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Date: **27 January 2022**

APPEALS CHAMBER

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

SITUATION IN UGANDA

IN THE CASE OF
THE PROSECUTOR v. DOMINIC ONGWEN

PUBLIC
with Public Annexes A-F

Corrected Version of "Defence Response to the *Amici Curiae* Observations", filed on 17 January 2022 as ICC-02/04-01/15-1950

Source: **Defence for Dominic Ongwen**

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I. ISSUES BEFORE THE CHAMBER

A. The Judgment's Failure to Individualise the Circumstances of Mr Ongwen as a Child Soldier in finding Culpability after the Age of 18

i. Introduction

1. The Judgment's findings and conclusions of Mr Ongwen's culpability after the age of 18 are based on a narrow and rote interpretation of Article 26, as well as a rejection of evidence of Mr Ongwen's childhood as having any impact on his conduct in the period of 2002-2005. Thus, the legal interpretation and application of Article 26 is a touchstone in this case.

2. Although most of the debate on Article 26 has focused on the apparent discrepancies of the different age limits of 15 and 18 years for culpability, as well as national and international precedents, the *Ongwen* case places the nature or character of child soldiering squarely at the centre of the Article 26 debate.

3. The Prosecution's position is that Mr Ongwen committed crimes after he was 18 years of age, and therefore is culpable. Although acknowledging his victimhood as an LRA abductee, turning age 18 transformed him into a perpetrator.[1] In contrast, the Defence's position is that Mr Ongwen's victim status as a child soldier is continuous from his abduction and never ends.[2]

4. Thus, the Defence position is that the Judgment's strict chronological application of Article 26 is incorrect because it fails to individualise the circumstances of Mr Ongwen and rejects the continuum of harms with which child soldiers must live, regardless of their chronological age. The Defence suggests that the legal application of the age of culpability of 18 for child soldiers must consider the impact of a number of factors on child soldiers, including the continuous trauma and the capacity to formulate *mens rea* and role of mental illness.[3]

5. The Defence concurs with Doc **1929** that, while the Trial Chamber recognized that Mr Ongwen witnessed and participated in atrocities as a child, it failed to make clear findings in respect to the harm caused from these events.[4] Similarly, it provided no analysis as to when, according to

[1] T-26, p. 35, ln. 22 to p. 36, ln. 4 and p. 37, lns 8-10.
[2] Defence Closing Brief, paras 565-693 (which includes the evidence of child soldier expert D-0133, Major (Ret) Pollar Awich; Appeal Against Convictions, paras 611-650 (Grounds 61, 62 and 63).
[3] *See*, Grover, pp. 66, 71 (noting that culpability of child soldiers is based on presumption that the child has the capacity to formulate the required *mens rea). See*, evidence of Mr Ongwen's frozen, "child-like" moral development at Defence Closing Brief, paras 565-693; Appeal Against Convictions, paras 473 and 491-492.
[4] *See*, Doc **1929**, para. 13.

the Trial Chamber, the effects of his victimhood dissipated, but for the chronological 18th birthday.[5]

ii. A narrow chronological interpretation of Article 26 fails to consider that age is not distinct from social context or legal capacity to formulate mens rea

6. The commentaries we consulted for Article 26 do not explicitly address whether and how child soldiering impacts on culpability over age 18.[6] However, Triffterer/Ambos offers general legal guidance which is applicable to formulating an approach to child soldiering.

7. For example, Triffterer/Ambos indicates that the question of age of culpability is unsettled in international criminal law, especially *vis-à-vis* national jurisdictions and hybrid courts.[7] It also notes that a link exists between age for jurisdiction and maturity. It states that "an evaluation of maturity strongly depends on the social surroundings in which the offender has grown up…."[8] As applied to Mr Ongwen, this supports an analysis of his individual circumstances starting with his abduction, contrary to the Judgment's findings.[9]

8. In addition, Triffterer/Ambos also recognizes that responsibility for persons above the age of 18 may be excluded by Article 31(1)(a), when their immaturity results from mental disease.[10]

iii. Mr Ongwen is a continuing victim

9. A number of *amici* recognize the enduring nature and longevity of the impacts, especially psychological, of child soldiering.[11] This was the evidence of Defence expert witness Retired UPDF Major Pollar Awich, in his testimony as well as in his two expert reports (for trial and for sentence).[12]

10. Doc **1936** supports the continuing status of Mr Ongwen as a child soldier. It concludes that "**Dominic Ongwen, in light of his age of abduction into the LRA, should be considered a**

[5] *See*, Doc **1929**, paras 13-15.
[6] *See* Triffterer/Ambos.
[7] *See*, discussion of SCSL at section 10, Article 26 Commentary in Triffterer/Ambos.
[8] Triffterer/Ambos, Article 16, sections 11-15.
[9] Judgment, para. 27 (exact age at time of abduction not relevant) and 2592 ("Ongwen's childhood experience in the LRA is not central to the issue").
[10] The notion that Mr Ongwen did not have the maturity to formulate the required *mens rea* (regardless of his chronological age) is implicit in the analysis that he suffered from a mental disease or defect under Article 31(1)(a). Grover similarly argues that accountability for crimes for children must be linked to a child's capacity to formulate the *mens rea*, *see*, fn. 3, *supra*.
[11] *For example, see* Docs **1929** and **1936**.
[12] Awich testimony discussed at Appeal Against Convictions, paras 611-650, with particular focus on longevity/enduring nature of child soldiering at paras 614 and 626-633, with fns to T-203. *See also*, Defence Closing Brief at paras 567, 572, 587 and 724-725; Awich Expert Report, pp. 10-11 (the report discusses mitigating factors including abduction, indoctrination, spiritualism and compulsion by Joseph Kony and coercive LRA environment; Mato Oput; and arguing why Mr Ongwen should be treated as a young adult offender, as per the Beijing Rules since he was only 6-9 years above the age of 18 at the time of the crimes for which he was convicted, p. 1900.); and Awich Sentencing Report.

child soldier to this day…respectfully disagree[ing] with the Trial Chamber's view on this point and its belief in a lack of a legal nexus between Ongwen's victimization as a child soldier and his actions as a leader in the same army…."[13] Doc **1936** also articulates a concept of juvenile justice that recognizes "profound psychological impact of trauma, but also asserts the linkages between juvenile trauma and the continuing impact of that trauma into adulthood."[14]

11. Similarly, Doc **1929** points out that the Judgment[15] does not discuss any legal principles regarding the approach to Mr Ongwen's child soldier experience.[16] It argues for the need to recognize the long-term effects of being a child soldier.[17] Relying on Article 7 of the Rome Statute and the definition of enslavement, it argues that "victims remain victimized long after the criminalized harm was inflicted."[18] The *Ongwen* case provides an opportunity for the "lasting effects" of crimes committed against Mr Ongwen as a child to be considered, "consistent with the principle of culpability."[19] The *Amicus* notes, *inter alia*, that Mr Ongwen was *made* into a child soldier.[20]

12. As Doc **1926** aptly points out, the period beginning with Mr Ongwen's abduction through his initiation, indoctrination and training in the LRA, "cannot just be wished away."[21]

13. To put it another way, Raphael Pangalangan, emphasised the continuity of the abduction and its impact on Mr Ongwen in the years of the charged period. He wrote:

> Certainly it is difficult to separate the child who suffered from soldiering from the soldier he eventually became. **Ongwen, the Brigadier General, carries with him the same traumas and values formed by Ongwen the child soldier.** The former is but the necessary product of the latter. For the Court to turn a blind eye to this reality runs the risk of failing to give life to the rights of the child the law so vehemently seeks to protect.[22]

14. This continuum of trauma post age 18 is not addressed by the Judgment in its rote and narrow application of Article 26.

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[13] Doc **1936**, para. 8. [Emphasis added.]
[14] Doc **1936**, para. 8.
[15] Doc **1929** appears to use Trial Judgment and Trial Chamber interchangeably; we are using Trial Judgment.
[16] Doc **1929**, para. 4.
[17] Doc **1929**, paras 7-15.
[18] Doc **1929**, para. 7.
[19] Doc **1929**, para. 12.
[20] Doc **1929**, para. 10.
[21] Doc **1926**, para. 19.
[22] Pangalangan, p. 629. [Emphasis added.] This point is echoed by Dr Abbo's evidence found in Appeal Against Convictions, paras 484-486 ("I would like to look at it on a timeline and not divorce Mr Ongwen from his childhood because Mr Ongwen did not fall from space as an adult…"); *also* supported by Court-appointed Expert Prof de Jong, *see*, Appeal Against Convictions, fn. 559.

15. Although there are now more studies on the longevity of the trauma of child soldiers, the first longitudinal study was conducted by Neil Boothby on child soldiers in Mozambique.[23] It is particularly relevant because it was based on information collected from former child soldiers, between 1988-2004 – almost the exact period from Mr Ongwen's abduction to the end of the charged period. Information was collected from 39 male former child soldiers. They all had been abducted from their families by RENAMO, and later were rehabilitated at the Lhanguene Rehabilitation Centre in Maputo. The study found that "none of them are truly free from their pasts. All continue to struggle with psychological distress linked to their experiences as a child soldier."[24]

iv. Legal consistency with Lubanga analysis of the lasting effects of child soldiering would help repair the damage of the Ongwen Judgment to child soldiers world-wide

16. As discussed in Doc **1936,** the *Lubanga* Trial Judgment (both the Majority and the Dissent) acknowledged that a child soldier's past and present are linked in a continuous and linear manner.[25] Both the Majority and Dissent[26] rely on the Expert Report of Dr Elizabeth Schauer who described the suffering of child soldiers from "long-term consequences" from having witnessed or experienced acts of violence.

