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No. ICC-02/04-01/15 A A2

Date: 9 February 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

Decision on various motions concerning the parties and participants responses to the observations of the *amici curiae*

Decision 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 Krispus Ayena Odongo
Chief 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, Jelía Sané, Hyunah Yang

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

Prof. Dr. Mario H. Braakman

Mr Arpit Batra

REGISTRY

Registrar

Mr Peter Lewis

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

The Appeals Chamber of the International Criminal Court,

In the appeal of the Defence against the decision of Trial Chamber IX entitled “Trial Judgment” of 4 February 2021 (ICC-02/04-01/15-1762-Red),

In the appeal of the Defence against the decision of Trial Chamber IX entitled “Sentence” of 6 May 2021 (ICC-02/04-01/15-1819-Red),

Having before it the “Defence Correction to a Serious Error in the Common Legal Representative for Victims Observations on the *Amici Curiae*” of 20 January 2022 (ICC-02/04-01/15-1956); the “Motion to Strike Paragraphs 51-52 of the ‘Defence Response to the *Amici Curiae* Observations’(ICC-02/04-01/15-1950)” of 21 January 2022 (ICC-02/04-01/15-1959); the “Defence request for an order to the Prosecution to file specific academic articles in the record of the case” of 26 January 2022 (ICC- 02/04-01/15-1962); and the “Defence Motion against CLRV Filing ICC-02/04-01/15-1965” of 31 January 2022 (ICC-02/04-01/15-1969),

Issues the following

DECISION

1. The “Defence Correction to a Serious Error in the Common Legal Representative for Victims Observations on the *Amici Curiae*” is dismissed as moot.
2. Decides not to rule on the “Motion to Strike Paragraphs 51-52 of the ‘Defence Response to the *Amici Curiae* Observations’(ICC-02/04-01/15-1950)”. However, paragraphs 51-52 of ICC-02/04-01/15-1950-Corr together with ICC-02/04-01/15-1950-AnxB, ICC-02/04-01/15-1950-AnxE and ICC-02/04-01/15-1950-AnxF are disregarded and will not be considered by the Appeals Chamber.
3. The “Defence request for an order to the Prosecution to file specific academic articles in the record of the case” is dismissed as moot.
4. The “Defence Motion against CLRV Filing ICC-02/04-01/15-1965” is rejected.

REASONS

I. RELEVANT PROCEDURAL HISTORY

1. On 17 November 2021, the Appeals Chamber scheduled a hearing from Monday, 14 February 2022, to Friday, 18 February 2022, to hear submissions and observations by the parties and participants on the merits of the abovementioned appeals.¹
2. On 24 November 2021, following the issuance of an order inviting expressions of interest to participate as *amici curiae* in the appeal proceedings,² the Appeals Chamber granted leave to 18 individuals or groups of individuals to submit, by 23 December 2021, written observations on the issues identified in paragraph 19 of the Order inviting expressions of interest.³ The Defence, the Prosecutor and the participating victims were allowed to submit consolidated responses to the written observations of the *amici curiae*, by Monday, 17 January 2022.⁴
3. On 23 December 2021, the Appeals Chamber received written observations from 18 *amici curiae*.⁵

¹ [Order scheduling a hearing before the Appeals Chamber](#), ICC-02/04-01/15-1909.

² [Order inviting expressions of interest as amici curiae in judicial proceedings \(pursuant to rule 103 of the Rules of Procedure and Evidence\)](#), 25 October 2021, ICC-02/04-01/15-1884 (hereinafter: “Order inviting expressions of interest”).

³ [Decision on the requests for leave to file observations pursuant to rule 103 of the Rules of Procedure and Evidence](#), ICC-02/04-01/15-1914 (hereinafter: “Decision under Rule 103”), p. 3.

⁴ [Decision under Rule 103](#), p. 3. On 14 January 2022, following a request of the Prosecutor which was unopposed, the Appeals Chamber extended the page limit of 25 pages by 5 pages for the responses of the Prosecutor, the Defence and the participating victims to the written observations of the *amici curiae*. See [Decision on “Prosecution’s Urgent Request for Extension of Pages”](#), ICC-02/04-01/15-1949.

