounded. This argument is rejected.

1592. Turning to the Defence's argument that the Trial Chamber failed to provide a full and reasoned opinion for not relying on D-0133's expert evidence, and that the reasons provided by the Trial Chamber are based on "factual misrepresentations" and not on the evidence on the record, the Appeals Chamber notes that, contrary to the Defence's submission, the Trial Chamber set out in detail its reasons for doing so. As noted above, it first explained that D-0133 was not a mental health expert,[3578] which the Defence in its submissions seems to accept.[3579] Moreover, contrary to the Defence's submissions,

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[3573] Conviction Decision, para. 262.
[3574] Conviction Decision, para. 612.
[3575] In particular, the conclusions "concerning the enduring effect on the mental health of having been a child soldier, the conditions within the LRA on abductees and the influence on their free will as a grown up and whether they are, ultimately, responsible for any of their actions undertaken as an adult". Conviction Decision, para. 612.
[3576] Conviction Decision, para. 612 (footnotes omitted).
[3577] Appeal Brief, para. 618.
[3578] Conviction Decision, para. 612, fn. 1084, *referring to* T-203, p. 31, line 25 to p. 32, line 13. *See also* fn. 1086, *referring to* T-203, p. 33, line 13 to p. 34, line 4
[3579] Appeal Brief, paras 622, 623, 630.

D-0133's conclusions concerned the enduring effect and consequences of being a child soldier on that person's mental health.[3580] The Defence fails to show that the Trial Chamber was unreasonable in finding that D-0133 needed to be a mental health expert for his conclusions in that respect to be reliable. Further, the Trial Chamber correctly noted that the witness's conclusions,[3581] particularly the conditions within the LRA on abductees and the influence on their free will as a grown up and whether they were ultimately responsible for any of their actions undertaken as adults, concerned a legal question – namely whether article 31(1)(a) or (d) of the Statute are fulfilled – which "can only be determined by the Chamber".[3582] The Trial Chamber therefore did not err when it decided not to rely on the conclusions above and it does not find anything in the Appeal Brief showing that the Trial Chamber abused its discretion.

1593. Furthermore, the Appeals Chamber considers that the Defence's submissions that the Trial Chamber erred in law and in fact by concluding, without providing a reasoned opinion, that "the remainder of [D-0133]'s testimony does not go to issues of relevance to the disposal of the charged crimes",[3583] are also without merit. The Defence itself states that the witness testified about "child soldiering, and its effects on the child soldier throughout his/her life".[3584] The Appeals Chamber finds that the Trial Chamber's conclusion that D-0133's testimony was not relevant to its determination of the charged crimes, is not unreasonable, considering the general nature of the topics discussed and its prior finding about D-0133's lack of expertise to conclude how this affected the mental health of child soldiers, and Mr Ongwen's mental health specifically.

1594. The Appeals Chamber will now turn to the Defence's challenges to the Trial Chamber's finding that D-0133's statement that "there are no cases where children escaped […] voluntar[ily]" was "incredible".[3585] The Defence emphasises that D-0133

[3580] Conviction Decision, para. 612, fns 1084-1086, *referring to* T-203, p. 31, line 25 to p. 32, line 13, p. 33, line 13 to p. 34, line 4, p. 63, line 17 to p. 66, line 6.
[3581] Conviction Decision, para. 612.
[3582] Conviction Decision, para. 612. *See also* *Ruto and 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.").
[3583] Appeal Brief, paras 634-638.
[3584] Appeal Brief, para. 637.
[3585] Appeal Brief, para. 641.

testified that escape was successful when the opportunity presented itself, that is in a combat situation or while the person was in sickbay, and that the Trial Chamber erred by selectively relying on evidence from certain witnesses to "inculpate" Mr Ongwen, while disregarding relevant evidence "of escape by opportunity" to support its conclusion on D-0133's evidence on escape.[3586] The Defence submits that evidence concerning escape and the Trial Chamber's conclusions in respect of Mr Ongwen's ability to escape are a "key element" in its rejection of the defence of duress.[3587]

1595. The Appeals Chamber notes that the Trial Chamber reached its conclusion based on a holistic assessment of the relevant evidence before it. As stated by the Trial Chamber, this finding was made "considering the ample evidence received to the contrary".[3588] As recalled above,[3589] the Trial Chamber heard several witnesses testifying about LRA members, of both low and high rank, escaping from or otherwise leaving the LRA.[3590] As mentioned above, regardless of the circumstances, the Trial Chamber found, on the evidence before it, that escaping from or otherwise leaving the LRA was possible and even "relatively common".[3591]

1596. The Appeals Chamber further notes that the evidence referred to by the Defence on the circumstances of escape is not "exculpatory", as suggested by the Defence. Rather, it confirms and reinforces the ample evidence received by the Trial Chamber showing that escaping from or otherwise leaving the LRA was indeed a realistic option available, including to Mr Ongwen.[3592] As a result, and even though the Trial Chamber did not refer to the specific evidence "to the contrary" discussed elsewhere in the Conviction Decision, the Defence fails to show that it was unreasonable for the Trial Chamber to consider D-0133's evidence on this point as not credible.

[3586] Appeal Brief, paras 641, 644-646, *referring, inter alia, to* P-0138, P-0209, P-0099, P-0340, P-0406, P-0352, P-0018, P-0410.
[3587] Appeal Brief, paras 647, 650.
[3588] Conviction Decision, para. 612.
[3589] *See* section VI.F.2(e) (Alleged errors regarding the possibility of escaping from or otherwise leaving the LRA) above.
[3590] Conviction Decision, paras 2621-2632.
[3591] Conviction Decision, para. 2619 (footnotes omitted).
[3592] Conviction Decision, paras 2635, 2668.

(iv) Conclusion

1597. In light of the foregoing, the Appeals Chamber rejects grounds of appeal 61, 62 and 63.

(j) Overall conclusion

1598. For the above reasons, and after having considered all the arguments raised under grounds of appeal 26, 28 (in part), 44, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 58, 61, 62 and 63, and rejected these grounds of appeal, the Appeals Chamber concludes that the Defence has not demonstrated any error that would warrant the Appeals Chamber's intervention in relation to the Trial Chamber's findings on duress as a ground for excluding criminal responsibility pursuant to article 31(1)(d) of the Statute.

G. Alleged errors regarding cumulative convictions

1599. Under grounds of appeal 20, 21 and 22, the Defence challenges the Trial Chamber's findings regarding cumulative convictions.

1. Ground of appeal 20: Alleged legal error in rejecting the relevance of the principle of ne bis in idem when assessing permissible concurrence of crimes

1600. Under this ground of appeal, the Defence submits that "[t]he Trial Chamber erred in law in the test for impermissible concurrence of crimes […] by: 1) rejecting the principle of *ne bis in idem* as a basis to guide its assessment of concurrences and 2) in the full formation of a test for permissible concurrence of crimes, leading to prejudice and injustice to [Mr Ongwen]".[3593]

(a) Summary of the submissions

(i) The Defence's submissions

1601. The Defence submits that the Trial Chamber erred "in rejecting the relevance of Article 20's provisions".[3594] The Defence argues that article 20 of the Statute and the *Bemba et al.* Appeal Judgment provide support for a conduct-based approach "rather than [an approach based on] the legal definition of the offences" when assessing impermissible concurrences.[3595] The Defence further contends that while the Trial

[3593] Appeal Brief, p. 60, paras 277-288.
[3594] Appeal Brief, para. 277; T-264, p. 106, line 24 to p. 107, line 2.
[3595] Appeal Brief, paras 281-283, *referring, inter alia, to* *Bemba et al.* Appeal Judgment, para. 751.

Chamber correctly followed this conduct-based approach and "adopted the consumption and subsidiarity" principles,[3596] it made "errors in some of the applications of the approach".[3597]

(ii) The Prosecutor's submissions

1602. The Prosecutor submits that "for a predictable and stable jurisprudence, the Court should maintain the established test", "endorsed by the Appeals Chamber" and correctly applied by the Trial Chamber, and that there is no need for additional principles such as "consumption and subsidiarity".[3598] The Prosecutor further argues that the Defence's position regarding article 20 of the Statute is incorrect and its reliance on selected "practices in domestic jurisdictions" is "inapposite".[3599]

1603. In addition, the Prosecutor contends that the Defence "misinterprets" the holding of the Appeals Chamber in the *Bemba et al.* Appeal Judgment on the approach to cumulative convictions.[3600] The Prosecutor avers that in that judgment, the Appeals Chamber endorsed the test elaborated in the ICTY *Delalić et al.* Case (also known as the "*Čelebići*" test) on cumulative convictions applied by the ICTY Appeals Chamber and therefore "has already settled this question".[3601]

(iii) The Victims' observations

1604. Victims Group 1 contend that the Defence's submission on the "applicability of the *ne bis in idem* principle as provided for in Article 20 of the Statute is erroneous" given the provision's "[l]iteral, teleological and historical interpretation".[3602]

1605. Victims Group 2 submit that the *ne bis in idem* principle "concerns the question of whether a person may be tried more than once for the same conduct", and that a review of the preparatory work "does not provide or in fact was not conceived to