17. The continuity of the effects of child soldiering on those who are above 18, including those who are no longer held captive, such as ex-LRA fighters, is discussed in respect to the Judgment's errors concerning D-0133, retired UPDF Major Pollar Awich, the *Ongwen* child soldier expert, who himself was a victim of child soldier abduction by the NRA in the 1980's.[27]

18. Yet, the *Ongwen* Judgment is inconsistent with *Lubanga*: even where it acknowledges that Mr Ongwen suffered as a child soldier, it – nonetheless – carves out an "Ongwen exception" to the effects on him. It concludes that Mr Ongwen did not act under duress, and Mr Ongwen was not suffering from a mental disease or defect.[28]

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[23] Boothby, pp 244-259.
[24] Boothby, p. 245.
[25] Doc **1936**, para. 10. (*noting* the fn. is to Majority Decision, paras 38-42.)
[26] *See* J. Benito's Dissent, Lubanga Majority Decision, paras 9, 10, and 20 (extensive descriptions of harm of child soldiering to abductees and their families).
[27] *See,* Appeal Against Convictions, paras 611-650, fn. 751 addresses the longevity of the effects of child soldiering, *citing* Dr Schauer's report as a Prosecution expert in *Lubanga,* and Dr Wessells' report as a Victims' Expert in *Ongwen. See,* fn. 12 *supra* for two expert reports submitted by Major (Ret) Awich.
[28] Appeal Against the Sentence, para. 5 and Judgment, paras 906-930 (descriptions of initiation and indoctrination of recruits acknowledged but not applied to Mr Ongwen), para. 2658 (Trial Chamber rejected spirituality and role of Kony as contributing to a threat to Mr Ongwen under Article 31(1)(d)).

v. Non-punishment of the Mr Ongwen as a victim

19. Doc **1929** argues for non-liability of former child soldiers based on their status as victims of modern slavery/human trafficking.[29] It asserts that the Trial Chamber erred by ignoring (a) the harm caused to Mr Ongwen as a victim of modern slavery/human trafficking and (b) how the harm affected criminal responsibility (noting that it is not discussed in the Judgment's finding at paragraphs 2580 that Article 31(1)(a) did not apply).[30]

20. The Defence generally concurs with the argument of non-punishment, and agrees that the arguments on modern slavery/human trafficking should be viewed in the context of the affirmative defences under Article 31(1)(a)[31] and (d), which were litigated at trial. Mr Ongwen was a victim of human trafficking, when he was abducted at age 8 or 9 in 1987 and his status as a child soldier victim still continues even though he is no longer in the LRA.

21. Lastly, the Defence states the obvious: had Uganda enforced the provisions of the CRC, Mr Ongwen would not have been prosecuted and convicted thirty years later.[32] Article 9 of the CRC states that 'State Parties shall ensure that a child shall not be separated from his or parents against their will…." In 1990, when Uganda ratified the CRC, its obligations under the CRC were triggered. But Uganda did nothing to protect Mr Ongwen's rights as a child,[33] which were initially violated by the 1987 abduction by the LRA, and remained in continuous violation of the CRC while Mr Ongwen was still in the LRA captivity.

vi. Conclusion

22. Although the ICC has opined on the devastating harms on child soldiers in other cases, the *Ongwen* case is unique: it is the first time a child soldier has been prosecuted, convicted and sentenced for crimes contemporaneous to the harms he was suffering as child soldier, including the continuing mental health illnesses, triggered by his abduction by the LRA.

23. *Ongwen* is a legal test ground for expanding the understanding and parameters of criminal responsibility. Potentially, the inhumane and continuing phenomenon of child soldiering can

[29] Doc **1929**, paras 16-38.
[30] Doc **1929**, para. 37.
[31] Doc **1936**, para. 5 states that Mr Ongwen "should not have been found culpable because his forcible abduction by and indoctrination resulted in a mental defect leading to incapacity under Article 31(1)(a).
[32] *See*, Grover, *supra*, p. 113 ("international criminal law characterization of child soldiers as victims…surely is also grounded, in part, at least, on the assumption that *but* for the State's failure to protect these children, as its obligation: the children would not have been in the position of committing conflict-related atrocities as members of armed groups or forces that systematically perpetrate conflicted-related international crimes.").
[33] *See*, Appeal Against Convictions, paras 604-610.

be judicially noticed to exclude culpability of child soldier victims, whose victimhood is endured throughout their lives.

B. Issue 1: Excluding criminal responsibility under Article 31(1)(a) & (d)

i. Legal interpretation of Article 31(1)(a) and (d)[34]

24. Doc **1926** argues for a finding of diminished capacity, pursuant to Article 31(3) and for the mitigating circumstance in sentencing of substantially diminished capacity, under Rule 145(2)(a)(1).[35] It is not clear whether diminished capacity is proposed *in lieu* of the defence under Article 31(1)(a) or proposed as a "lesser included" ground for excluding criminal responsibility under Article 31(1)(a), or a partial defence.[36] But, the implication of the argument is that a finding of diminished capacity is legally viable even with the Trial Chamber's rejection of Mr Ongwen's Article 31(1)(a) defence.

25. The Defence argued Article 31(1)(a) at trial and sentencing, and argued substantially diminished capacity then too. Doc **1926** raises important legal issues. The Defence, however, does not agree with Doc **1926** that the Trial Chamber conceded that Mr Ongwen's abduction and experiences as a child soldier impacted his mental capacity.[37] Although the Trial Chamber acknowledged that Mr Ongwen "suffered following his abduction…this trauma did not lead to a mental disease or disorder and had no lasting consequences…" [38] Hence, it gave no weight to this suffering in making its determination on Article 31(1)(a). The Defence submits that the Trial Chamber erroneously rejected all of the extensive evidence on the lasting impact of Mr Ongwen's childhood trauma and brutalization, and its impact on his mental capacity.[39]

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[34] The Defence discussed its legal interpretation of Article 31(1)(a) and (d) in prior pleadings. *See*, Appeal Against Convictions, paras 320-321 and 499-523 and Defence Closing Brief, at paras 529-534 and 675-679.
[35] The Defence notes that it argued both diminished capacity and duress as mitigating facts in its Defence Sentencing Brief, paras 85-117, and both factors were rejected by the Trial Chamber, Sentencing Judgment, paras 100 and 111. The Defence appealed, *see*, Appeal Against the Sentence, Ground 7: paras 151-188 and Ground 8: paras 189-204.
[36] Doc **1929**, para. 24 (Trial Chamber's finding of no mental disease or defect does not exclude a finding of diminished responsibility as a partial defence).
[37] Doc **1926**, para. 27, footnoting Sentencing Judgment, paras 72-76. *But see*, Sentencing Judgment, para. 86 (Trial Chamber finds that Mr Ongwen was not forced to commit crimes).
[38] Sentencing Judgment, para. 83.
[39] The Defence submits that Mr Ongwen could not form the *mens rea* required for the crimes for which he was convicted, and the material elements of intent and knowledge (Article 30) were not present. *See* Defence Closing Brief, paras 599-603. The Defence experts presented evidence of the mental state of Mr Ongwen and addressed issues of the cultural context of Mr Ongwen. *See*, Appeal Against Convictions, paras 381-386, 430-470; Defence Closing Brief, paras 661-666. *See also* Ovuga and Abbo, "'Orongo' and "Cen' Sprit Possession', UGA-D26-0015-0197, but the Trial Chamber chose to completely reject the evidence.

Doc 1942

26. Doc **1942** also supports the legal notion of diminished capacity. However, the *Amicus* argues that the interpretation of "destroy" in Article 31(1)(a) should be interpreted to permit the possibility of diminished capacity, which would impact mitigation and sentence reduction.[40]

Doc 1929

27. Doc **1929** argues for the interpretation of Article 31 through a prism which includes recognition of "non-punishment" (including non-liability of defendants) based on the level of harms "inflicted upon" them by others. This perspective recognizes that severe harm can result in long-term lack of capacity, and may amount to duress or create justification through continuing circumstances.[41]

28. The Defence notes that a number of points in Doc **1929,** including that threats include those "constituted by other circumstances beyond that person's control", are key to interpreting Article 31.[42] The Defence concurs that the Trial Judgment did not consider whether/how the issues of excuse and justification relate to Articles 31(1)(a) and 31(1)(d). Doc **1929** concludes that this resulted in the Trial Chamber conflating Article 31(1)(d) as relates to duress only, and Article 31(3) as a justificatory necessity.[43]

29. The Defence agrees with Doc **1929** that Mr Ongwen suffered, starting with his abduction, and this impacted on his mental health and moral perceptions throughout his life (including when he was considered an adult).[44]

30. The Defence submits that legal capacity is a central component of the Article 31(1)(a) affirmative defence, and that Mr Ongwen's diagnoses of mental illnesses support the legal criteria for Article 31(1)(a).[45] The Defence submits that the failure of the Trial Chamber to consider the impact of the abduction and conditions of life within the LRA means that it failed to consider evidence which, in fact, destroyed these capacities as a matter of law pursuant to Article 31(1)(a).

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[40] Doc **1942**, p. 4.
[41] Doc **1929**, para. 38.
[42] Doc **1929**, para. 59; *See also*, Appeal Against Convictions, para. 508.
[43] Doc **1929**, para. 61. Triffterer notes that Article 31 is "ambivalent" in respect to whether a ground for excluding criminal responsibility is a justification or excuse. Triffterer/Ambos, Article 31, Section 2.
[44] Doc **1929**, paras 13, 37, 45 and 47-48.
[45] The Defence disagrees with Doc **1929**, para. 44, which appears to be criticizing the Defence Closing Brief for its focus on mental health diagnosis and not legal criteria. The Defence submits that this is a false dichotomy: the mental health diagnoses support the legal criterion of legal capacity. This results in an incorrect conclusion at Doc **1929**, para. 52, that "treating capacity as a preliminary issue rather than a defence can contribute to resolving questions of responsibility."