⁵ [Amicus brief of Justice Francis M. Ssekandi](#), 20 December 2021, ICC-02/04-01/15-1926 (hereinafter: “Justice Ssekandi’s Brief”); [Amicus Curiae Observations on the issue of Sexual and Gender-based Crimes: Sexual Slavery & Forced Marriage](#), 19 December 2021 (notified on 20 December 2021), ICC-02/04-01/15-1927; [Amicus Curiae pursuant to Rule 103\(1\) of the Rules of Procedure and Evidence](#), 20 December 2021, ICC-02/04-01/15-1928; [Amicus Curiae Observation](#), 21 December 2021, ICC-02/04-01/15-1929; [Amicus Curiae Observations Regarding the Relevance to this Case of the Convention on the Rights of Persons with Disabilities](#), 21 December 2021 (notified on 22 December 2021), ICC-02/04-01/15-1930; [Submission of amicus curiae observations by the National Institute of Military Justice \(NIMJ\)](#), 21 December 2021 (notified on 22 December 2021), ICC-02/04-01/15-1931; [Amici Curiae Observations on Duress and the Standards Applicable to Assessing Evidence of Sexual Violence](#), 22 December 2021, ICC-02/04-01/15-1932 (with one Annex); [Amici Curiae Observations on Sexual- and Gender-Based Crimes, Particularly Forced Pregnancy, and on Standards of Proof Required for Sexual and Reproductive Violence Pursuant to Rule 103 of the Rules of Procedure and Evidence](#), 22 December 2021 (notified on 23 December 2021), ICC-02/04-01/15-1933; [Amici Curiae Observations on Sexual- and Gender-Based Crimes, Particularly Sexual Slavery, and on Cumulative Convictions Pursuant to Rule 103 of the Rules of Procedure and Evidence](#), 23 December 2021, ICC-02/04-01/15-1934; [Amici Curiae](#)

4. On 17 January 2022, the Defence, the Prosecutor, and the participating victims filed their respective consolidated responses to the written observations of the *amici curiae*.⁶

5. On 20 January 2022, the Defence filed a motion seeking to correct alleged errors made in the CLRV's Response to the *Amici* Observations concerning the qualifications of Justice Francis Muzingu Ssekandi to submit *amicus curiae* observations.⁷ On 21 January 2022, the CLRV responded to the Defence Motion of 20 January 2022.⁸

6. On 21 January 2022, the Prosecutor filed a motion seeking to have two paragraphs from the Defence Response to the *Amici* Observations, together with associated annexes, dismissed *in limine* (hereinafter: "Prosecutor's Motion").⁹ In his

[Brief on Forced Marriage](#), 22 December 2021 (notified on 23 December 2021), ICC-02/04-01/15-1935 (with Annex 1); [Submission of Amicus Curiae observations on the merits of the legal questions presented in the "Order inviting expressions of interest as amici curiae in judicial proceedings \(pursuant to rule 103 of the Rules of Procedure and Evidence\)" of 25 October 2021 \(ICC-02/04-01/15A\)](#), 23 December 2021, ICC-02/04-01/15-1936 (hereinafter: "Clarke et al. Brief"); [Observations of the Association of Defence Counsel practising before the International Courts and Tribunals \(ADC-ICT\) as amicus curiae regarding questions proposed by the Appeals Chamber in Prosecutor v. Ongwen](#), 23 December 2021, ICC-02/04-01/15-1937; [Amici Curiae Observations on the Rome Statute's definition of 'forced pregnancy' by Dr Rosemary Grey, Global Justice Center, Women's Initiatives for Gender Justice and Amnesty International](#), 23 December 2021, ICC-02/04-01/15-1938; [Amicus Curiae Observations pursuant to Rule 103\(1\) of the Rules of Procedure and Evidence](#), 23 December 2021, ICC-02/04-01/15-1939; [Amicus Curiae Observations by Public International Law & Policy Group](#), 23 December 2021, ICC-02/04-01/15-1940 (hereinafter: "PILPG Brief"); [Amici curiae observations submitted by Prof. Bonita Meyersfeld and the Southern African Litigation Centre Trust pursuant to rule 103 of the Rules of Procedure and Evidence](#), 23 December 2021, ICC-02/04-01/15-1941; [Submission of observations pursuant to rule 103 of the Rules of Procedure and Evidence, as amici curiae on transcultural forensic psychiatric issues](#), 23 December 2021, ICC-02/04-01/15-1942 (hereinafter: Professor Braakman's Brief"); [Amicus curiae observations on issues raised in the Appeals Chamber Order of 25 October 2021 inviting expressions of interest as amici curiae in judicial proceedings \(pursuant to Rule 103 of the Rules of Procedure and Evidence\)](#), 23 December 2021, ICC-02/04-01/15-1943.