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[3596] T-265, p. 18, line 11.
[3597] Appeal Brief, para. 284; T-264, p. 106, lines 12-13.
[3598] Prosecutor's Response, para. 138 (footnotes omitted); T-264, p. 113, lines 13-18, p. 117, lines 11-18; T-265, p. 23, lines 10-13.
[3599] Prosecutor's Response, para. 141. *See also* paras 142-144.
[3600] Prosecutor's Response, para. 142.
[3601] Prosecutor's Response, para. 142.
[3602] Victims Group 1's Observations, para. 101. *See also* T-264, p. 123, lines 3-16.

provide any guidance on the question of concurrence of crimes or cumulative conviction".[3603]

(iv) The observations of the amici curiae

1606. The NIMJ submit that the double jeopardy clause of the Fifth Amendment to the United States Constitution "provides, in part: 'nor shall any person be subject, for the same offense, to be twice put in jeopardy of life or limb'".[3604] The NIMJ aver that this provision has been interpreted to provide three protections to the accused: "(1) protection against a second prosecution for the same offense after acquittal; (2) protection against a second prosecution after conviction; and (3) protection against multiple punishments for convictions that amount to a single criminal offence".[3605]

1607. The ADC-ICT submit that the Appeals Chamber should depart from the ICTY and ICTR jurisprudence that applied the *Delalić et al*. test because it "focuses on the legal definition of the crimes" rather than on the conduct of the accused.[3606] They argue that this test has "proven to be insufficient to protect an accused from prejudice" and therefore "fairer test" must be developed.[3607] The ADC-ICT aver that although the Appeals Chamber in the *Bemba et al.* case considered that the *ne bis in idem* principle does not apply to cumulative convictions, "some national jurisdictions and scholars do consider [that it applies]", and in case of doubt, "this doubt must be resolved in favour of the accused, and it must be considered to apply".[3608] The ADC-ICT further aver that in light of article 20(1) of the Statute, an approach based on the conduct is more appropriate.[3609]

1608. Mr Batra argues that the scope of article 20(1) of the Statute is "far broader than the specific language of the ad hoc statutes, which clearly [was] designed to allow

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[3603] T-264, p. 124, lines 11 to p. 125, line 16, p. 126, lines 7-16.
[3604] Observations of NIMJ, para. 22.
[3605] Observations of NIMJ, para. 22. They argue that the United States Supreme Court set out in the *Blockburger v. United States* case the "*Blockburger* elements test" for multiplicity of convictions which "focuses on a strict facial comparison of the elements of the charged offences". Observations of NIMJ, para. 23, *referring, inter alia, to United States of America, Supreme Court, Blockburger v. United States*, 4 January 1932, 284 U.S. 299. *See also* T-265, p. 6, lines 7-12.
[3606] Observations of ADC-ICT, paras 19, 30.
[3607] Observations of ADC-ICT, paras 29-30.
[3608] Observations of ADC-ICT, para. 22. *See also* para. 31; T-265, p. 12, line 18 to p. 13, line 14.
[3609] Observations of ADC-ICT, paras 30, 34; T-265, p. 10, lines 20-21.

international prosecution when the state prosecution was for an 'ordinary crime'".[3610] He argues that because the drafters of the Statute used "the nomenclature 'same conduct'", the Statute "is to be interpreted more broadly than the legal characterization of the crimes solely".[3611]

1609. Dr Behrens submits that, although there is no consensus under international customary law as to whether the general principle of *ne bis in idem* under article 20(1) applies to cumulative convictions,[3612] this provision "cannot be literally applicable to multiple convictions in the same trial".[3613] In any event, he argues that "multiple convictions are often still allowed if the commission of 'distinct offences' through the same conduct can be established".[3614] Mr Behrens further argues that the principle of consumption is difficult to apply "in international criminal law" because it "presupposes a hierarchy of crimes" which does not transpose well in the context of international crimes.[3615] He submits that apart from situations in which different crimes are at issue, "[c]onsumption might work quite well when we are talking about a lesser form of perpetration against a more serious form of perpetration, which consumes that for the same crime".[3616] As for the principle of subsidiarity, he argues that it is more relevant when it concerns "preparatory acts for a particular crime that are meeting the full commission of the crime" but "[i]t does not work quite well […] if completely different crimes are at issue".[3617]

1610. Prof Meyersfeld and the SALCT describe the principle of concurrence as follows: "if the four corners of one crime, and the facts underlying it, fall completely within the borders of another crime, and the facts underlying it, then there is impermissible concurrence. If the overlap does not result in the one crime completely subsuming the other, then there is permissible concurrence, even if there are elements that overlap".[3618]

[3610] Observations of Mr Batra, p. 13.
[3611] Observations of Mr Batra, p. 13.
[3612] Observations of Dr Behrens, paras 29-30; T-265, p. 14, lines 17-20.
[3613] T-265, p. 14, lines 15-16.
[3614] Observations of Dr Behrens, para. 30 (footnote omitted).
[3615] T-265, p. 16, lines 3-8.
[3616] T-265, p. 16, lines 12-15.
[3617] T-265, p. 17, lines 2-5.
[3618] Observations of Prof Meyersfeld and SALCT, para. 24.

1611. Ms Ashraph *et al*. submit that the Trial Chamber did not err "in rejecting the relevance of Article 20 of the Statute to cumulative convictions".[3619] They argue that "Article 20 of the Statute deals with the principle of *ne bis in idem*, namely the prohibition of consecutive trials for conduct which formed the basis of crimes for which a person has already been convicted or acquitted, whereas the permissibility or otherwise of entering cumulative convictions is an issue that arises within a single trial".[3620]

(b) Relevant parts of the Conviction Decision

1612. The Trial Chamber rejected the Defence's claim that article 20 of the Statute is a source of "guiding law" when assessing the permissibility of concurrence of crimes.[3621] The Trial Chamber explained that "[c]oncurrence of crimes, also referred to as cumulative conviction, is a situation where the same facts satisfy the legal definition of multiple crimes".[3622] The Trial Chamber noted that "there is no provision in the Statute explicitly requiring it to exclude some legal qualifications of facts on the ground that they are in impermissible concurrence with other legal qualifications of the same facts".[3623] The Trial Chamber recalled that "convictions may be entered cumulatively if the conduct in question violates two distinct provisions of the Statute, each having a 'materially distinct' element not contained in the other, *i.e.* an element which requires proof of a fact not required by the other".[3624] The Trial Chamber further found that "there may be situations in which crimes requiring *in abstracto* different legal elements may nevertheless be in impermissible concurrence".[3625]

1613. With regard to "situations in which the same conduct fulfils the legal elements of more than one crime", the Trial Chamber noted that these concerned the concurrence of:

[3619] Observations of Ashraph *et al.*, para. 26 (footnote omitted).
[3620] Observations of Ashraph *et al.*, para. 26 (footnote omitted).
[3621] Conviction Decision, para. 2794, *referring to* Motion on Multiple Charging and Convictions, para. 10.
[3622] Conviction Decision, para. 2792.
[3623] Conviction Decision, para. 2792.
[3624] Conviction Decision, para. 2792, *referring to* *Bemba et al.* Conviction Decision, para. 951; *Bemba* Conviction Decision, paras 747-748; *Katanga* Conviction Decision, para. 1695. *See also* Conviction Decision, para. 2795.
[3625] Conviction Decision, para. 2796.

> (i) analogous crimes against humanity under Article 7 and war crimes under Article 8 of the Statute;
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> (ii) torture and cruel treatment as war crimes under Article 8(2)(c)(i) of the Statute;
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> (iii) torture and other inhumane acts as crimes against humanity under Article 7(1)(f) and (k) of the Statute;
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> (iv) enslavement and sexual slavery as crimes against humanity under Article 7(1)(f) and (g) of the Statute; and
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> (v) rape and sexual slavery, both as crimes against humanity under Article 7(1)(g) of the Statute, and as war crimes under Article 8(2)(e)(vi) of the Statute.[3626]

1614. The Trial Chamber found it permissible to enter cumulative convictions in three specific contexts. First, in the context of the attacks on the IDP camps, the Trial Chamber entered cumulative convictions for murder and attempted murder, both as a crime against humanity under article 7(1)(a) of the Statute and as a war crime under article 8(2)(c)(i) of the Statute (counts 2-3, 12-13, 14-15, 25-26, 27-28; 38-39, 40-41);[3627] and torture as a crime against humanity under article 7(1)(f) of the Statute and as a war crime under article 8(2)(c)(i) of the Statute (counts 4-5, 16-17, 29-30, 42-43).[3628]

1615. Second, in the context of sexual and gender-based crimes committed directly by Mr Ongwen, the Trial Chamber entered cumulative convictions for torture as a crime against humanity under article 7(1)(f) of the Statute and as a war crime under article 8(2)(c)(i) of the Statute (counts 51-52);[3629] rape as a crime against humanity under article 7(1)(g) of the Statute and as a war crime under article 8(2)(e)(vi) of the Statute (counts 53-54);[3630] sexual slavery as a crime against humanity under article 7(1)(g) of the Statute and as a war crime under article 8(2)(e)(vi) of the Statute (counts 55-56);[3631] and forced pregnancy as a crime against humanity under article 7(1)(g) of the Statute and as a war crime under article 8(2)(e)(vi) of the Statute (counts 58-59).[3632]

[3626] Conviction Decision, para. 2797 (footnotes omitted).
[3627] Conviction Decision, paras 2825-2827, 2874, 2877-2883, 2927, 2930-2936, 2973, 2976-2982, 3020.
[3628] Conviction Decision, paras 2828-2833, 2874, 2884-2889, 2927, 2937-2942, 2973, 2983-2988, 3020.
[3629] Conviction Decision, paras 3027-3034.
[3630] Conviction Decision, paras 3035-3043.
[3631] Conviction Decision, paras 3044-3049.
[3632] Conviction Decision, paras 3056-3062.