31. In respect to the Article 31(1)(a) affirmative defence, the Defences agrees with Doc **1929** that the Trial Chamber failed to consider the legal criteria of the Rome Statute and how the evidence of mental disease or defect affected "capacity, duress and necessity and the intersection of all three in the context of child soldiers and those suffering the continued effects of such harms."[46]

32. The Defence agrees with Doc **1929's** criticism of the Chamber's narrow approach to sentencing, which did not give weight to Mr Ongwen's victim status.[47]

Doc 1930

33. Doc **1930** argues that the Convention on the Rights of Persons with Disabilities ('CRPD') is relevant to the interpretation of Article 31(1)(a) and (d).[48] It correctly argues that duress must be considered within the terms of the mentally disabled defendant, i.e. how s/he perceives and experiences the threat and what is necessary and reasonable as s/he understands the circumstances.[49]

34. In respect to Article 31(1)(a), Doc **1930** subsumes Article 31(1)(a) into Articles 30 and 31 (1)(c) and (d).[50] This formulation incorporates a defendant's subjective experience of "distress or unusual perceptions" and its effect on intent and knowledge under the element of *mens rea* in Article 30.[51] The Defence agrees that Mr Ongwen's distress or unusual perceptions are part of the *mens rea* analysis, but disagrees with Doc **1930**'s position that effectively deletes the Article 31(1)(a) affirmative defence from the Rome Statute.[52]

35. CRPD is a treaty within the sphere of the disabled person's civil rights and liberties.[53] In this context, it provides authority, for example, for reasonable accommodation of a disability. In the case of Mr Ongwen, the Defence submits that a *prima facie* showing of mental illness should have been sufficient to trigger the ICC's obligations under the CRPD. For example, there was

[46] Doc **1929**, para. 45.
[47] Doc **1929**, paras 62-65. *See also*, Defence Sentencing Brief, para. 225.
[48] Doc **1930**, para. 15.
[49] Doc **1930**, paras 47, 48 and 53.
[50] Doc **1930**, para. 54.
[51] Doc **1930**, para. 44.
[52] Doc **1930**, para. 54. The analysis also confuses *mens rea*, which is an element with affirmative defences. At para. 54, the implication is that the Trial Chamber found distress and unusual perceptions as a possible symptom of mental disease of defect. This is not accurate. The Trial Chamber denied any relevance of Mr Ongwen's experience of distress as an abductee, and this included denying its impact on his mental illnesses. *See*, Judgment, para. 2592 (the Chamber explicitly negated his childhood experiences in the LRA as relevant in its assessment of Mr Ongwen's conduct in later life).
[53] *For example*, its specific provisions articulate equality before the law and equal access to judicial remedies and within judicial structures. *See* CRDP, Preamble and Articles 1, 4, 5 and 12-14.

evidence from the beginning of Mr Ongwen's detention in 2016 that he was being treated for mental disorders.[54]

36. But the Defence goes one step further: the CRPD also provides a basis for the ICC to adopt a presumption of mental disability not only for the victims, but also for the defendants. First, all of the "situations" in ICC cases are conflict situations (either pre-, current or post conflict). Within these "situations," such as Uganda in the *Ongwen* case, there was credible expert evidence that Mr Ongwen, like others, suffered from "mass trauma."[55] This is underscored by psychological damage to Mr Ongwen (and others) who was abducted by the LRA, and *made* into a child soldier.[56] As Doc **1942** states, "Based purely on statistics, it is very unlikely that accused did **not** suffer from any mental disorder." [57]

37. Second, as illustrated by the *Ongwen* case, both Mr Ongwen and the victims come from the same community or area in Northern Uganda. Hence, both experienced the same "mass trauma."[58]

Doc 1932

38. Doc **1932** argues for a legal interpretation of Article 31(1)(d) through a gender analysis, in order to avoid any adverse gender discrimination.[59] Although the components of what constitutes a gender analysis are not defined, it argues that the defence of duress for SGBC crimes was inapplicable because (1) Mr Ongwen was a "male living in a patriarchal society and held the position as a Brigade Commander after rising through the ranks," and (2) he "created an environment where SGBC were sustained and/or normalized."[60]

39. The Defence disagrees with the analysis: it superimposes a gender lens which does not fit the factual evidence. First, the *Amicus*'s conclusions on Mr Ongwen, and his ability to control or

[54] The Court-appointed Medical Expert, Prof Joop de Jong, listed medications that Mr Ongwen was taking in December 2016 (*see* de Jong Expert Report, UGA-D26-0015-0046-R01, p. 0049). The Defence notes that two of the medications are used to treat the mental diseases of depression and obsessive-compulsive disorder. The Defence Experts diagnosed severe depressive illness in their first expert report, Defence Expert Report #1, UGA-D26-0015-0004, p. 0017. Prof de Jong diagnosed major depressive disorder in the de Jong Expert Report, p. 0051. In the Defence Expert Report #2, the Defence Experts diagnosed symptoms of OCD, at UGA-D26-0015-0948, p. 0968.
[55] Musisi Expert Report references to mass trauma of the Acholi people at pp. 7 and 24-25 and PTSD, at pp 26-31. *See also*, Musisi and Kinyanda.
[56] Doc **1929**, para. 10.
[57] Doc **1942**. Section 2.1, p 6. [Emphasis in original.]
[58] In the *Ongwen* case, some Prosecution witnesses who were testifying about events in 2002-05 were accompanied by trauma experts when they testified years later, yet the Judgment rejected Mr Ongwen's traumatic experiences as having impact on him throughout his life. *For example see* email from VWU to Defence and Trial Chamber IX, *Outcome Vulnerability Assessment UGA-OTP-P-0252*, received on 15 June 2017 at 13h07 CET.
[59] Doc **1932**, para. 5.
[60] Doc **1932**, paras 17-18.

create the environment are totally in contradiction to the evidence.[61] Specifically in respect to SGBC, the Defence has argued and presented evidence that Mr Ongwen had no authority within the so-called "command structure" of the LRA, and he was the object of surveillance initiated by Joseph Kony.[62] Further, it erroneously states that the Defence's reliance on "a general coercive environment is misplaced given that it is unsupported by law and jurisprudence."[63] In fact, the Judgment, itself, clearly acknowledged the brutality/discipline regime of the lives of LRA abductees.[64]

40. In terms of the interpretation of Article 31(1)(d), the *Amicus* purports to agree with the Judgment at paragraphs 2581 and 2582, but – in fact – misreads the Judgment's position. At paragraph 2582, the Judgment indicates that "imminent" and "continuing" in the plain language of the Statute, refer to the harm, not to the threat.[65] While technically the Judgment's reading may be correct, the fact that Doc **1932,** which essentially bolsters the Judgment's conclusions and findings, is confused indicates that the notions of threat and harm (resulting from the threat) can be viewed as interconnected.[66] The Defence suggests that the notions of threat and harm (resulting from the threat) have to be interpreted less rigidly than the Trial Chamber interprets them.

Doc 1936

41. The Defence concurs with the position in Doc **1936** that the definition of "mental disease" and "defect" in Article 31(1)(a) should be interpreted broadly, with attention to the particular circumstances of the Accused.[67] As applied to child soldiers, and to Mr Ongwen, the *Amicus* supports that the standard for mental capacity should be a "reasonable child soldier" standard – as opposed to a "reasonable man (or woman) standard;" it argues that this standard is mandated by the extent to which coercive indoctrination is present in this case.[68] Noting the *amicus*'s discussion on child soldiers and the importance of taking into account Mr Ongwen's abduction and experiences in the LRA, this proposed standard is both logical and, in the view of the

[61] *See*, Appeal Against Convictions, paras 536-541 and 918-934.
[62] *See*, Defence Closing Brief, paras 685-686, 716-718 and fn. 956 and Appeal Against Convictions, paras 512 and 556. *See also*, UGA-OTP-0255-0943, "Internal Wrangles within the LRA," confirming surveillance on Major Odomi, at p. 3.
[63] Doc **1932**, para. 11.
[64] Judgment, paras 131-132, 916, 950, 957, 2590 ("it is an established fact that the mechanisms used in the LRA to ensure obedience in its ranks, discussed in detail above, (fn. 6929), were characterized by their brutality") and 2856.
[65] Doc **1932**, para. 11.
[66] Appeal Against Convictions, para. 501 states that "provisions of Article 31(1)(d) must be read as a whole, and be put into a proper context." Doc **1943**, para. 7, notes that there is not a "neat" division between threat and harm.
[67] Doc **1936**, para. 15.
[68] Doc **1936**, paras 37-38.

Defence, a solid approach to individualizing the circumstances of Mr Ongwen – something the Trial Chamber did not do.

42. Doc **1936**, in proposing this framework, draws on the elements of a) indoctrination, b) spiritual cosmologies, c) neuroscience and mental development, d) temporal continuities of childhood trauma, and e) examination of impact on the "reasonable child soldier."[69]

43. Doc **1936** squarely places the responsibility for the destruction of Mr Ongwen's capacity to develop an understanding of morality "within a standard of mature 'reasonableness'" on the leadership of the LRA.[70] His loss of capacity to make moral decisions in his childhood development resulted in a mental defect as an adult.[71] The Defence concurs with this point.[72]

44. Lastly, **Doc 1936** discusses indoctrination at paras 24-26, pointing out that it is a continuing process to assert and deepen control over the person.[73]

ii. Evidentiary assessment of issues regarding mental disease or defect[74]

Doc 1926

45. Doc **1926**[75] reviewed the evidence of all the Experts who testified, and concluded that the Trial Chamber's total rejection of the Defence Experts and their detailed, consistent testimony as not credible "seems harsh." The Defence agrees, and has argued that the Defence Experts' evidence raised reasonable doubt as to the evidence relied on by Trial Chamber from the Prosecution Experts to find no mental disease or defect.[76] Further, Doc **1926** endorses the view that traumatic events are more damaging to children than adults, leading to mental disorders and deteriorated abilities.[77]

[69] Doc **1936**, para. 23.
[70] Doc **1936**, para. 16.
[71] Doc **1936**, para. 43.
[72] *See*, Appeal Against the Sentence, paras 473, 491-492 and 497-498; Defence Closing Brief, paras 13, 551-552, 570-577 and 565-585.
[73] Doc **1936**, para. 26. *See also*, Herman, UGA-D26-0015-1395 (discussing impact of repeated trauma on victims, where the final step in "breaking" the victim is forcing her to betray her most basic attachments, by witnessing or participating in crimes against others). This was a tactic routinely employed by Joseph Kony with new abductees in the LRA.
[74] The analysis in some briefs discusses the three aspects of Issue #1 together, hence, there is some overlap.
[75] *See*, Doc **1926**, paras 20-24.
[76] *See*, Judgment, paras 226-231 and 2450-2457 and Appeal Against Convictions, paras 208-215 (arguing that the Trial Chamber's failure to apply Articles 66(2) and (3) of the statute to the affirmative defences prejudiced the Appellant and materially affected the Judgment), paras 320-419 (Grounds 27, 29, 31, 32 and 35-41). The Chamber erred by rejecting the Appellant's Article 31(1)(a) affirmative defence.
[77] Doc **1926**, para. 3 (quoting from Request for Leave from Dr Ronald Johannes Petrus Rijinders).