⁶ Defence Response to the Amici Curiae Observations, ICC-02/04-01/15-1950 with public annexes A-F. A corrected version of [Defence Response to the Amici Curiae Observations](#), ICC-02/04-01/15-1950-Corr was filed on 27 January 2022 (hereinafter: "Defence Response to the Amici Observations"); [CLR V consolidated response to the Amici Curiae observations in the Defence's Appeals against the Conviction and the Sentence](#), ICC-02/04-01/15-1951 (hereinafter: "CLR V's Response to the Amici Observations"); [Prosecution Response to Amici Curiae observations](#), ICC-02/04-01/15-1952 (hereinafter: "Prosecutor's Response to the Amici Observations") with [Annex A](#), ICC-02/04-01/15-1952-AnxA (hereinafter: "Annex A -Table of Authorities"); [Victims' Observations on amici curiae submissions](#), ICC-02/04-01/15-1953.

⁷ [Defence Correction to a Serious Error in the Common Legal Representative for Victims Observations on the Amici Curiae](#), ICC-02/04-01/15-1956 (hereinafter: "Defence Motion of 20 January 2022").

⁸ [CLR V Response to the "Defence Correction to a Serious Error in the Common Legal Representative for Victims Observations on the Amici Curiae"](#), ICC-02/04-01/15-1957 (hereinafter: "CLR V's Response to the Defence Motion of 20 January 2022")

⁹ [Motion to Strike Paragraphs 51-52 of the "Defence Response to the Amici Curiae Observations" \(ICC-02/04-01/15-1950\)](#), ICC-02/04-01/15-1959.

view, “[t]hese paragraphs do not respond to the observation of any *amicus curiae*” and serve to “advance new-and misplaced-allegations to supplement arguments in the Defence appeal brief”.¹⁰ On 24 January 2022, the CLRV responded to the Prosecutor’s Motion indicating her agreement with the Prosecutor’s position.¹¹ On 26 January 2022, the Defence responded to the Prosecutor’s Motion indicating its opposition thereto.¹²

7. On 26 January 2022, the Defence filed a request to order the Prosecutor to file into the record of the case certain academic articles, referred to in Annex A of the Prosecutor’s Response to the *Amici* Observations.¹³ On 27 January 2022, the Prosecutor filed the requested academic articles.¹⁴

8. On 19 January 2022, following a request by Ms Siobhán Mullally, UN Special Rapporteur on Trafficking in Persons,¹⁵ the Appeals Chamber allowed her to submit observations as *amicus curiae* on the issues identified in paragraph 19 of the Order inviting expressions of interest.¹⁶ In addition, the Appeals Chamber permitted the parties and participants to file responses, of no more than 3 pages, to Ms Mullally’s observations.¹⁷ On 28 January 2022, following receipt of Ms Mullally’s observations,¹⁸ the Defence, the Prosecutor, and the CLRV filed their respective responses thereto.¹⁹

¹⁰ [Prosecutor’s Motion](#), para. 1.

¹¹ [CLRV Response to the Prosecution “Motion to Strike Paragraphs 51-52 of the ‘Defence Response to the Amici Curiae Observations’ \(ICC-02/04-01/15-1950\)”](#), ICC-02/04-01/15-1960 (hereinafter: “CLRV Response to the Prosecutor’s Motion”), para. 2.

¹² [Defence Response to the Prosecution’s Motion to Strike, ICC-02/04-01/15-1959](#), ICC-02/04-01/15-1961 (hereinafter: “Defence Response to the Prosecutor’s Motion”), pp 3-10.

¹³ [Defence request for an order to the Prosecution to file specific academic articles in the record of the case](#), ICC-02/04-01/15-1962 (hereinafter: “Defence Motion of 26 January 2022”).

¹⁴ [Filing of authorities requested by the Defence](#), ICC-02/04-01/15-1964 (hereinafter: “Filing of authorities”) with public [Annex A](#), ICC-02/04-01/15-1962-AnxA (hereinafter: “Annex A to the Filing of authorities”) and confidential Annex B, ICC-02/04-01/15-1962-AnxB.