1616. Third, in the context of sexual and gender-based crimes not directly perpetrated by Mr Ongwen, the Trial Chamber entered cumulative convictions for torture as a crime against humanity under article 7(1)(f) of the Statute and as a war crime under article 8(2)(c)(i) of the Statute (counts 62-63);[3633] rape as a crime against humanity under article 7(1)(g) of the Statute and as a war crime under article 8(2)(e)(vi) of the Statute (counts 64-65);[3634] and sexual slavery as a crime against humanity under article 7(1)(g) of the Statute and as a war crime under article 8(2)(e)(vi) of the Statute (counts 66-67).[3635]

1617. Furthermore, the Trial Chamber found that cumulative convictions were impermissible for the crimes of torture and cruel treatment as war crimes under article 8(2)(c)(i) (counts 5, 6, 17, 19, 30, 32, 43 and 45);[3636] torture and other inhumane acts as crimes against humanity under articles 7(1)(f) and 7(1)(k) (counts 4, 7, 16, 18, 29, 31, 42 and 44);[3637] and sexual slavery and enslavement as crimes against humanity under article 7(1)(g) and 7(1)(c) (counts 55 and 57).[3638]

(c) Determination by the Appeals Chamber

(i) Preliminary issue

1618. The Appeals Chamber notes that the Defence incorporates by reference arguments made in its Motion on Multiple Charging and Convictions.[3639] As found above,[3640] the Appeals Chamber will address only those arguments that are sufficiently developed in the Appeal Brief in relation to the present ground of appeal.

1619. The Appeals Chamber further notes that in paragraphs 105 to 113 of its Response to the *Amici Curiae* Observations, the Defence presents arguments on the issue of cumulative convictions that are not directly in response to the *amici*'s observations.[3641] In light of the limited scope of the response to the *amici curiae*, the Appeals Chamber will disregard the submissions made in the above-mentioned paragraphs.

[3633] Conviction Decision, paras 3072-3077.
[3634] Conviction Decision, paras 3078-3080.
[3635] Conviction Decision, paras 3081-3084.
[3636] Conviction Decision, paras 2834-2835, 2892-2893, 2945-2946, 2991-2992.
[3637] Conviction Decision, paras 2836-2837, 2890-2891, 2943-2944, 2989-2990.
[3638] Conviction Decision, paras 3044, 3050-3051.
[3639] Appeal Brief, para. 281, *referring to* Motion on Multiple Charging and Convictions.
[3640] *See* paragraph 97 above. *See also* section V.D. (Substantiation of arguments) above.
[3641] Defence's Response to the Amici Curiae Observations, paras 105-113.

1620. The Appeals Chamber will now turn to the Defence's argument challenging the Trial Chamber's interpretation of article 20 of the Statute and the test applicable to cumulative convictions.

(ii) Scope of article 20 of the Statute

1621. As noted above, the Trial Chamber rejected the Defence's argument that article 20(1) of the Statute "contains guiding law on the interpretation for multiple convictions within one case".[3642] The Trial Chamber explained that article 20(1) "by its terms, regulates consecutive trials for the same conduct, and protects persons from being unduly subjected to criminal proceedings twice, as well as the finality of judgments and thus the integrity of the legal system".[3643] It further noted that article 20 "also places obligations both on the Court and on States Parties, seeking to regulate with precision the different situations, notably related also to the Court's jurisdiction being limited *ratione materiae*, as opposed to the jurisdiction of States".[3644] Noting the holding of the Appeals Chamber in the *Bemba et al*. Case, the Trial Chamber held that the "procedural situations foreseen by Article 20 of the Statute are entirely different from the one at hand: concurrence of crimes within single criminal proceedings before the Court".[3645]

1622. The Trial Chamber also held that "the analysis as to the permissibility of concurrence of crimes – and consequent cumulative conviction –" is not "entirely abstract", since "the test based on materially distinct legal elements defines such elements as those which require proof of a fact not required by the other".[3646]

1623. The Appeals Chamber notes that while the Defence submits that the Trial Chamber erred in rejecting the relevance of article 20 of the Statute, it concedes that "[n]either the Statute nor the [Rules] directly addresses how to assess the concurrence of charges or convictions within one trial" and that article 20 of the Statute does not "literally apply to cumulative convictions".[3647] Nonetheless, according to the Defence,

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[3642] Conviction Decision, para. 2794, *referring to* Motion on Multiple Charging and Convictions, para. 10.
[3643] Conviction Decision, para. 2794.
[3644] Conviction Decision, para. 2794.
[3645] Conviction Decision, para. 2794, *referring to* *Bemba et al.* Appeal Judgment, para. 748.
[3646] Conviction Decision, para. 2795.
[3647] Appeal Brief, paras 277-278. *See also* T-265, p. 12, lines 18-25, p. 13, line 1.

the principle of *ne bis in idem* is "the foundation for assessing concurrence issues arising within a single trial",[3648] and therefore provides "guidance on the appropriate test" for the concurrence of crimes.[3649] The Defence also argues that article 20 of the Statute differs from similar provisions contained in the ICTY and ICTR Statutes, as the former "prohibits multiple prosecutions in the ICC for the same conduct […] that was previously prosecuted at a national level or in the ICC, rather than the same crime", adding that "[t]his was a deliberate change by the drafters of the Rome Statute from crime to conduct".[3650]

1624. The principle of *ne bis in idem* is enshrined in the first paragraph of article 20 of the Statute which provides that

> [e]xcept as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.[3651]

1625. The Appeals Chamber notes that article 20 provides a safeguard against new trials triggered after a conviction or acquittal.[3652] However, this provision has no bearing on the permissibility of cumulative convictions. In the *Bemba et al.* Appeal Judgment, the Appeals Chamber has considered and rejected arguments claiming that the principle of *ne bis in idem* under article 20(1) of the Statute prevents a chamber from entering multiple convictions in respect of the same underlying conduct.[3653] In particular, the Appeals Chamber observed that article 20(1) of the Statute "concerns the question of whether a person may be tried more than once for the same conduct", and not "the question of whether a trial chamber, at the end of a trial, may enter multiple convictions if the same conduct fulfils the legal elements of more than one offence".[3654]

[3648] Appeal Brief, para. 278; T-264, p. 106, lines 17-23, p. 107, lines 3-5.
[3649] Appeal Brief, para. 277.
[3650] T-264, p. 108, lines 7-11.
[3651] Article 20(2) and (3) of the Statute reads ("2. No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court. 3. No person who has been tried by another court for conduct also proscribed under article 6, 7, 8 or 8 *bis* shall be tried by the Court with respect to the same conduct unless the proceedings in the other court: (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.").
[3652] *See also* *Gaddafi* OA8 Appeal Judgment, para. 63.
[3653] *Bemba et al.* Appeal Judgment, paras 743, 748.
[3654] *Bemba et al.* Appeal Judgment, para. 748.

1626. Following this jurisprudence, the Appeals Chamber finds that the Trial Chamber correctly determined that the *ne bis in idem* principle, as formulated in article 20(1) of the Statute, serves to prevent a retrial of a person, who has been convicted or acquitted on the basis of the same conduct before this Court. It follows that, contrary to the Defence's contention, this provision is not concerned with the question of whether a trial chamber can impose cumulative convictions on a person for the same underlying conduct in one and same trial proceedings.

1627. A review of the drafting history of article 20 of the Statute supports the above interpretation. The original provision which later crystallised into article 20 of the Statute addressed the *ne bis in idem* principle and the prohibition against double jeopardy in the context of subsequent trials and/or concurrent jurisdiction; however, it did not address the issue of cumulative convictions.[3655] Indeed, while the "intersection of cumulative convictions, double jeopardy and sentencing" was discussed at the Rome conference, efforts in that regard "were abandoned due to the 'major differences between the dominant legal systems, and the risk of re-opening intractable discussions of the intrinsic penal value of various crimes'".[3656]

[3655] *See, inter alia*, ILC, Twelfth Report on the Draft Code of Crimes against the Peace and Security of Mankind, 15 April 1994, A/CN.4/460, article 9, pp 18-22; ILC, Draft Code of Crimes against the Peace and Security of Mankind with commentaries, 1996, article 12, pp. 36-38; ILC, Report of the International Law Commission on the work of its forty-fifth session, 3 May-23 July 1993, A/48/10, article 45, pp. 120-121; ILC, Draft Statute for an International Criminal Court with commentaries, 1994, article 42, pp. 57-58; Draft Statute for an International Criminal Court -Alternative to the ILC Draft- (Siracusa-Draft), July 1995, article 42, p. 45; ILC Draft Statute for an International Criminal Court With Suggested Modifications (Updated Siracusa-Draft) prepared by a Committee of Experts, 1994, article 42, pp. 87-88; United Nations General Assembly, Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume II (Compilation of proposals), 1996, Supplement No. 22A (A/51/22), article 42, pp. 202-203; United Nations General Assembly, Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, the Netherlands, 4 February 1998, A/AC.249/1998/L.13, article 13, pp. 46-47; United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Report of the Preparatory Committee on the Establishment of an International Criminal Court, Addendum, 14 April 1998, A/CONF.183/2/Add.1, article 18, pp. 45-46; United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Reports and other documents*, 15 June - 17 July 1998, A/CONF.183/13 (Vol. III), article 20, pp. 101-102. *See also* General Assembly, Report of the Preparatory Committee on the Establishment of an International Criminal Court Vol I, Proceedings of the Preparatory Committee during March-April and August 1996, Fifty-first Session, Supplement No. 22 (A/51/22), article 42, paras 170-174; General Assembly, Report of the Preparatory Committee on the Establishment of an International Criminal Court Volume II (Compilation of proposals), Fifty-first Session, 13 September 1996, Supplement No. 22 A (A/51/22), article 42, pp. 202-203.