Doc 1942

46. A number of evidentiary issues raised in Docs **1942** and **1936** address the impact of culture, which we will address below.[78]

47. Doc **1942** puts the impact of culture (both of the psychiatrist and of the patient) as front and centre to evaluation and diagnosis.[79] In respect to the Prosecution Experts, Dr Mezey (Dr M) and Prof Weierstall-Pust (Prof W-P), neither share Mr Ongwen's cultural background. Dr Abbo generally shares his background, as does both Defence Experts, but especially Dr Akena, who came from the same area as Mr Ongwen. He testified:

> I have lived in some of those places…But I also looked at the client and his age, and I looked backed at that time and I, like, oh my goodness, this could have actually been me.[80]

48. The Judgment misrepresented Dr Akena's evidence. The quote, at paragraph 2461, is incomplete and taken out of context. Paragraph 2461 states, "Dr Akena also stated that the core symptoms of mental illnesses are similar across cultures."[81] However, this one sentence is part of an almost two-page answer.[82] His evidence emphasizes that diagnosis of mental illness does not rely only on "core symptoms" but on other factors, including cultural factors.

> Q . . . The question is whether – looking at page 24 and 25 here, whether he agrees or not that core symptoms of PTSD manifest themselves more or less similarly across culture.
>
> […]
>
> A. Yes, to the manifestation of mental illnesses, the core similarities – sorry, the core symptoms, yes, would be similar across cultures, but the diagnosis of mental illness doesn't rely squarely on – on the core symptoms. They rely on other perhaps – well, let me not call them non-core symptoms, but they rely on a number of things. […][83] Some questions don't – are difficult to assess. I'll give an example. There's a famous screening instrument for depression called CESD which is used for screening depression in general populations. I think question number 3 of the CESD asks something like have you been feeling blue, talks about blues. Many African languages cannot translate the word "blues", so if you ask somebody that question in Africa and everywhere – I mean, and some other places, they don't understand what that means. So how do you ask that question our setting? That's just one of the examples of how

[78] *See*, discussion of Judgment errors regarding cultural issues in Appeal Against Convictions, paras 381-386 and 430-470. *See also*, Defence Closing Brief, paras 661-666 and Defence Rejoinder Report, UGA-D26-0015-1574, p. 1577, which discusses points on culture in the Rebuttal Report.
[79] Doc **1942**, p. 5, para. 3 (important to consider "social context of patient with ample room for potential focuses and biases," and p. 5, para. 4 ("psychiatric assessment is a transcultural assessment since the cultural context of western based psychiatry and the cultural background of the psychiatrists involved in the assessment of Mr Ongwen are different from the cultural background of Mr Ongwen.").
[80] *See*, Defence Closing Brief, para. 605 and T-248-Red, p. 42, ln. 8 to p. 43, ln. 2.
[81] Judgment, para. 2461 and fn. 6694 (T-248, p. 46, lns 9-11).
[82] T-248-Red, p. 46, ln. 1 to p. 47, ln. 23.
[83] Discussion on how variations are developed.

> context matters. […] So it is those little differences that makes these variations that we see happens. [84]

49. The Defence suggests that Doc **1942** arrived at an incorrect conclusion that the Defence Experts lacked transcultural expertise,[85] based on the Judgment's misrepresentation. The Defence asks the *amicus* to re-consider his position *vis-à-vis* the Defence Experts, and his conclusion that a new assessment of Mr Ongwen is required.[86]

50. The Defence agrees with Doc **1942** on number of points: (i) "that observations made by lay persons is preferred by the Trial Chamber over the diagnosis made by professional psychiatrists is astounding…"[87]; (ii) "Based purely on statistics it is very unlikely that the accused did **not** suffer from any mental disorder. Nine out of ten former child soldiers in Uganda suffer from depressed mood in adulthood. And that is just one of several possible mental health consequences…;[88] (iii) that mental illness and functionality can co-exist,[89] noting that it is "quite offensive and stigmatizing to state that people with mental disorders are incapable of working or incapable of planning complex operations: most people with mental disorders are still working;[90] (iv) that, professional guidelines in many countries, forbid a psychiatrist who has not examined the patient to present diagnostic remarks;[91] and (v) that Mr Ongwen, given his abduction and separation from his parents, and the extremely violent [LRA] environment which "normalized war" is "highly likely leading to a developmental defect or personality derailment."[92]

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[84] T-248-Red, p. 46, ln. 2 to p. 47, ln. 18.
[85] Doc **1942**, pp 7-8, Section 2.3. Both Defence Experts testified as to the important impact of culture on mental health. *See*, Defence Closing Brief, paras 607, 662-664 and 666. In addition, Prosecution Expert Dr Abbo (P-0445) stressed the importance of transcultural psychiatry (*see* T-168, p 27, ln.8 to p 20, ln. 14) and the impact of cultural and religious beliefs of *orongo* and *cen* on mental health of children abducted into the LRA (T-167, p 64, ln. 25 to p 67, ln. 4).
[86] Doc **1942**, p. 10, Section 3.4. The situation of *Al Hassan* is particularly instructive here.
[87] Doc **1942**, p. 6, Section 2.1.
[88] Doc **1942**, p. 6, Section 2.1. [Emphasis in original] The Defence shares this position. *See*, Defence Closing Brief, para. 539 (referencing Dr Musisi's Expert Report) and Appeal Against Convictions, paras 435-441 (mass trauma and the Judgment's "Ongwen exception"). *See also*, Musisi and Kinyanda and Musisi Expert Report, UGA-PCV-0003-0046, references to mass trauma of the Acholi people, at pp 7, 24, 25 and 26-31 (PTSD).
[89] Doc **1926**, p.7, Section 2.2 quoting Prof Ovuga's response that presence of a mental disorder is not contradicted by careful planning.
[90] Doc **1942**, p. 7, Section 2.2; Doc **1943**, para. 11 (observation that mental disorder is 'incompatible' with military planning appears doubtful). However, the Defence disagrees with the conclusion in para. 11 which argues that careful planning of campaigns may indicate the capacity to appreciate the nature of one's conduct. The Defence's view is that the relevant capacities under Article 31(1)(a) cannot be separated from the mental disease or defect.
[91] Doc **1942**, p. 8, Section 2.5; *see*, Judgment, para. 2535 ("heavy reliance on clinical interview" by Defence experts is criticized).
[92] Doc **1942**, p. 8, Section 2.4.

1. Relevance of the Al Hassan case

51. Two of the Prosecution Experts in *Ongwen*, Dr M and Prof W-P were also appointed by the Court in the *Al Hassan* case to conduct a Rule 135 examination of Mr Al Hassan to assess his competency to stand trial. The third expert, Dr Korzinski, was supported by the Trial Chamber and Registry because of his expertise in developing culturally sensitive methods in assessing complex trauma.[93]

52. What is striking about *Al Hassan* is Dr M's and Prof W-P's 180-degree turnaround on the same issues which were used by the *Ongwen* Chamber to reject the Article 31(1)(a) defences in *Ongwen.*[94]

    a. In *Al Hassan*, the Experts endorsed the practice of open-ended questions for victims of torture.[95] But, in *Ongwen*, the Judgment relied, at paragraph 3532, on Prof W-P's methodology critique (in his Rebuttal Report) of open-ended questions to disregard the evidence of the Defence Experts.[96]

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[93] *Al Hassan* Decision, paras 9 and 32.

[94] See, *Al Hassan* Report, *especially noting* Prof W-P, who concluded that Al Hassan had a complex trauma-disorder taking into account cultural and biographical (individual) background. In the same Report, Dr M found no sign of mental disorder, p. 4.

[95] *Al Hassan* Report, para. 202.