¹⁵ [Request for Leave to File an Amici Curiae Brief on sexual slavery and defence of duress Pursuant to Rule 103 of the Rules of Procedure and Evidence](#), ICC-02/04-01/15-1954.

¹⁶ [Decision on the request for leave to file observations pursuant to rule 103 of the Rules of Procedure and Evidence](#), ICC-02/04-01/15-1955, p. 3, paras 14-15.

¹⁷ [Decision on the request for leave to file observations pursuant to rule 103 of the Rules of Procedure and Evidence](#), ICC-02/04-01/15-1955, p. 3, para. 17.

¹⁸ [Observations on the crimes of sexual slavery, enslavement and trafficking in persons, and on the grounds for excluding criminal responsibility: defences of duress, mental defect or disease and the non-punishment principle](#), 21 January 2022, ICC-02/04-01/15-1958 (hereinafter: Ms Mullally’s Observations”).

¹⁹ [Common Legal Representative of Victims’ Response to Amicus Curiae Observations No. ICC-02/04-01/15-1958 in the Defence’s Appeals against the Conviction and the Sentence](#), ICC-02/04-01/15-1965 (hereinafter: “CLRV’s Response to Ms Mullally’s Observations”); [Defence Response to the UN Special](#)

9. On 31 January 2022, the Defence filed a motion requesting the Appeals Chamber to disregard the CLRV's Response to Ms Mullally's Observations on the basis that it exceeded the page limit, prescribed by the Appeals Chamber, by 2 pages.²⁰ To date, the Appeals Chamber has not received any response from the CLRV to the Defence Motion of 31 January 2022.

II. MERITS

A. The Defence Motion of 20 January 2022

10. The Defence Motion of 20 January 2022, seeks to correct an alleged error in the CLRV's Response to the *Amici* Observations concerning the notification of information on the qualifications and background of Justice Francis Muzingu Ssekandi, an *amicus curiae* who, amongst others, was permitted to make written observations on specific issues arising in the appeals at hand.

11. In particular, the Defence allege that the CLRV was incorrect in asserting that the *amicus* "does not provide - neither in its request to appear nor in its brief - background information as to its professional status, experience or expertise".²¹ The Defence argues that this information was submitted by the *amicus* in a "separate document" at the request of the Appeals Chamber and before it rendered its decision permitting the *amici curiae* to submit observations.²²

12. The CLRV submits that the document referred to by the Defence containing the explanation of the expertise of the *amicus* "was inadvertently overlooked in the midst of documents filed for the purpose of Rule 103 of the Rules of Procedure and Evidence proceedings".²³

[Rapporteur Siobhán Mullally's Amicus Curiae Observations](#), ICC-02/04-01/15-1966; [Prosecution Response to Amicus Curiae observations by the United Nations Special Rapporteur on Trafficking in Persons, especially women and children](#), ICC-02/04-01/15-1967.

²⁰ [Defence Motion against CLRV Filing ICC-02/04-01/15-1965](#), 31 January 2022, ICC-02/04-01/15-1969 (hereinafter: "Defence Motion of 31 January 2022"),

²¹ [Defence Motion of 20 January 2022](#), paras 8-9 referring to [CLRV's Response to the Amici Observations](#), para. 6.

²² [Defence Motion of 20 January 2022](#), para. 9 referring to [Request to Submit an Amicus Curiae pursuant to Rule 103\(1\) of the Rules of Procedure and Evidence](#), registered on 23 November 2021, ICC-02/04-01/15-1912.

²³ [CLRV's Response to the Defence Motion of 20 January 2022](#), para. 1.

13. The Appeals Chamber notes that, as pointed out by the Defence, the qualifications and background information of the *amicus* was requested and considered by it prior to allowing the *amicus* to submit written observations on specific issues arising in the appeals.²⁴ While the CLRV's oversight with respect to this information is unfortunate, the Appeals Chamber considers that it is of little consequence since the CLRV maintains that the substance of her observations on the opinions offered by the *amicus* are unaffected by the latter's qualifications and background information.²⁵ Consequently, the Appeals Chamber notes the correction to the CLRV's Response to the *Amici* Observations as highlighted by the Defence and dismisses the Defence Motion of 20 January 2022, as moot.