[3656] Ildiko Erdei, 'Cumulative Convictions in International Criminal Law: Reconsideration of a Seemingly Settled Issue' 34 *Transnational Law Review* 317 (2011), at 338 (footnotes omitted), *quoting*

1628. In light of the above, the Appeals Chamber rejects the Defence's argument that the Trial Chamber erred in rejecting its contention that article 20 of the Statute is relevant to the assessment of cumulative convictions.

1629. The Appeals Chamber will now review the test applied by the Trial Chamber regarding cumulative convictions.

(iii) Test applicable to cumulative convictions

1630. With respect to the test applicable to cumulative convictions, the Appeals Chamber notes that the Defence contends that while the Trial Chamber correctly adopted a "conduct-based approach", it misapplied it in relation to some specific crimes, such as the crime against humanity of forced marriage as a form of other inhumane acts.[3657] At the outset, the Appeals Chamber observes that article 78(3) of the Statute specifically provides for the possibility of entering multiple convictions, stipulating that "[w]hen a person has been convicted of more than one crime, *the Court shall pronounce a sentence for each crime* and a joint sentence specifying the total period of imprisonment".[3658]

1631. In setting out its understanding of cumulative convictions, the Trial Chamber explained that "convictions may be entered cumulatively if the conduct in question violates two distinct provisions of the Statute, each having a 'materially distinct' element not contained in the other, *i.e.* an element which requires proof of a fact not required by the other".[3659] The Appeals Chamber recalls that in the *Bemba et al.* case, it has confirmed the application of this test, which was articulated in the *Delalić et al*.

Rolf Fife, "Note on Multiple Offences", in Roy S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, (Transnational Publishers, 2001), p. 537.

[3657] Appeal Brief, paras 284-286; T-264, p. 111, line 23 to p. 112, line 1.

[3658] Emphasis added.

[3659] Conviction Decision, paras 2792, 2795, 3037.

case[3660] and has been applied by the *ad hoc* tribunals and chambers of this Court.[3661] It observed, however, "that the *Delalić et al.* test only addresses the principle of speciality, namely a situation where one offence falls entirely within the ambit of another, and therefore only a conviction for the more specific crime is ultimately entered".[3662]

1632. The Appeals Chamber further noted, as *obiter dictum*, that "it is arguable that a bar to multiple convictions could also arise in situations where the same conduct fulfils the elements of two offences even if these offences have different legal elements, for instance if one offence is fully consumed by the other offence or is viewed as subsidiary to it",[3663] but "did not dwell on [the] question any further".[3664] The Trial Chamber, in the present case, did refer to this *obiter dictum* pronouncement and held that it "agrees that there may be situations in which crimes requiring *in abstracto* different elements may nevertheless be impermissible concurrence, and bears this in mind in its analysis of the concrete questions posed in this case".[3665]

1633. The Defence argues that "[t]he language in *Bemba et al*., is identifying the principles of speciality, consumption and subsidiarity, which form the core analysis of concurrences, or *concursus delictorum*, in civil law systems".[3666] It submits that "[t]he principle of speciality or reciprocal speciality arises when an offence 'falls entirely within the ambit of another'".[3667] Referring to some academic work, it contends that

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[3660] The ICTY Appeals Chamber in the *Delalić et al.* Case, stated the following regarding the said test: "reasons of fairness to the accused and the consideration that only distinct crimes may justify multiple convictions, lead to the conclusion that 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. An element is materially distinct from another if it requires proof of a fact not required by the other". It added the following when the test was not met: "the Chamber must decide in relation to which offence it will enter a conviction. This should be done on the basis of the principle that the conviction under the more specific provision should be upheld. Thus, if a set of facts is regulated by two provisions, one of which contains an additional materially distinct element, then a conviction should be entered only under that provision". *Delalić et al.* Appeal Judgment, paras 412-413. In the *Kordić and Čerkez* Appeal Judgment, the ICTY Appeals Chamber held in relation to this test that "[t]he cumulative convictions test serves twin aims: ensuring that the accused is convicted only for distinct offences, and at the same time, ensuring that the convictions entered fully reflect his criminality". *Kordić and Čerkez* Appeal Judgment, para. 1033.
[3661] *Bemba et al.* Appeal Judgment, para. 750.
[3662] *Bemba et al.* Appeal Judgment, para. 750.
[3663] *Bemba et al.* Appeal Judgment, para. 751.
[3664] *Bemba et al.* Appeal Judgment, para. 751.
[3665] Conviction Decision, para. 2796.
[3666] Appeal Brief, para. 283 (footnotes omitted), *referring, inter alia, to* *Bemba et al.* Appeal Judgment, paras 750-751. *See also* T-264, p. 108, lines 14-21, p. 109, line 19 to p. 110, line 2.
[3667] Appeal Brief, para. 285.

"[t]he principle of subsidiarity arises when a single act appears to violate two offences, yet one of the offences 'describes a less intensive form […] of the same type of criminal conduct'".[3668] Finally, the Defence submits, also by reference to academia, that "[t]he principle of consumption arises where two offences protect the same interests".[3669]

1634. For the reasons that follow, the Appeals Chamber does not deem it necessary to address the issue of whether, and to what extent, the principles of speciality, subsidiarity and consumption may be of assistance to determine the issue of cumulative convictions in the present case.[3670] The Appeals Chamber notes, in particular, that the Defence does not challenge the legal test espoused by the Trial Chamber in the Conviction Decision, but rather its application to the facts of the case.[3671]

[3668] Appeal Brief, para. 286.
[3669] Appeal Brief, para. 287.
[3670] With respect to the principle of speciality, the ICTY Trial Chamber in the *Kupreškić et al*. Case held that "[t]he rationale behind the principle of speciality is that if an action is legally regulated both by a general provision and by a specific one, the latter prevails as most appropriate, being more specifically directed towards that action." "When each of the two provisions requires proof of a fact which the other one does not require, civil law courts tend to speak of "reciprocal speciality" and find that both provisions apply." *Kupreškić et al.* Trial Judgment, paras 684-685. Regarding the principle of consumption, the ICTY Trial Chamber in that same case held that "[i]n civil law jurisdictions, a double conviction is ruled out in such cases by the so-called principle of consumption. Its *ratio* is that when all the legal requirements for a lesser offence are met in the commission of a more serious one, a conviction on the more serious count fully encompasses the criminality of the conduct." *Kupreškić et al.* Trial Judgment, para. 688 (footnote omitted). As to the principle of subsidiarity, it is applicable to situations "when a criminal offense is a previous stage of another criminal offense", dealing therefore "with the relation of two criminal offenses connected by an assault on the same legally protected good, but separated by different stages of their execution" (I. Joksic "Apparent joinder of criminal offenses in the criminal law of Siberia" in 4 *Law theory and practice* 4 (2021), p. 63). *See also* J. Baumann et al., 'Konkurrenzen' in Mitsch (ed.) *Strafrecht Allgemeiner Teil* (2021), paras 15-16.
[3671] Appeal Brief, para. 284. The Appeals Chamber notes the holding of the ICTY Appeals Chamber in the *Kunurac et al*. Case regarding the application of the principles of speciality, subsidiarity and consumption in the context of international criminal law. The ICTY Appeals Chamber held that "[t]ypically, the issue of multiple convictions or cumulative convictions arises in legal systems with a hierarchy of offences in which the more serious offences within a category require proof of an additional element or even require a specific *mens rea*. It is, however, an established principle of both the civil and common law that punishment should not be imposed for both a greater offence and a lesser included offence. Instead, the more serious crime subsumes the less serious (*lex consumens derogat legi consumptae*). The *rationale* here, of course, is that the greater and the lesser included offence constitute the same core offence, without sufficient distinction between them, even when the same act or transaction violates two distinct statutory provisions. Indeed, it is not possible to commit the more serious offence without also committing the lesser included offence. In national laws, *this principle is easier to apply because the relative gravity of a crime can normally be ascertained by the penalty imposed by the law. The Statute, however, does not provide a scale of penalties for the various crimes it proscribes. Nor does the Statute give other indications as to the relative gravity of the crimes.* Indeed, the Tribunal has explicitly rejected a hierarchy of crimes, concluding instead that crimes against humanity are not inherently graver than war crimes" (emphasis added). (*Kunarac et al.* Appeal Judgment, paras 170-171). Moreover, according to one of the *amici*, that the principles of speciality, subsidiarity and consumption

1635. In that regard, the Appeals Chamber observes that the test for cumulative convictions, as articulated in the *Delalić et al*. Case and confirmed by the Appeals Chamber in the *Bemba et al*. Appeal Judgment, finds its *rationale* in the need to reflect the full culpability of an accused person, given that each provision which has a "materially distinct" element protects different legal interests. What the legal interests protected by each crime are, can only be discerned by reference to the elements of that specific crime.[3672] When two or more crimes have materially distinct elements, the interests protected are necessarily different, and a conviction for only one of these crimes will therefore not be reflective of the full extent of the culpability of an accused person.