[96] Judgment, paras 2532-2535. The Judgment relied particularly on Prof W-P's Rebuttal Report, to reject the Defence Experts' evidence, based on their methodology. *See*, Judgment, paras 2532-2535; *also see* Appeal Against Convictions, paras 342-350; fn. 384 references transcripts where Defence Experts explain their methodology; Defence Closing Brief, paras 651-660. The Judgment, based on Prof W-P, found that the Defence Experts used an "outmoded" system of classifications, i.e., DSM IV instead of DSM V. As argued in the Appeal Against Convictions, paras 345-350, the Judgment misrepresented the evidence.
But, in addition, Prof W-P, the source of the Judgment's information, does not have "clean hands." Prof W-P was one of the authors of a professional study discussed in an article entitled, "The cycle of violence as a function of PTSD and appetitive aggression: A longitudinal study with Burundian soldiers," which was received by Wiley's journal, *Aggressive Behavior*, in August 2019 and published in April 2020 in Vol. 46 at pp 391-399.
This study used DSM-IV, although DSM-V had been approved for publication at the time of the study by the APA Board of Trustees (in December 2012), after a recommendation from the Assembly in November 2012. Initial data on 488 male Burundian soldiers was collected in November 2012-January 2013, simultaneous to the APA'S Assembly approval. Data on a second group of 468 soldiers was collected between March and July 2014, which was clearly within the time frame of DSM-5, which had been published in 2013. Prof W-P submitted his Rebuttal Report when he testified 25-26 November 2019 in *Ongwen* rebuttal case, while the article was being considered for publication.
The study, at Section 2.3.1, states that "DSM-IV was chosen as DSM-V had not been validated at the time of the first data collection." The procedural history above suggests a different timeline. However, Prof W-P never disclosed in his Rebuttal Report or in testimony any of this information regarding his own involvement with DSM IV and DSM V, which was clearly a key point in the Prosecution case and the Trial Chamber's findings.
In addition, his representation of the DSM-5 is not accurate: in his Rebuttal Report, UGA-OTP-0287-0072, p. 0078, he states that the Defence Experts' in Second Psychiatric Report (SPR) "multi-axial diagnosis is part of out-dated DSM IV." First, the "multi-axial format" in SPR is used for format, not content (all diagnoses are based on DSM-5 diagnostic criteria – *see*, SPR at -0971). Second, the DSM-5's Introduction, Section 1, p. 16 states that the revision in DSM-5 is consistent with text in DSM-IV.
This information, had it been disclosed by Prof W-P to the Court, provides reasonable doubt as to the reliability and credibility of the Judgment's findings, based on Prof W-P's critique and Rebuttal Report, rejecting the Defence Experts' methodology.

b. In *Al Hassan*, Dr M and Prof W-P recognized the long-term effects of PTSD as well as the impact of adverse childhood experiences on trauma.[97] In *Ongwen*, both Dr M and Prof W-P ruled out PTSD in the case of Mr Ongwen.[98] The Trial Chamber denied the relevance of Mr Ongwen's abduction, and rejected its negative, lasting effects on Mr Ongwen.[99]

c. In *Al Hassan*, Dr M and Prof W-P demonstrated a flexibility toward standardized testing based on the specific circumstances and culture of the defendant.[100] This was accompanied by a view that mental health conditions can change.[101] Yet, in *Ongwen*, the Trial Chamber, relying on Prof W-P's critique of the Defence experts' methodology, used this as a basis to find their evidence unreliable.[102]

d. *Al Hassan*'s report (like *Ongwen*'s) was based on self-reporting, and the issue of malingering was addressed in only one paragraph, paragraph 129, which concluded that he was not feigning distress or malingering.[103] In *Ongwen*, malingering was a key critique of Dr M and Prof W-P of the methodology of the Defence Experts (although neither Dr M nor Prof W-P had examined the client).[104]

e. In *Al Hassan*, Dr M and Prof W-P displayed a professional attitude toward other experts involved in the case.[105] The methodology and reliability of their reports were not criticized. In *Ongwen*, there was no recognition of the Defence Experts' decades of experience as psychiatrists[106] and there was a fundamental critique of the methodology.[107]

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[97] *Al Hassan* Report, paras 69-70 and 206 (report recognizes that Al Hassan may have suffered from PTSD in the past or is at risk for future PTSD).
[98] *Al Hassan* Report, paras 203, 289, 290 and 321-324. *Compare* to Mezey Report, UGA-OTP-0280-0786, paras 62 and 89-92 and Weierstall-Pust Report, UGA-OTP-0280-0674, pp 16, 18 and 27-28. *See*, Defence Closing Brief, paras 586-591.
[99] Judgment, para. 2592. *See*, Appeal Against Convictions, para. 613 and fn. 751.
[100] *Al Hassan* Report, para. 203 ("there are recognized limitations in a purely categorical approach…the complexity of the human condition does not slot itself neatly into diagnostic categories…"). *See also*, Ardila, Alfredo, "Cultural Values Underlying Psychometric Cognitive Testing, "*Neuropsychology Review*, Vol. 15, no. 4, December 2005 at p. 192 (psychometric cognitive testing is only appropriate in those societies with a solid psychometric tradition, basically, Western Societies); Aggarwal, Neil Krishnan, "Culture, Communication, and DSM-5 Diagnostic Reliability," *Journal of the National Medical Association*, Vol No. 2017 (discussing the role of cultural and racial factors in making diagnoses, and the need for DSM-5 field studies to address actual experiences of care of different populations who are part of the field studies).
[101] *Al Hassan* Report, para. 238 ("Fitness [to stand trial] is not a static state but is a dynamic variable which may change according to circumstances…").
[102] Judgment, paras 2532-35. *See*, Appeal Against Convictions, paras 343-353 and Defence Closing Brief, paras 651-653.
[103] *Al Hassan* Report, paras 66 and 129.
[104] Judgment, paras 2558-68. *See* Appeal Against Convictions, paras 393-409 and Defence Closing Brief, paras 667-673.
[105] *Al Hassan* Report, paras 4, 230 and 288.
[106] *See*, CV of Dr Emilo Ovuga (UGA-D26-0015-0856) and CV of Professor Akena (UGA-D26-0015-0849).
[107] Judgment, paras 2528-2574. *See*, Appeal Against Convictions, paras 323-419 and Defence Closing Brief, paras 604-674.

f. In *Al Hassan*, Dr M and Prof W-P considered the cultural context in the PTSD diagnosis of Al Hassan, and had a less rigid approach to indices of trauma.[108] In *Ongwen*, both Experts disregarded the impact of cultural factors on mental health issues.[109]

2. Culture and spiritualism

53. Doc **1936** asserts that the perversion of spiritualism in the LRA impacted on Mr Ongwen's mental and moral development, and is relevant to the question of his mental capacity under Article 31(1)(a).[110] The *Amicus* describes the LRA environment in which Mr Ongwen grew up as a "coercive environment of trauma and weaponized spiritual indoctrination."[111]

54. Doc **1943** argues that the determination of duress should include Mr Ongwen's subjective view of the threats from Joseph Kony, and that these threats appeared "real enough" – assuming a credible case is made that his peers were also influenced by such beliefs.[112]

55. The Defence agrees.[113] The Judgment found credible evidence of Kony's spiritual powers and control,[114] but it erred by concluding that this did not apply to Mr Ongwen.[115] It gave no weight to the expert report on spiritualism in the LRA, submitted by Defence Expert Professor Kristof Titeca.[116] Nowhere in the Judgment does the Trial Chamber rely on the evidence of Professor Titeca (D-0060) for any findings.[117]

56. Doc **1926** also recognizes the spiritual impact of Kony on Mr Ongwen, and pointed out that Mr Ongwen did not choose his life in the LRA – but was enslaved into it.[118] The Trial Chamber, however, failed to take these circumstances into account.

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[108] Importantly, the findings in *Al Hassan* on PTSD are under Section 7.2.3 "Cultural Considerations and Limitations of the *Al Hassan* Report surrounding the Diagnosis of PTSD" at p. 29. At para. 206, DR M and Prof W-P disagreed about the implications of late onset PTSD, but the report is careful to recognize that he may have suffered from PTSD in the past or is at risk for future PTSD.
[109] Appeal Against Convictions, paras 451-458. *But see*, Judgment, paras 2458-2463.
[110] Doc **1936**, para. 38.
[111] Doc **1936**, para. 38.
[112] Doc **1943**, paras 6-7.
[113] For misuse of spiritualism by Kony, and its impact on Mr Ongwen and others, s*ee*, Defence Closing Brief, paras 24-29, 476-477, 484-485, 617, 692 and 713 and Appeal Against Convictions, paras 512, 522, 581, 585-589, 591, 599, 600, 727 and 994.
[114] Judgment, paras 282 and 286, as well as some of the evidence in paras 2643-2658.
[115] Judgment, para. 2658 (no evidence that belief in Kony's spiritual powers played a role for Ongwen, and LRA spirituality did not contribute to a "threat" under Article 31(1)(d)).
[116] *See* Titeca Expert Report, UGA-D26-0018-3901. *See also*, T-197.
[117] Judgment, paras 596-597.
[118] Doc **1926**, para. 19.

iii. Burden of proof for excluding criminal responsibility and standard of proof for assessing mental disease or defect or duress

57. The Defence proposed that for affirmative defences, the Prosecution must disprove each element of the defence beyond a reasonable doubt. The Accused need only raise some evidence of the defence; at this point, the Prosecution bears the burden to refute it beyond a reasonable doubt.[119]

58. The Defence asserts that the Judgment articulated the correct burden and standard of proof to assess affirmative defences under Article 31(1)(a) and (d), but erred by failing to apply it.[120] However, the Trial Chamber erred by deferring its response on the burden and standard to the Judgment.[121]

59. Doc **1926** concurs with Doc **1940** that where a defence is pleaded under Article 31(1)(a), the defendant discharges his burden, if the evidence adduced raises a reasonable doubt re his mental capacity. The Prosecution maintains the burden to prove its case beyond a reasonable doubt.[122] Similarly, Doc **1931** supports that when the Defence raises "some evidence" [of an affirmative defence], the Prosecution has "the burden of proving beyond a reasonable doubt that the defence does not exist."[123]

Doc 1937

60. The Defence agrees with the Doc **1937** that: a) defences under 31(1)(a) and 31(1)(d) are complete defences, and may also be used in mitigation of sentence; and b) the legal issue of impairment of mental capacity must be based on the opinions of medical experts and is an issue of fairness.[124]

61. The Defence disagrees that: a) affirmative defences must be established by a preponderance of the evidence, and b) the Defence has to prove the defences.[125] The "preponderance of evidence" standard eviscerates the Prosecution's burden of proof beyond a reasonable doubt, and shifts the onus to the Accused, in violation of Article 67(1)(i).

[119] Defence Filing 1423, paras 2 and 14.
[120] Judgment, para. 231 (places burden of proof on the Prosecution). *See also*, Appeal Against Convictions, paras 198-219 and 320-322 and Defence Closing Brief, paras 91-96, 107, 529-534 and 660.
[121] Appeal Against Convictions, paras 208-219.
[122] Doc **1926**, para. 3.
[123] Doc **1931**, paras 14 and 16-18.
[124] Doc **1937**, paras 4 and 14-17.
[125] Doc **1937**, paras 4 and 13.