1636. Furthermore, the question of whether and to what extent a crime may be fully subsumed in another crime can only be answered by reference to the elements of each crime as well. If these elements require proof of a fact not required by the other, cumulative convictions are permissible. As argued by the Prosecutor,[3673] any remaining concerns arising from overlapping facts can be addressed in the determination of the sentence. The Appeals Chamber is of the view that the above approach strikes a careful balance between the need to reflect the full culpability of an accused person while safeguarding his or her rights and ensuring that the person is not being unlawfully punished.

1637. The Defence's more specific arguments alleging errors in the application of the test to cumulative convictions regarding war crimes and crimes against humanity as well as with respect to the crimes of forced marriage, sexual slavery, and rape,[3674] will be addressed below in the determination of grounds of appeal 21 and 22.

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may not work "quite well in international criminal law" because they "presuppose […] a hierarchy of crimes" that is not codified in the Statute. *See* T-265, p. 16, lines 3-8.

[3672] *See also* Separate and Dissenting Opinion of Judges Hunt and Bennouna, para. 17 ("Various decisions of this Tribunal and the ICTR refer to the consideration that different criminal provisions may protect different societal interests or values as being an additional matter which may justify cumulative convictions. However, the consideration of societal interests or protected values is both the rationale for, and inherent in, different acts being labelled different crimes, and it will therefore generally be given effect by the application of the "different elements" test.").

[3673] Prosecutor's Response, para. 144. *See also* Prosecutor's Response to the Amici Curiae Observations, para. 60.

[3674] Appeal Brief, paras 286, 288, fns 308, 312-313.

(d) Overall conclusion

1638. In light of the above, and after having considered all the arguments raised under ground of appeal 20, the Appeals Chamber finds that the Defence has failed to show that the Trial Chamber erred in its interpretation of article 20(1) of the Statute and in its approach to cumulative convictions. Accordingly, ground of appeal 20 is rejected.

2. Ground of appeal 21: Alleged error in finding that war crimes and crimes against humanity based on the same underlying conduct are permissible concurrences

1639. Under this ground of appeal, the Defence submits that the Trial Chamber erred in imposing multiple convictions for war crimes and crimes against humanity "based on the same underlying conduct", given the "complete overlap based on the facts in the present case".[3675]

(a) Summary of the submissions

(i) The Defence's submissions

1640. The Defence submits that "[w]ar crimes and crimes against humanity based on the same underlying conduct are impermissible concurrences because there is a complete overlap based on the facts in the present case".[3676]

1641. The Defence also avers that the Trial Chamber "erred in finding that the contextual elements of war crimes and crimes against humanity protect significant different interests when occurring in a single factual situation".[3677] The Defence argues that the "protected interests were identical in each overlapping pair of convictions" for the crimes of murder, attempted murder, torture, rape, sexual slavery and forced pregnancy.[3678] Referring to the *Brima et al*. Case, the Defence contends that the SCSL Appeals Chamber has "recognised the same protection of interests in overlapping war crimes and crimes against humanity" and, as a result, did not enter a conviction for forced marriage as other inhumane acts, because the conviction for sexual slavery as

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[3675] Appeal Brief, para. 289. *See also* paras 290-293.
[3676] Appeal Brief, para. 289; T-264, p. 110, lines 3-5.
[3677] Appeal Brief, para. 290, *referring to* Conviction Decision, paras 2820-2821. *See also* T-264, p. 110, line 16 to p. 111, line 6, p. 111, lines 13-18.
[3678] Appeal Brief, para. 290.

"outrages upon personal dignity" sufficiently "express[es] 'society's disapproval of the forceful abduction and use of women and girls as forced conjugal partners'".[3679]

1642. The Defence further submits that, as a consequence of the Trial Chamber's error, "one of the two convictions should be reversed for the following pairs of counts: Counts 2-3; 4-5; 12-13; 14-15; 16-17; 25-26; 27-28; 29-30; 38-39; 40-41; 42-43; 51-52; 53-54; 55-56; 58-59; 62-63; 64-65; and 66-67".[3680]

(ii) The Prosecutor's submissions

1643. The Prosecutor submits that it is "permissible to enter convictions for crimes against humanity and war crimes based on the same underlying criminal conduct".[3681] The Prosecutor avers that both sets of crimes have "materially distinct elements, and protected interests", and that "[t]heir respective contextual elements serve to distinguish crimes within the Court's jurisdiction from ordinary crimes".[3682] He adds that there is "settled law and practice" on their concurrence, and that the Defence's interpretation of the *Brima et al*. Appeal Judgment is "inapposite".[3683]

(iii) The Victims' observations

1644. Victims Group 1 "strongly object to any suggestion to the principle of consumption with respect to war crimes and crimes against humanity based on the same underlying conduct" as this would "present a complete overhaul of the current regime of international law".[3684] They also "oppose any attempt to subsume the different types of harm that they suffered into a single crime".[3685] They submit that war crimes and crimes against humanity "aim to deter different types of behaviour".[3686]

1645. Victims Group 1 further argue that "the Trial Chamber relied on established jurisprudence and practice of the Court" when taking into account the contextual elements of the crimes in assessing "whether concurrence of such analogous crimes is

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[3679] Appeal Brief, para. 292, *referring to* *Brima et al.* Appeal Judgment, para. 202.
[3680] Appeal Brief, para. 293.
[3681] Prosecutor's Response, para. 146.
[3682] Prosecutor's Response, para. 146. *See also* T-264, p. 114, lines 19-20; Prosecutor's Response to the Amici Curiae Observations, para. 60. *See also* T-265, p. 23, lines 4-8.
[3683] Prosecutor's Response, paras 139, 146.
[3684] Victims Group 1's Observations, para. 103.
[3685] Victims Group 1's Observations, para. 103, *referring to* Appeal Brief, para. 288. *See also* T-265, p. 25, lines 3-6.
[3686] Victims Group 1's Observations, para. 104.

permissible".[3687] They also submit that the Trial Chamber's approach to cumulative convictions for war crimes and crimes against humanity was correct as it took "into account all aspects of [Mr Ongwen's] criminal conduct and reflect[ed] the totality of the harm of the victims of the crimes in question".[3688]

(iv) The observations of the amici curiae

1646. The ADC-ICT submit that the *chapeaux* elements should not be taken into account when applying the test for cumulative convictions because the focus should be "on the conduct, rather than the elements".[3689]

1647. Ms Ashraph *et al*. submit that the Trial Chamber did not err in entering cumulative convictions "for the same crime enumerated both as a crime against humanity and as a war crime".[3690]

1648. Dr Behrens submits that "there is no relationship of speciality" regarding crimes against humanity and war crimes as "the contextual elements distinguish[…] both categories".[3691] He avers that the "link to the perpetrator's conduct is made clear through the inclusion of the accompanying subjective element".[3692]

(b) Relevant parts of the Conviction Decision

1649. The Trial Chamber rejected the Defence's submission that multiple convictions for war crimes and crimes against humanity are "barred" because both set of crimes charged are "based on the same conduct", as well as the Defence's argument that the analysis for the concurrence of crimes should "consist solely of a comparison of the *actus reus* and *mens rea* elements and not the contextual chapeau elements".[3693] The Trial Chamber was of the view that the contextual elements were not "qualitatively different from the specific elements of the crimes", and should therefore be taken into consideration when assessing "whether concurrence of analogous crimes against

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[3687] Victims Group 1's Observations, para. 106.
[3688] Victims Group 1's Observations, para. 107. *See also* T-264, p. 123, lines 17-20; T-265, p. 25, lines 8-14.
[3689] Observations of ADC-ICT, para. 34; T-265, p. 10, lines 20-21.
[3690] Observations of Ashraph *et al.*, para. 28.
[3691] Observations of Dr Behrens, para. 33.
[3692] Observations of Dr Behrens, para. 33. *See also* T-265, p. 15, line 17 to p. 16, line 2.
[3693] Conviction Decision, para. 2818, *referring to* Motion on Multiple Charging and Convictions, paras 40, 42-43.

humanity and war crimes is impermissible".[3694] It reasoned that "[t]he contextual elements of crimes against humanity on the one hand and war crimes on the other hand require proof of facts not required by the other".[3695]

1650. Moreover, the Trial Chamber considered that "the contextual elements of crimes in the jurisdiction of the Court are not neutral as concerns the qualitative legal evaluation of the charged conduct".[3696] It was of the view that "beyond their unitary function of distinguishing crimes within the material jurisdiction of the Court from ordinary crimes falling outside such jurisdiction, the statutory contextual elements of crimes, considered individually, encapsulate distinct interests protected by the corresponding incriminating provisions under the Statute".[3697] The Trial Chamber found that "neither of these two sets of crimes can thus be said to be subsumed or consumed in any way by the other",[3698] and concluded that "concurrence of analogous crimes against humanity and war crimes is permissible".[3699]

(c) Determination by the Appeals Chamber

1651. The Appeals Chamber recalls that in its determination of ground of appeal 20, it has found no error in the Trial Chamber's approach and the test it has applied in determining whether cumulative convictions are permissible. In light of this, the Defence's argument that cumulative convictions for war crimes and crimes against humanity are impermissible because they are based on the same underlying conduct,[3700] must fail as well for the reasons set out in ground of appeal 20,

1652. The Defence further submits that the Trial Chamber "erred in finding that the contextual elements of war crimes and crimes against humanity protect significant different interests when occurring in a single factual situation".[3701] The Defence adds that a focus on the intention would show that "in each case[,] there is only one culpable intention for the indivisible acts that occurred, such as murder".[3702]

[3694] Conviction Decision, para. 2820.
[3695] Conviction Decision, para. 2820 (footnote omitted).
[3696] Conviction Decision, para. 2820.
[3697] Conviction Decision, para. 2820.
[3698] Conviction Decision, para. 2820.
[3699] Conviction Decision, para. 2821.
[3700] Appeal Brief, paras 288-289, 293.
[3701] Appeal Brief, para. 290.
[3702] Appeal Brief, para. 290.

1653. The thrust of the Defence's argument is that since the contextual elements of war crimes and crimes against humanity should not be considered when determining whether cumulative convictions are permissible, convictions for war crimes and crimes against humanity in relation to the same underlying conduct were wrongly entered by the Trial Chamber. For the reasons that follow, the Appeals Chamber finds no merit in the Defence's argument.

1654. While the Defence is correct in suggesting that in relation to several underlying pair of crimes some of the legal elements of those crimes coincide, it ignores that, as the Trial Chamber correctly stated in the Conviction Decision, crimes against humanity and war crimes "reflect (partly) different forms of criminality, in that they complement, in terms of protected interests, the incrimination of the individual 'specific' crimes – which, in turn, are therefore distinct depending (also) on the relevant contextual elements".[3703] For instance in relation to murder both as a crime against humanity and as a war crime, while some of the legal interests protected may coincide (*e.g.* the right to life), the protected interests discerned from the contextual elements do reflect different forms of criminality, and consequently, distinct crimes. As explained in the determination of ground of appeal 20, the legal interests protected by a given criminal provision can only be discerned by reference to the elements of the crimes.

1655. In this regard, the Appeals Chamber notes that the Elements of Crimes list, in unequivocal terms, in relation to each of the crimes identified by the Defence,[3704] the relevant contextual elements for each of these sets of crimes. For example, the crime against humanity of murder (article 7(1)(a) of the Statute) has the following elements: "1. The perpetrator killed one or more persons. 2. *The conduct was committed as part of a widespread or systematic attack directed against a civilian population*.[3705] 3. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population". The elements of the war crime of murder (article 8(2)(c)(i) of the Statute) are: "1. The perpetrator killed one or more persons. 2. Such person or persons were either hors de combat, or were civilians, medical personnel, or religious personnel taking no active part in the hostilities. 3. The

[3703] Conviction Decision, para. 2820.
[3704] Appeal Brief, paras 290-291.
[3705] Emphasis added.

perpetrator was aware of the factual circumstances that established this status. 4. *The conduct took place in the context of and was associated with an armed conflict not of an international character*.[3706] 5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict".

1656. The relevant contextual elements are also included for the crimes of torture as a crime against humanity (article 7(1)(f) of the Statute)[3707] and a war crime (article 8(2)(c)(i) of the Statute);[3708] rape as a crime against humanity (article 7(1)(g)-1 of the Statute)[3709] and a war crime (article 8(2)(e)(vi)-1 of the Statute);[3710] sexual slavery as a crime against humanity (article 7(1)(g)-2 of the Statute)[3711] and a war crime (article 8(2)(e)(vi)-2 of the Statute);[3712] and forced pregnancy as a crime against humanity (article 7(1)(g)-4 of the Statute)[3713] and a war crime (article 8(2)(e)(vi)-4 of the Statute).[3714] As such, the inclusion of the contextual elements as constitutive elements of the crimes allows the identification of the legal interests protected by each provision which, given the materially distinct contextual elements contained therein, indicate that they protect different legal interests. Indeed, the Trial Chamber found that "war crimes give protection in criminal law to persons in times of armed conflict, whereas crimes against humanity protect persons where there is a widespread and systematic attack on a civilian population".[3715] In this regard, the Appeals Chamber notes by way of example that crimes against humanity can occur in times of peace so

[3706] Emphasis added.
[3707] Elements of Crimes, article 7(1)(f): 4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
[3708] Elements of Crimes, article 8(2)(c)(i): 5. The conduct took place in the context of and was associated with an armed conflict not of an international character.
[3709] Elements of Crimes, article 7(1)(g)-1: 3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
[3710] Elements of Crimes, article 8(2)(e)(vi)-1: 3. The conduct took place in the context of and was associated with an armed conflict not of an international character.
[3711] Elements of Crimes, article 7(1)(g)-2: 3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
[3712] Elements of Crimes, article 8(2)(e)(vi)-2: 3. The conduct took place in the context of and was associated with an armed conflict not of an international character.
[3713] Elements of Crimes, article 7(1)(g)-4: 2. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
[3714] Elements of Crimes, article 8(2)(e)(vi)-4: 2. The conduct took place in the context of and was associated with an armed conflict not of an international character.
[3715] Conviction Decision, para. 2820.

long as a widespread or systematic attack against a civilian population is established. The Appeals Chamber therefore finds no error in the Trial Chamber's finding.

1657. In addition, the Appeals Chamber notes that in relation to the crime of murder as a crime against humanity and as a war crime, the Defence argues that the same underlying conduct that was committed for murder as a crime against humanity (count 2) and murder as a war crime (count 3) corresponds to "an indivisible action with one culpable intention and the same protected interest of protection of life".[3716] Referring to the Trial Chamber's finding at paragraph 2826 of the Conviction Decision,[3717] the Defence contends that for both counts, the conduct was the "killing of at least four civilians by the LRA fighters during the Pajule IDP attacks", and that the "acts of murder occurred simultaneously during an armed attack and a widespread or systematic attack".[3718]

1658. The Trial Chamber found at said paragraph 2826 that "the first legal element of both murder as a crime against humanity, pursuant to Article 7(1)(a) of the Statute, and murder as a war crime, pursuant to Article 8(2)(c)(i) of the Statute, *i.e.* that the perpetrator killed one or more persons, [was] met".[3719] The Appeals Chamber notes that the Defence's focus on this specific finding ignores the Trial Chamber's finding, made in the following paragraph, that the *second element* of murder as a war crime, namely that "the person or persons killed were either *hors de combat*, or were civilians, medical personnel, or religious personnel taking no active part in the hostilities", was also met.[3720] Indeed, the Trial Chamber was correct in finding that the latter crime included, in addition to the distinct contextual elements, a materially distinct element that is not contained in the crime of murder as a crime against humanity. Therefore, in light of the above considerations, the Appeals Chamber finds that the Defence does not show any error in the Trial Chamber's finding and this argument is rejected.

1659. The Defence argues that in the *Brima et al.* Appeal Judgment, the SCSL Appeals Chamber has "recognised the same protection of interests in overlapping war crimes

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[3716] Appeal Brief, para. 291.
[3717] Appeal Brief, fns 324-325.
[3718] Appeal Brief, para. 291.
[3719] Conviction Decision, para. 2826, *referring to* para. 152.
[3720] Conviction Decision, para. 2827 (emphasis added).

and crimes against humanity."[3721] The Appeals Chamber finds the Defence's argument to be misleading. While it did not enter a "fresh convictions for 'Other Inhumane Acts' (forced marriage)" on appeal, the SCSL Appeals Chamber found that forced marriage satisfied the elements of other inhumane acts as a crime against humanity.[3722] Contrary to the Defence's contention, the SCSL Appeals Chamber found that cumulative convictions for crimes against humanity and war crimes "on the basis of the same facts" were, in principle, permissible for the crimes of "Outrages upon Personal Dignity" and "'Other Inhumane Acts' (forced marriage)" because they "have materially distinct elements (in the least, the former is a war crime, and the latter a crime against humanity)".[3723] Consequently, the Appeals Chamber rejects the Defence's argument in this regard.

(d) Overall conclusion

1660. In light of the above, and after having considered all the arguments raised under ground of appeal 21, the Appeals Chamber finds that the Defence has failed to show that the Trial Chamber erred in finding that cumulating convictions for crimes against humanity and war crimes is permissible.[3724] Accordingly, ground of appeal 21 is rejected.

3. Ground of appeal 22: Alleged errors in finding that rape and sexual slavery, and forced marriage, as a form of other inhumane acts, and sexual slavery are permissible concurrences

1661. Under this ground of appeal, the Defence challenges the Trial Chamber's findings on cumulative convictions for the crimes of rape and sexual slavery, and for the crimes of forced marriage, as a form of other inhumane acts, and sexual slavery.[3725]

(a) Summary of the submissions

(i) The Defence's submissions

1662. The Defence submits that based on the consumption principle rape and sexual slavery are an impermissible concurrence and, therefore, the convictions for counts 53,

[3721] Appeal Brief, para. 292.
[3722] *Brima et al*. Appeal Judgment, para. 202.
[3723] *Brima et al*. Appeal Judgment, para. 202.
[3724] Conviction Decision, para. 2821.
[3725] Appeal Brief, paras 294-297.