Doc 1940

62. The Defence agrees with the "Evidentiary Production Approach ('EPA')," [126] and recognizes it as the approach the Defence proposed and litigated in its pleadings. [127] The EPA is described as part of a strict interpretation of the presumption of innocence. [128] The EPA provides guidance on the application of Articles 31(1), 66 and 67(1)(i) and Rule 79 (1)(b).

63. Doc **1940** presents arguments: (a) for human rights norms, by discussing the combined effect of Articles 66(2) and (3) and 67(1)(i) and (b) to refute the "preponderance of the standard" in Doc **1937.** The argument is that Article 67(1)(i), which was not in the ICTY Statute, indicates that the Rome Statue "intentionally took a different approach to the burden of proof applied at the ICTY…." The *Amicus* concludes that Articles 66(2) and 67(1)(i) render the ICTY approach incompatible with the ICC context. [129]

64. The Defence agrees that the Trial Chamber used the Free Assessment Approach to determine whether there was a mental disease or defect. However, the Defence disagrees with Doc **1940'**s conclusion that "the outcome of the case would not be different had the Trial Chamber explicitly applied the Evidentiary Production Approach that PILPG proposes." [130] The Defence suggests that Doc **1940** accepted the findings and conclusions in the Judgment as based on the evidence, and did not independently review the evidence in the Judgment to determine if the Defence had raised "some evidence" of mental disease and defect, or of duress. [131] The Defence also disagrees that the Court gave "clear reasons" why the Defence Experts' evidence was unreliable. [132]

[126] Doc **1940**, para. 3.
[127] *See*, Defence Filing 1423 and Defence Filing 1466.
[128] Doc **1940**, para. 26.
[129] In addition, the ICTR Statute does not have a provision of Article 67(1)(i) in Article 20, Rights of the Accused. The *amicus* discusses why the ICTY approach in *Celebici* is incompatible in the ICC context in respect to the Burden Shifting Approach, at paras 23-27.
[130] Doc **1940**, para. 29.
[131] One of the evidentiary errors in Doc **1940**, fn. 61 is: contrary to fn. 61, the Judgment specifically did not "defer heavily" to the evidence of the court-appointed psychiatrist. *See*, Appeal Against Convictions, Ground 42, paras 270-276 for arguments that the Judgment disregarded Prof de Jong's evidence. Similarly, as to duress, the Defence has contested the evidentiary findings discussed in fn. 62 at Appeal Against Convictions, paras 307-319. *See also* Appeal Against Convictions, paras 499-603 (errors related to duress and evidence).
[132] Doc **1940**, para. 29. *See*, Appeal Against Convictions, paras 323-419, 522, 571 and 590 and Defence Closing Brief, paras 535-674.

Doc 1943

65. The Defence agrees with the *Amicus* that in respect to affirmative defences, the Defence discharges its evidentiary burden of production as soon as it presents reasonable doubt.[133] The standard for establishing reasonable doubt is lower than proof on the balance of probabilities.[134] It is comparable, as Doc **1943** points out, to "the existence of *some* grounds on whose basis incriminating evidence can be doubted.[135] The Defence maintains that this evidentiary burden was met through the testimony and documentary evidence of the Defence Experts and, consequently, it was incumbent upon the Prosecution to disprove each element of each affirmative defence.

66. The Defence concurs with Doc **1943** regarding the application of *favor rei*, or *in dubio reo* (when applied to appraisal of evidence) to statutory interpretation (Article 22(2)) and the assessment of evidence of proof for Article 31(1)(d).[136]

C. Issue 2: Sexual and Gender-Based Crimes

i. Forced pregnancy

Doc 1932

67. The Defence agrees with the standard applicable to assessing evidence of sexual violence proposed by Doc **1932**. In particular, the Defence agrees with the opinion that sexual violence evidence should be assessed within the temporal and geographical scope of the charges and the wider campaign to prevent prejudicial evaluation.[137]

[133] *See*, Doc **1943**, paras 4 and 13-14. The Defence notes that the language used in Doc **1943** may differ and sometimes appears inconsistent, but that the thrust of its position is that the Defence has no burden of proof but must present "some evidence" of the affirmative defence. One additional note – it is unclear what is meant in para. 1 ("common law systems appear to presume the absence of affirmative defenses"). Doc **1943** is likely referring to the criminal law concept that the Prosecution does not have to disprove all possible affirmative defences unless and until a defence is raised by some evidence. At that point, though, Doc **1943** is clear that the burden of proof is on the Prosecution to disprove the affirmative defence beyond reasonable doubt.
[134] Doc **1943**, para. 4.
[135] Doc **1943**, para. 14.
[136] Doc **1943**, para. 8 (arguing against a literal interpretation of 31(1)(d)). The Defence emphasizes that in respect to threats, there is evidence that they materialized against LRA abductees. Appeal Against Convictions, paras 440, 534 (fn. 609), 540-557, 559 (fn. 641), 576-579, 590-603 and 681-688 and Defence Closing Brief, paras 474-479, 680-701, and 714-722.
[137] Doc **1932**, paras B 20 (1-6).

Docs 1933, 1938 and 1941

68. The Trial Chamber decided that "[t]he crime of forced pregnancy is grounded in the woman's right to personal and reproductive autonomy and the right to family."[138] The definitions in Docs **1933**, **1938** and **1941** appear to concur with the Trial Chamber.[139]

69. Nevertheless, Doc **1938** and Doc **1933** appear equivocal. Doc **1938** concludes that the range of harms may best be captured under a broader charge such as enslavement, which has been entwined with the crime of forced pregnancy since its inception.[140] The opinion of Doc **1933** is qualified by the criticism of the Chamber's restrictive definition of "grave violations of international law" to crimes which are criminalised in the Statute and the Chamber's failure to extend the definition to violations of international human rights law.[141]

70. Doc **1933** failed to acknowledge the fact that many of the crimes in the Rome Statute are also human rights violations under the international human rights regime. For this reason, a woman's reproductive autonomy and right to family is fully guaranteed.

71. Doc **1938** supports the decision by Pre-Trial Chamber II that the final sentence in Article 7(2)(f) does not create a new element to the offence.[142] However, this *Amicus* submits that national laws may be relevant to the determination of cases on forced pregnancy before the ICC.[143]

72. Doc **1933** submits that the interpretation of forced pregnancy should be informed by the recognition of, and protection of reproductive autonomy in international law,[144] and that the Chamber can establish elements of international crime.[145] The *Amicus* points to no provision of the Statute conferring on the Chamber the authority to establish elements of international crimes.

73. The Defence agrees with Doc **1941** that the crime of forced pregnancy applies only if it occurs within the context of a widespread or systematic attack or armed conflict.[146] Doc **1938** echoes

[138] Judgment, para. 2717 (the Defence at para. 961 of the Appeal Against Convictions argued that this definition brings forced pregnancy into a divisive political and ideological debate).
[139] Doc **1933**, paras 3 and 9; Doc **1938**, para. 3; and Doc **1941**, paras 16, 18 and 19.
[140] Doc **1938**, para. 39.
[141] Doc **1933**, paras 4, 9, 18 and 20.
[142] Doc **1938**, para. 18.
[143] Doc **1938**, para. 15. "Crucially, however, the last sentence of Art. 7(2)(f) RS does not affect in any way the Court's ability to admit into evidence, consider and make findings on the role that national laws relating to pregnancy may have played in the commission of the crime…Nor can it be interpreted to provide any protection to those who perpetrate forced pregnancy pursuant to national laws."
[144] Doc **1933**, paras 9-19.
[145] Doc **1933**, para. 20.
[146] Doc **1941**, para. 20.

a similar opinion, recounting elements of the crime of forced pregnancy.[147] The Defence submits that the Chamber did not provide a reasoned statement on the elements identified by the *Amici*.[148]

Docs 1939 and 1938

74. Doc **1939** submits that forced marriage, forced pregnancy and sexual slavery are specific forms of "Sexual and Gender Based Crimes".[149] The Defence recalls that forced marriage, forced pregnancy and sexual slavery were confirmed on the same facts. The Defence objected to this legal characterisation of facts.[150] The Defence also objected to the legal characterisation of forced marriage as a cognisable offence under the statute.[151]

75. The Defence disagrees with the Doc **1939** submission on page 4, Section A(a)(i)-(iii) on the definition of forced marriage.[152]

76. However, the Defence concurs with the submission of the Doc **1939** on forced pregnancy on page 5, Section A(b)(i)-(iv) of the *Amicus* brief.[153]

77. The Chamber relied on the evidence outside the temporal scope of the charges for patterns of sexual violence in the charges of forced pregnancy. The Chamber did not use the evidence for vital context as the Prosecution requested.[154]

78. However, the patterns occurred beyond the temporal jurisdiction of the case when Mr Ongwen was already subject to ICC warrant of arrest in July 2005.[155] The act of sexual violence against P-0101 occurred in 1995 when she was 15 years old and when Mr Ongwen was not a commander and approximately 18 years.[156]

79. The Trial Chamber inferred *mens rea* from "the nature of the acts, sustained character and the length of time" but provided no reasoned statement.[157] The Chamber made no forced pregnancy determinations on uncharged acts and acts out of jurisdiction from which it inferred patterns of

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[147] Doc **1938**, para. 17.
[148] Appeal Against Convictions, paras 935, 939, 941, 944, 959, 960, 965-967 and 969-972.
[149] Doc **1939**, para. 2.
[150] CoC Decision, para. 87.
[151] *See* CoC Decision, para. 87, (referring to Defence Confirmation Brief, paras 8, 78, 128 and 137 (Pre-Trial Chamber I, Prosecutor v. Katanga and Ngudjolo, *Decision on the confirmation of charges*, ICC-01/04-01/07-717, para. 431)).
[152] Doc **1939**, p. 4, para. A(a)(i)-(iii).
[153] Doc **1939**'s submission is consistent with the Appeal Against Convictions, paras 936, 945, 960-961 and 963-973.
[154] Prosecution Closing Brief, para. 160 and Judgment, para. 2070.
[155] Warrant of Arrest.
[156] Ongwen was abducted at the age of 9 (Judgment, para. 27) and the sexual violence against P-0101 occurred when she was 15 (T-13, p. 16, lns 11-20). She was never forced to sleep with the Appellant during the 8 years she was with him the in the bush (T-13, p. 19, ln. 24 to p. 20, ln. 3).
[157] Judgment, para. 3060.

sexual violence. Patterns may also be reasonably inferred from unintended pregnancies arising from sexual contacts under different circumstances.