54, 64, and 65 should be reversed.[3726] Alternatively, the Defence argues that in the present case, the crime of rape is "subsidiary" to the crime of sexual slavery, as "the acts of a sexual nature for the crime of sexual slavery are solely based on the acts of rape".[3727]

1663. The Defence further submits that the Trial Chamber failed to analyse whether forced marriage as a form of other inhumane acts is subsidiary to the crime of sexual slavery.[3728] The Defence argues that as "forced marriage and sexual slavery share the same protected interest of violence against physical integrity and the deprivation of liberty", concurrence of these crimes is impermissible and convictions on counts 50 and 61 should be reversed.[3729]

(ii) The Prosecutor's submissions

1664. The Prosecutor submits that the Defence's arguments "contradict settled law".[3730] He argues that the Trial 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".[3731] The Prosecutor further submits that in describing sexual slavery as a "more intensive form of rape", the Defence "mischaracterises the crime, overlooking the interests protected by separately criminalising the perpetrator's exercise of ownership over the victim".[3732]

1665. The Prosecutor argues that the Defence "misinterprets forced marriage as a standalone crime, rather than as underlying act of the crime of other inhumane acts".[3733] He avers that "the crimes of other inhumane acts and sexual slavery have materially distinct elements, warranting cumulative convictions" and that, in any event, "the underlying facts and protected values arising from the exclusive conjugal union

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[3726] Appeal Brief, para. 294.
[3727] Appeal Brief, para. 295.
[3728] Appeal Brief, para. 296; T-264, p. 111, line 24 to p. 112, line 1.
[3729] Appeal Brief, para. 296.
[3730] Prosecutor's Response, para. 148, *referring to* *Ntaganda* Conviction Decision, paras 1203-1204; *Taylor* Appeal Judgment, paras 575-578; *Kunarac et al.* Appeal Judgment, para. 186.
[3731] Prosecutor's Response, para. 148.
[3732] Prosecutor's Response, para. 148.
[3733] Prosecutor's Response, para. 149.

imposed by the crime of other inhumane acts (forced marriage) are sufficiently distinct from that of sexual slavery".[3734]

(iii) The Victims' observations

1666. Victims Group 1 submit that the Trial Chamber correctly found that sexual slavery and rape are permissible concurrence, and that the former does not consume the latter.[3735] They argue that while sexual slavery involves acts of a sexual nature, "these acts can include acts of rape but are not limited to them".[3736] Victims Group 1 argue that the "specificity" of Mr Ongwen's criminal conduct in this case, "including brutality of the individual acts of rape", indicates that "the crimes of rape cannot be fully consumed by the crimes of sexual slavery, neither the crimes of rape are subsidiary to the crimes of sexual slavery".[3737]

1667. Victims Group 1 also contend that the Trial Chamber "analyzed in detail the relation between the crimes of the other inhumane act of forced marriage, sexual slavery and rape, explaining that these crimes exists independently of each other".[3738] Additionally, they submit that the Trial Chamber explained that "victims of forced marriage suffer also from different aspects of harm than victims of rape or sexual enslavement", including "being ostracized from the community, mental trauma, the serious attack on the victim's dignity, deprivation of fundamental right to choose his or her spouse".[3739]

(iv) The observations of the amici curiae

1668. Prof Meyersfeld and SALCT submit that given the "distinctive nature" of sexual and gender-based crimes, it is "proper and permissible to have cumulative charges and convictions for such crimes".[3740] They argue that sexual and gender-based crimes "all protect distinct interests".[3741]

[3734] Prosecutor's Response, para. 149; T-264, p. 120 lines 4-9.
[3735] Victims Group 1's Observations, para. 108.
[3736] Victims Group 1's Observations, para. 108.
[3737] Victims Group 1's Observations, para. 108.
[3738] Victims Group 1's Observations, para. 109.
[3739] Victims Group 1's Observations, para. 110.
[3740] Observations of Prof Meyersfeld and SALCT, para. 23.
[3741] Observations of Prof Meyersfeld and SALCT, para. 25.

1669. Dr Behrens submits that "[r]ape and sexual slavery […] have distinctive characters": the former "requires the invasion of the body and the existence of a coercive element": the latter "contains the exercise of powers attaching to the right of ownership".[3742] In his view, "both crimes thus contain an element that is materially distinct from the other, leading to permissible concurrences".[3743]

1670. Mr Batra submits that permissible cumulative convictions should be based on the "conduct-based test approach", and not on the "material element test or Blockburger test".[3744] On this basis, he argues that "the concurrence of crimes and particularly the crimes of rape and sexual slavery based on the same conduct is not permissible".[3745]

(b) Relevant parts of the Conviction Decision

1671. In addressing the Defence's argument that "the charges of rape and those of sexual slavery are based on the 'same alleged conduct of intercourse without consent' and that concurrence of crimes is not permissible", the Trial Chamber held that

> in application of the test based on the principle of speciality – *i.e.* whether each statutory provision involved has a materially distinct element not included in the other, requiring proof of at least one additional fact – concurrence of the crimes of rape and sexual slavery is in principle permissible, on the ground that each of the crimes requires an element not required by the other. Indeed, the crime of rape requires the invasion of the body of a person by conduct resulting in penetration, however slight, committed under certain specific circumstances, while for the crime of sexual slavery any act of a sexual nature in which the victim is caused to engage, would suffice without the need for penetration; conversely, the crime of sexual slavery requires the exercise by the perpetrator of any or all of the powers attaching to the right of ownership over the victim – an element which is not required for the commission of the crime of crime of [*sic*] rape. It is worth reiterating in this regard that, significantly, the crime of sexual slavery, as defined under the Statute, may be committed through subjecting the victim to *any* act of sexual nature and not only rape.[3746]

1672. The Trial Chamber further noted by reference to the *Bemba et al.* Appeal Judgment that

> [it] is mindful of the Appeals Chamber's consideration that, beyond the operation of the principle of speciality, a bar to the permissibility of concurrence of crimes

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[3742] Observations of Dr Behrens, para. 36.
[3743] Observations of Dr Behrens, para. 36.
[3744] Observations of Mr Batra, p. 15.
[3745] Observations of Mr Batra, p. 15.
[3746] Conviction Decision, para. 3037.

> may also result from the full consumption of one crime by another in the concrete circumstances. The Chamber is of the view that this is not the case as concerns the facts at issue; to the contrary, the full scope of [Mr] Ongwen's culpable conduct may only be reflected by the concurrence of the crimes of rape under Counts 53 and 54 and those of sexual slavery under Counts 55 and 56.[3747]

1673. Accordingly, the Trial Chamber rejected the Defence's submission in this regard by holding that

> on the basis of the principle of speciality *in abstracto* and considering in addition that the crimes of rape cannot be said to be fully consumed within the crimes of sexual slavery nor that there exists a relation of subsidiarity between the two crimes, the Chamber considers that concurrence of the two sets of crimes on the basis of the same facts, *i.e.* the same repeated acts of rape on the part of [Mr] Ongwen, is permissible.[3748]

1674. The Trial Chamber analysed the crimes of forced marriage, as a form of other inhumane acts, and sexual slavery in different sub-sections.[3749] In addition, in the section on the "Applicable law", the Trial Chamber explained the distinctive elements of these crimes as follows:

> The conduct underlying forced marriage – as well as the impact it has on victims – are not fully captured by other crimes against humanity. To focus on sexual slavery and rape in particular, these crimes and forced marriage exist independently of each other. While the crime of sexual enslavement penalises the perpetrator's restriction or control of the victim's sexual autonomy while held in a state of enslavement, the 'other inhumane act' of forced marriage penalises the perpetrator's imposition of 'conjugal association' with the victim. Forced marriage implies the imposition of this conjugal association and does not necessarily require the exercise of ownership over a person, an essential element for the existence of the crime of enslavement. Likewise, the crime of rape does not penalise the imposition of the 'marital status' on the victim. When a concept like 'marriage' is used to legitimatise a status that often involves serial rape, victims suffer trauma and stigma beyond that caused by being a rape victim alone.[3750]

1675. Consequently, as regards the crimes committed directly by Mr Ongwen, the Trial Chamber convicted him of the crimes of forced marriage as a form of other inhumane

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[3747] Conviction Decision, para. 3038, *referring to* *Bemba et al.* Appeal Judgment, para. 751.
[3748] Conviction Decision, para. 3039. *See also* para. 3079 (The Trial Chamber also noted with respect to the crimes of rape under counts 64-65 and the crimes of sexual slavery under counts 66-67 that while they are based partly on the same underlying conduct, "[t]his situation is […] identical to the one concerning the relationship between Counts 53-54, on the one hand, and Counts 55-56". The Trial Chamber therefore considered that concurrence of these crimes is permissible.).
[3749] *See* Conviction Decision, paras 3021-3026, 3044-3049.
[3750] Conviction Decision, para. 2750.

acts, pursuant to article 7(1)(k) of the Statute (count 50);[3751] rape as a crime against humanity, pursuant to article 7(1)(g) of the Statute (count 53);[3752] rape as a war crime, pursuant to article 8(2)(e)(vi) of the Statute (count 54);[3753] sexual slavery as a crime against humanity, pursuant to article 7(1)(g) of the Statute (count 55);[3754] and sexual slavery as a war crime, pursuant to article 8(2)(e)(vi) of the Statute (count 56).[3755]

1676. Regarding the crimes not directly committed by Mr Ongwen, the Trial Chamber convicted him of the crimes of forced marriage as a form of other inhumane acts, pursuant to article 7(1)(k) of the Statute (count 61);[3756] rape as a crime against humanity, pursuant to article 7(1)(g) of the Statute (count 64);[3757] rape as a war crime, pursuant to article 8(2)(e)(vi) of the Statute (count 65);[3758] sexual slavery as a crime against humanity, pursuant to article 7(1)(g) of the Statute (count 66);[3759] and sexual slavery as a war crime, pursuant to article 8(2)(e)(vi) of the Statute (count 67).[3760]