80. The Trial Chamber provided no reasoned statement on unlawful confinement of each of the two witnesses. The three pregnancies occurred during intense bombardments by the UPDF during the operation Iron Fist. Mr Ongwen, P-0101 and P-0214 were constantly fleeing in attempts to evade intense bombardments and imminent death, making confinement with the requisite intent unlikely.[158] Thus, they were not confined.

81. According to Trifterer/Ambos, a situation in which a woman, held in 'unlawful confinement', conceives or gives birth to a child as a result of sexual violence as such, does not fulfil the element of specific intent and thus by itself does not amount to the crime of forced pregnancy.[159]

82. The Judgment did not provide a reasoned statement to support the finding that Mr Ongwen had the requisite Article 30 *mens rea*. Article 30 enshrines the principle that all prohibited *actus reus*, unless otherwise specified, must have corresponding knowledge and intent.[160] In other words, there must be evidence and a reasoned statement about intent and knowledge for each objective element of a crime.

83. For forced pregnancy, the Judgment acknowledges this requirement at paragraph 2726. However, the Judgment does not articulate the Article 30 standard which it applied. The Defence position is that it must be proved that the accused intended the conduct to confine and intended the result of forced pregnancy.

84. Additionally, the Trial Chamber provided no reasoned statement that Mr Ongwen intended to make P-0214 or P-0101 pregnant forcibly. The error is the lack of a finding on an element of the charged crime. Significantly, the Judgment states, at paragraph 2722, that "*[i]t is not enough to punish [forced pregnancy] merely as a combination of other crimes (e.g., rape and unlawful detention), or subsumed under the generic "any other form of sexual violence'*."

85. Despite this dicta, this is precisely what the Judgment did. The Trial Chamber did not articulate the legal standard of the particular special intent for the conviction under counts 58 and 59. The Judgment did not identify the specific violation instance Mr Ongwen committed nor did it identify the evidence underlying the special *mens rea* for which it convicted him for forced pregnancy of P-0101 and P-0214. Thus, the Judgment's reasoning seems to be that Mr Ongwen

[158] The Chamber found that Operation Iron Fist was in full operation during the charged period (Judgment, paras 13, 1014 and fn. 2004).
[159] Triffterer/Ambos, p. 274.
[160] The Judgment uses specific intent at para. 2726 and special intent at paras 2727, 2872 and 2873.

was committing SGBC on these women for years and since they were confined there must have been a *mens rea* nexus at some point.

86. Special intent is defined in the Judgment as confining a woman with the intent "to carry out other grave violations of international law, e.g., confining a woman with the intent to rape, sexually enslave, enslave and/or torture her."[161] The Chamber did not specify which intention to carry out a violation of international law fulfilled this criteria at the time of the actus reus of crimes for which he is convicted.

87. Consequently, the Judgment effectively did not articulate the legal standard of the specific special intent required by law. The Judgment did not provide a reasoned statement to support the finding that Mr Ongwen forcefully confined P-0101 and 0214 with the special intent of carrying out other grave violations of international law.

88. The Judgment also did not articulate or identify the specific special intent requirement against which it evaluated the evidence and did not describe a nexus between the *actus reus*, the Article 30 *mens rea* and the special intent.[162]

Doc 1934

89. The Defence rejects paragraphs 10, 12 and 19 of the Doc **1934** as misconceived. The *Amicus* relied on a legal and factual mischaracterisation of the evidence by the Trial Chamber in paragraphs 2803-2805, 2894-2896, 2948, 3083 and 3087 which is contested. Doc **1934** faults the legal characterisation of criminal conduct, by the Trial Chamber[163] and requests a reversal of an acquittal in the absence of an appeal in the interest of justice.[164] The *Amicus* fails to develop the interest of justice and no detriment submission.[165]

[161] Judgment, para. 2727.
[162] Judgment, para. 3061. The lack of articulation is compounded by the Sentencing Judgment, para. 317, stating "the victims became pregnant through acts of rape by Dominic Ongwen", (SJ fn. 583 citing Judgment, paras 2068-2069). There is no such finding in the cited paras 2068-2069. Further, the Judgment (para. 3061) does not indicate whether the 'other grave violations of international law' special intent were war crimes or crimes against humanity, suggesting that Ongwen's conduct is also double counted in sentencing. Regarding acts not charged in respect of forced pregnancy, the Sentencing Judgment at para. 301, with no references to the evidence, stated: "The Chamber also recalls that, as a result of rapes, some of the concerned victims became pregnant and gave birth to children fathered by Dominic Ongwen." This is forced pregnancy through the backdoor which the Defence rejects.
[163] Doc **1934**, para. 12.
[164] Doc **1934**, para. 32.
[165] Doc **1934**, paras 2 and 32(2).

ii. The Amici miscomprehend the Judgment, the nature and scope of the charges

1. SGBC committed by Mr Ongwen

90. The Prosecution urged the Chamber to rely on evidence out of the Court's temporal jurisdiction for vital context.[166] The Trial Chamber decided that it might use it for corroboration,[167] stating that it was bound by the text of the confirmed charges.[168] The Trial Chamber provides no clear articulation thereafter.

2. SGBC not committed by Mr Ongwen

91. The Trial Chamber found ample evidence that standing orders for abductions were issued and revoked by Kony,[169] and that Kony had the sole prerogative to distributed women, including directly to Mr Ongwen.[170]

92. Kony had the prerogative to order commanders to distribute women and report back to him.[171] His orders were enforced by Control Alter under his deputy Vincent Otti when he was in Sudan.[172]

93. Although this system is explicitly mentioned by the Chamber in its evidentiary assessment, the Chamber failed to give credit to its own finding that Mr Ongwen was not appointed to brigade commander until March 2004.[173]

94. Joseph Kony violently punished the violation of the standing rules on the abduction and distribution of women and girls without his permission.[174]

95. When orders to distribute women were given at lower levels,[175] the form of systemic policy focussed on in the Trial Chamber's analysis was not dictated by anyone other than Kony.[176]

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[166] Prosecution Closing Brief, para. 160.
[167] Judgment, paras 2216-2247.
[168] Judgment, para. 2009.
[169] Judgment, paras 1188, 2114-2120 and 2336.
[170] Judgment, para. 2160.
[171] Judgment, paras 2117, 2160 and 2162- 2165.
[172] Judgment, para. 2100.
[173] Judgment, paras 137 and 1182.
[174] Judgment, paras 2166, 2611-2612 and fn. 6968 (UPDF intelligence report, at 0945, in the presence of 2,500 LRA fighters, Kony stated that one of the reasons for the execution of his deputy Otti Lagony was the fact that Lagony abducted and distributed women and girls in violation of the standing rules without Kony's permission).
[175] Judgment, para. 1189.
[176] Judgment, para. 2114.

iii. Amici observations on forced marriage

96. Doc **1941** defined forced marriage as the imposition of the conjugal association on an unwilling participant.[177]

97. Doc **1935** submits that forced marriage is a cognisable crime under the Statute due to the customary law nature of other inhumane acts as a crime against humanity.[178] The Doc **1935** identifies a violation of relational autonomy as a separate element distinguishing forced marriage from other crimes.[179]

98. The Defence disagrees with the element of continuing crime alleged by the Doc **1935**.[180]

99. Doc **1934** submits that forced marriage is an indicia of the crime slavery.[181]

100. The Defence disagrees with Doc **1928** that "forced marriage belongs to the paragraph K category as a residual clause whose aim is to support those types of victimization that have not been explicitly referred to in the Rome statute", and that expressive function of international justice supports adopting an independence-oriented approach to forced marriage".[182]

101. Doc **1939** appears to concur with Doc **1938** regarding sexual slavery and enslavement.

102. According to Triffterer/Ambos, sexual slavery encompasses situations where women and girls are forced into 'marriage', domestic servitude or other forced labour that ultimately involves forced sexual activity, including rape by their captors.[183]

103. The Defence agrees with the submission and conclusions of Doc **1927** and urges the Appeal Chamber to find them sufficiently compelling in finding that forced marriage is not a cognizable crime under the Rome Statute.[184]

D. Cumulative Convictions

104. The issues on cumulative convictions are complex and multi-faceted. Each *amicus* brief addresses one or more of the issues facing the Court. In order to put the *amicus* arguments in

[177] Doc **1941**, para. 5.
[178] Doc **1935**, paras 2-3.
[179] Doc **1935**, paras 12, 19 and 21-28.
[180] Doc **1935**, paras 30-32.
[181] Doc **1934** submits, "that acts of a sexual nature (the conduct legally characterised as forced marriage as and other inhumane act, (sexualised) torture, rape and forced pregnancy), committed against abducted individuals also are indicia of enslavement", paras 3, 4, 7 and 11.
[182] Doc **1928**, paras 9 and 10.
[183] Triffterer/Ambos, para. 61. The word 'sexual' in the current paragraph denotes the result of this particular crime of enslavement: limitations on one's autonomy, freedom of movement and power to decide matters relating to one's sexual activity. Sexual slavery thus also encompasses situations where women and girls are forced into 'marriage', domestic servitude or other forced labour that ultimately involves forced sexual activity, including rape by their captors.
[184] Doc **1927**, paras 49-58.

the context of the complexity of issues and address those arguments efficiently, the Defence will preface its comments with a brief summary of its position.