(c) Determination by the Appeals Chamber

1677. The Defence argues that the Trial Chamber should have found that the crime of rape is "consumed" by the crime of sexual slavery, because "both crimes overlap in terms of the protected interest" and "there is a single culpable intention".[3761] Alternatively, according to the Defence, the Trial Chamber should have found that rape is "subsidiary" to sexual slavery, and that "since the acts of a sexual nature for the crime of sexual slavery are solely based on the acts of rape", "sexual slavery in this case is a more intensive form of rape".[3762]

1678. As recalled above, the Trial Chamber referred to the principles of consumption, subsidiarity and speciality. However, for the reasons set out in the determination of

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[3751] Conviction Decision, paras 3021-3026.
[3752] Conviction Decision, paras 3035-3043.
[3753] Conviction Decision, paras 3035-3043.
[3754] Conviction Decision, paras 3044-3049.
[3755] Conviction Decision, paras 3044-3049.
[3756] Conviction Decision, paras 3069-3071.
[3757] Conviction Decision, paras 3078-3080.
[3758] Conviction Decision, paras 3078-3080.
[3759] Conviction Decision, paras 3081-3084.
[3760] Conviction Decision, paras 3081-3084.
[3761] Appeal Brief, para. 294 (The Defence submits that "[t]he protected interest of rape is the violence against physical integrity whereas for sexual slavery it is the violence against physical integrity and the deprivation of liberty".).
[3762] Appeal Brief, para. 295.

ground of appeal 20, the Appeals Chamber does not find it necessary to discuss these principles for the purposes of the present appeal. The Appeals Chamber is of the view that, contrary to the Defence's assertion, the crimes of rape and sexual slavery do not protect the same interest. The Appeals Chamber considers that while the protected interests may overlap to a certain degree, the fundamental nature of the crime of sexual slavery is reducing a person to a servile status, and depriving him or her of his or her liberty and sexual autonomy, whereas for the crime of rape, it is the invasion of a sexual nature, of a person's body, and the attack on his or her sexual autonomy. Indeed, these differences are expressed in the legal elements of the crimes of rape[3763] and sexual slavery.[3764]

1679. In addition, the Appeals Chamber finds no error in the Trial Chamber's finding that the crimes of rape and sexual slavery have materially distinct elements: rape requires "the invasion of the body of a person by conduct resulting in penetration, however slight, committed under certain specific circumstances, while for the crime of sexual slavery any act of a sexual nature in which the victim is caused to engage, would suffice without the need for penetration".[3765] It also correctly found that, while sexual slavery "requires the exercise by the perpetrator of any or all of the powers attaching to

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[3763] *See* Elements of Crimes, article 7(1)(g)-1: 1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body. 2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent. Elements of Crimes, article 8(2)(e)(vi)-1: 1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body. 2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent. *See also e.g.* 1998 Slavery Rapporteur Report, para. 24; *Akayesu* Trial Judgment, paras 686-688; *Kunarac et al.* Trial Judgment, paras 457-459; *Bemba* Conviction Decision, paras 99-101.

[3764] *See* Elements of Crimes, article 7(1)(g)-2: 1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty. 2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature. Elements of Crimes, article 8(2)(e)(vi)-2: 1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty. 2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature. *See also e.g.* Article 1(1) of 1926 Slavery Convention; 1998 Slavery Rapporteur Report, paras 27-30; *Katanga* Conviction Decision, paras 975-980.

[3765] Conviction Decision, para. 3037.

the right of ownership over the victim", this element is not required for the commission of rape.[3766] The Appeals Chamber notes that the Trial Chamber's assessment of the materially distinct elements for both crimes is consistent with the jurisprudence of the Court and the ICTY.[3767]

1680. In light of the above, the Appeals Chamber finds no error in the Trial Chamber's conclusion that concurrence of the two sets of crimes was permissible. The Defence's argument is therefore rejected.

1681. With regard to the question of whether cumulative convictions for the crimes of forced marriage as a form of other inhumane acts and sexual slavery are permissible, the Defence argues, as recalled above, that the Trial Chamber failed to analyse whether forced marriage as a form of other inhumane acts is subsidiary to sexual slavery,[3768] and submits that since these two crimes protect the same interest, concurrence of these crimes is impermissible and the relevant convictions should be reversed.[3769]

1682. The Appeals Chamber recalls in this regard the Trial Chamber's holding that "[w]hile the crime of sexual enslavement penalises the perpetrator's restriction or control of the victim's sexual autonomy while held in a state of enslavement, the 'other inhumane act' of forced marriage penalises the perpetrator's imposition of 'conjugal association' with the victim".[3770] The Trial Chamber also noted that "[f]orced marriage implies the imposition of this conjugal association and does not necessarily require the exercise of ownership over a person, an essential element for the existence of the crime of enslavement".[3771] The Appeals Chamber has found no error in this conclusion, when it addressed the Defence's challenges to these crimes under grounds of appeal 90 and 66 (in part).[3772] Furthermore, the Appeals Chamber has found, under those grounds of appeal, that the imposition of a conjugal union violates a person's right to marry, *i.e.* to

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[3766] Conviction Decision, para. 3037.
[3767] *See* *Ntaganda* Conviction Decision, para. 1204; *Kunarac et al.* Appeal Judgment, para. 186 (The Appeals Chamber found that "enslavement, even if based on sexual exploitation, is a distinct offence from that of rape".).
[3768] Appeal Brief, para. 296; T-264, p. 111, line 24 to p. 112, line 1.
[3769] Appeal Brief, para. 296.
[3770] Conviction Decision, para. 2750.
[3771] Conviction Decision, para. 2750.
[3772] *See* section VI.D.2(iv)(b) (Alleged errors in the Trial Chamber's factual findings on forced marriage and other related findings) above.

freely choose one's spouse and consensually establish a family, which is recognised as a fundamental right under international human rights law.[3773] It has also found that forced marriage is not necessarily sexual in nature but entails a "gendered harm", which is essentially the imposition on the victim of socially constructed gendered expectations and roles attached to "wife" or "husband".[3774]

1683. Having regard to the above, the Appeals Chamber is of the view that the interest protected by forced marriage as a form of other inhumane acts is not necessarily "violence against physical integrity and deprivation of liberty" as alleged by the Defence, but, crucially, a person's right to freely choose one's spouse and consensually establish a family. Thus, the Appeals Chamber finds no merit in the Defence's argument that these crimes aim at protecting the same interest. Given that these crimes have materially distinct elements not included in the other, resulting from the fact that they protect different interests, the Appeals Chamber sees no reason why the Trial Chamber should have considered whether forced marriage as a form of other inhumane acts was subsidiary to sexual slavery, and it therefore rejects the Defence's argument to that effect.

(d) Overall conclusion

1684. In light of the above, and after having considered all the arguments raised under ground of appeal 22, the Appeals Chamber finds that the Defence has failed to show an error in the Trial Chamber's conclusions that the crimes of rape and sexual slavery, as well as the crimes of forced marriage, as a form of other inhumane acts, and sexual slavery are permissible concurrence. Therefore, ground of appeal 22 is rejected.

H. General conclusion on the grounds of appeal

1685. Having considered all relevant arguments raised by the Defence in its Appeal Brief, the Appeals Chamber finds that the Defence failed to show, and the Appeals Chamber did not identify, any error in the Trial Chamber's findings concerning (i) Mr Ongwen's right to a fair trial and "other human rights violations" (grounds of appeal 1 to 18, 23, 25 and 45); (ii) other specific evidentiary assessments and findings

[3773] *See* section VI.D.2(iv)(a) (Alleged errors in the Trial Chamber's legal interpretation of forced marriage and the principle of *nullum crimen sine lege*) above.
[3774] *See* section VI.D.2(iv)(a) (Alleged errors in the Trial Chamber's legal interpretation of forced marriage and the principle of *nullum crimen sine lege*) above.

(grounds of appeal 24, 71, 72, 73 and 60); (iii) Mr Ongwen's individual criminal responsibility as indirect perpetrator and as indirect co-perpetrator (grounds of appeal 28 (in part) 60, 64, 65, 68 to 70, and 74 to 86); (iv) sexual and gender-based crimes (grounds of appeal 66, and 87 to 90); (v) grounds for excluding criminal responsibility, *i.e.* mental illness or defect (grounds of appeal 19, 27, and 29 to 43), and duress (grounds of appeal 26, 44, 46 to 56, 58, and 61 to 63), pursuant to article 31(1)(a) and (d) of the Statute, respectively; and, finally, (vi) cumulative convictions (grounds of appeal 20 to 22).

1686. Accordingly, the Appeals Chamber rejects the Defence's appeal and confirms the Conviction Decision.

VII. APPROPRIATE RELIEF

1687. In an appeal pursuant to article 81(1) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed or order a new trial before a different trial chamber (article 83(2) of the Statute). In the present case, it is appropriate to confirm the Conviction Decision.

Done in both English and French, the English version being authoritative.

Judge Luz del Carmen Ibáñez Carranza
Presiding

Judge Piotr Hofmański

Judge Solomy Balungi Bossa

Judge Reine Alapini-Gansou

Judge Gocha Lordkipanidze

Dated this 15th day of December 2022
At The Hague, The Netherlands