105. The Defence contends that the principle of *ne bis in idem* (NBII) governs multiple prosecutions and multiple punishments for the same offences. It does not literally apply to multiple convictions in the same trial. Rather, the NBII principle guides the assessment of overlapping crimes within one trial.

106. The ICC version of NBII in Article 20 prohibits multiple prosecutions in the ICC for the same *conduct* that was previously prosecuted at a national level or in the ICC. As a guiding principle, Article 20's NBII test means that the Court should use a *conduct*-based test to assess multiple convictions within one trial rather than an elements-based test.

107. The Defence has argued that even if Article 20 has no relevance, a multi-step approach that looks at conduct rather than only elements is called for under the Statute. The Trial Chamber agreed and applied a version of a civil law multi-step approach.[185]

108. The first step of this approach looks at the elements (specialty). If all the elements of one crime are contained in the other crime, then there can only be one conviction.

109. Unlike in the ICTY, the analysis does not stop at the elements/specialty assessment. Instead, the Trial Chamber took an additional step by considering whether the two crimes, based on the same conduct, protect different interests. If they do not protect different interests, then there can only be one conviction. This approach is based on the civil law concepts of consumption and subsidiarity.

110. Although the Appeals Chamber in *Bemba et al.* approved the use of the elements-based test, they left open in dictum the possibility of precluding multiple convictions even when there were different elements in each crime.[186] The Trial Chamber relied on this dictum in using a multi-step approach.[187]

111. In the Judgment, the Trial Chamber applied both the elements-based test and the conduct-based test. First, the Trial Chamber applied the elements-based test and found that there could only be one conviction with a) war crimes of torture and cruel treatment, b) crimes against humanity of torture and other inhumane acts, and c) sexual slavery and enslavement. Second, the Trial Chamber used the broader conduct-based test and assessed the protected interests of each

[185] Judgment, paras 2820-2821, 2826, 2837, 2944 and 3037-3039.
[186] *Bemba et al.* Appeals Judgment, para. 751.
[187] Judgment, paras 2789-2821.

alleged crime. The Trial Chamber rejected the Defence argument in two categories, including a) war crimes and crimes against humanity based on the same underlying conduct and b) rape and sexual slavery. The Defence appealed both findings.[188]

112. The Defence argument that war crimes and crimes against humanity based on the same underlying conduct should result in only one conviction is based on two points. First, the *chapeau* elements should not be considered when comparing elements. Second, even if the *chapeau* elements are considered, there should only be one conviction based on a conduct-based test and an assessment of protected interests.[189]

113. The Defence also raised as an error the failure to consider whether sexual slavery subsumes forced marriage.[190] The Defence argument is that the same conduct underlies both crimes in this case.[191]

Doc 1927

114. Doc **1927** does not speak to the test that should be applied to assess concurrence. Nevertheless, the analysis of forced marriage as a form of slavery is supportive of the Defence argument that there is an impermissible concurrence based on the same underlying conduct.

115. In the analysis of forced marriage, Doc **1927** asserts that sexual slavery and enslavement are forms of each other, specifically that forced marriage is a form of slavery. Doc **1927** also criticizes the Trial Chamber's distinction of forced marriage from slavery on the basis that the "conjugal association" was only achieved through possession and ownership, the crucial core of slavery.[192] This assertion that forced marriage is a form of slavery because the "conjugal association" is only achieved through possession and ownership supports the Defence argument that a conduct-based approach aligns with the principle of NBII by preventing the conviction of two crimes based on the same underlying conduct.

[188] Appeal Against Convictions, Ground 20: paras 277-288; Ground 21: paras 289-293; Ground 22: paras 294-297.
[189] See, Doc **1937**, paras 32-33. (The *chapeau* elements should not be considered when comparing elements of crimes. Even if *chapeau* elements are considered, they should not bar the possibility of impermissible concurrence of war crimes and crimes against humanity. The ADC agrees that conduct and not elements should be applied. In fn. 59, they mention that "One could argue that consumption and subsidiarity are what the Bemba et al. AC refer to in into analysis….").
[190] Appeal Against Convictions, para. 296.
[191] *Noting* that Doc **1939**, pp 14-15, argues that rape and sexual slavery are an impermissible occurrence because although the various sexual and gender-based crimes are independent of each other, under a conduct-based concurrence test there should only be one conviction for the same underlying conduct. *See also*, Doc **1934**, para. 32, concluding that enslavement and sexual slavery are an impermissible concurrence.
[192] Doc **1927**, para. 39.

Doc 1931

116. Doc **1931** illustrates a common law example of 1) NBII/double jeopardy as the foundation for assessing concurrence issues and 2) an approach that goes beyond the comparison of elements for assessing concurrence.

117. First, Doc **1931** is supportive of the Defence position that NBII/double jeopardy is the foundation for assessing concurrence issues.[193] The brief states that "the double jeopardy principle extends to multiple punishments for the same offense at a single criminal trial."[194] This is precisely the Defence position—it is the *principle*, even if not the exact language, of double jeopardy that underlies prohibiting multiplicity of charges and punishments.

118. Second, the use of a broader assessment of impermissible concurrence than just the elements-based test supports the Defence argument for a conduct-based test. The US military system, described in the brief, is bound by the element-based[195] test for double jeopardy itself. However, Doc **1931** states that, for purposes of "unreasonable multiplication of charges" (and punishments), the military court must assess the "reasonableness" of multiple charges or sentences.[196] This reasoning supports the Defence argument for a conduct-based assessment.

Doc 1937

119. The Defence agrees with the arguments presented in Doc **1937**.[197] Doc **1937** argues that Article 20/NBII should be taken into account because Article 20's *conduct* language is significant, not just the legal elements.[198]

120. For example, Doc **1937** distinguishes the ICTY elements-based jurisprudence on the basis of the difference in statutes[199] and also on the basis of unfairness to the accused.[200] Doc **1937** relies in part on the separate and dissenting opinions of Judges Hunt and Bennouna (ICTY) and Judge Dolenc (ICTR).[201] One of these arguments is that the *chapeau* elements of war crimes and crimes against humanity should not be part of the analysis when comparing elements. Regardless of the position on the *chapeau* elements, a second argument is that the underlying

[193] *See*, Doc **1931**, paras 20-26.
[194] Doc **1931**, para. 26.
[195] Also known as the Blockburger test (*Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932)).
[196] *See*, Doc **1931**, paras 30-32.
[197] *See*, Doc **1937**, paras 19-34.
[198] Doc **1937**, para. 21.
[199] Doc **1937**, para. 30. *See also*, Doc **1939**, pp 12-14 (noting that the ITCY statute refers to "crimes" and the ICC statute refers to "conduct").
[200] Doc **1937**, para. 29.
[201] Doc **1937**, para. 27.

conduct of overlapping war crimes and crimes against humanity should be assessed to decide if there is an impermissible concurrence. Doc **1937** also notes that the *Bemba et al.* Appeals Chamber decision left open the question of prohibiting multiple convictions based on the same conduct, regardless of differences in the elements of the crime.[202] These arguments support the Defence's position that a conduct-based assessment should be applied.

Doc 1939

121. Doc **1939** is a thorough analysis of why rape and sexual slavery should be an impermissible concurrence. The Defence agrees with the position of Doc **1939** for an NBII foundation for assessing cumulative convictions and for a conduct-based test from the language of Article 20. The Defence further agrees with Doc **1939's** position that, under a conduct-based test, only one conviction should result for overlapping charges of rape and sexual slavery based on the same conduct.[203]

Docs 1934, 1941 and 1943

122. The Appeals Chamber should not consider the arguments in Doc **1934**, Doc **1941** and Doc **1943**. The argument in Doc **1934** that Article 20 is not applicable is merely a conclusory statement based on the language of Article 20.[204] In addition, the Doc **1934** argument that the ICTY test is correct is an overly simplistic conclusion that ignores the need to interpret the Rome Statute and to understand the Appeals Chamber's statements in *Bemba et al.* about the test.[205] The Appeals Chamber should not consider the arguments in Doc **1941** because the authors do not provide reasoning to explain why the elements-based test should be used or how it aligns with the Rome Statue.[206] Finally, the Appeals Chamber should not consider the arguments in Doc **1934** because the author simply argues that Article 20 does not apply and does not address the proposition that, if Article 20 is relevant and guiding, then a conduct-based test is a better interpretation for addressing concurrent convictions.[207]

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[202] Doc **1937**, para. 31.
[203] Doc **1939**, p. 14.
[204] Doc **1934**, para. 26.
[205] As stated in para. 111 *supra*, the Appeals Chamber in *Bemba et. al*. left open in dictum the possibility of precluding multiple convictions even when there were different elements in each crime. This dictum supports the approach of the Trial Chamber and supports the Defence argument by leaving open the issue of considering conduct instead of merely comparing elements of crimes.
[206] *See generally*, Doc **1941**, paras 1-3 and 23-25.
[207] Doc **1934**, paras 29-36. The Defence notes that Dr Behrens concludes that the Trial Chamber was correct in finding impermissible concurrence of: 1) war crimes of torture and cruel treatment; 2) crime against humanity of torture and other inhumane acts; and 3) crime against humanity of enslavement and sexual slavery. The Defence agrees with these findings.

123. In sum, the Defence urges the Appeals Chamber to consider the analyses of the well-reasoned *amicus* briefs in Docs **1927**, **1931**, **1937** and **1939**, and to disregard the arguments in Docs **1934**, **1941** and **1943** that fail to fully evaluate how concurrence should be addressed under the Rome Statute.

Respectfully submitted,

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Hon. Krispus Ayena Odongo

On behalf of Dominic Ongwen

Dated this 27th day of January, 2022

At Kampala, Uganda

However, the Defence position is that this is only the first step. The second step requires a further analysis if different elements do exist.