B. The Prosecutor's Motion

14. The Prosecutor requests that paragraphs 51-52 of the Defence Response to the *Amici* Observations be dismissed *in limine*, together with associated annexes.²⁶ The Prosecutor argues that the aforesaid paragraphs do not respond to the observations of any *amicus curiae* and serve instead to "supplement arguments in the Defence appeal brief".²⁷ He avers that the Defence's submissions regarding the case of the *Prosecutor vs. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud* (hereinafter the: "*Al Hassan* case / Mr Al Hassan") is unrelated "to any observation made by the *amici curiae*, and cannot properly be construed as a 'response'".²⁸

15. More specifically, the Prosecutor argues that in paragraphs 51-52 the Defence refers to the evidence of two expert witnesses (Doctor Mezey and Professor Weirstall-Pust), who participated in the *Ongwen* case, and were appointed by the Court in the *Al Hassan* case to assess the fitness of Mr Al Hassan to stand trial.²⁹ The Prosecutor submits that in referring to the evidence of these experts the Defence seeks to assert that their approach in the *Al Hassan* case is contradictory to their approach in the

²⁴ See [Decision under Rule 103](#), fn. 16.

²⁵ [CLR V's Response to the Defence Motion of 20 January 2022](#), para. 2.

²⁶ [Prosecutor's Motion](#), para. 1 referring to [ICC-02/04-01/15-1950-AnxB](#) (hereinafter: "Annex B of the Defence Response to the *Amici* Observations"); [ICC-02/04-01/15-1950-AnxE](#) (hereinafter: "Annex E of the Defence Response to the *Amici* Observations"); [ICC-02/04-01/15-1950-AnxF](#) (hereinafter: "Annex F of the Defence Response to the *Amici* Observations").

²⁷ [Prosecutor's Motion](#), para. 1.

²⁸ [Prosecutor's Motion](#), para. 2.

²⁹ [Prosecutor's Motion](#), para. 3.

Ongwen case.³⁰ The Prosecutor further submits that these arguments could have been raised in the Defence’s appeal brief and that this “‘back-door’ tactic now impedes the fair and expeditious conduct of the proceedings [...]” since the prosecution and the participating victims are deprived of an opportunity to respond in writing to these allegations.³¹

16. In light of these submissions, the Prosecutor requests that paragraphs 51-52 of the Defence Response to the *Amici* Observations be dismissed *in limine*, together with associated annexes, or in the alternative, that “the parties and participants be afforded a reasonable opportunity to respond in writing”.³²

17. The CLRV, who concurs with the arguments of the Prosecutor, submits that the Defence’s approach of using its response to the *amici curiae* observations “to supplement and/or add new arguments” to its appeal provides the Defence “with a second opportunity to plead [...] to which the other party and the participating victims have no ability to respond effectively, giving rise to prejudice”.³³ Moreover, the CLRV argues that the Defence fails to explain why these new or additional arguments could not have been included in the Defence’s appeal brief or why it failed to avail itself of the opportunity to seek a variation of its grounds of appeal in order to raise these arguments.³⁴

18. The Defence argues that, contrary to the Prosecutor’s arguments, paragraphs 51-52 are direct responses to issues raised in the *amici* briefs.³⁵ In this regard, the Defence refers to Professor Braakman’s Brief, the Clarke *et al.* Brief and Justice Ssekandi’s Brief.³⁶ The Defence submits that even though these *amici* did not address the evidence, as discussed in the *Al Hassan* case, on the impact of culture on a mental health assessment and evaluation by medical experts, they do address this issue more generally.³⁷ In the Defence’s view, “whether or not a particular brief refers to *Al Hassan*

³⁰ [Prosecutor’s Motion](#), para. 3.

³¹ [Prosecutor’s Motion](#), paras 3-4.

³² [Prosecutor’s Motion](#), para. 5.

³³ [CLRV Response to the Prosecutor’s Motion](#), paras 2-3.

³⁴ [CLRV Response to the Prosecutor’s Motion](#), para. 6.

³⁵ [Defence Response to the Prosecutor’s Motion](#), para.7.

³⁶ [Defence Response to the Prosecutor’s Motion](#), paras 10-20.

³⁷ [Defence Response to the Prosecutor’s Motion](#), para. 8.

or its case number is irrelevant” rather the “issue is whether the principles and subject matter in *Al Hassan* are relevant to the *Amici Curiae*”.³⁸

19. In relation to Annex B of the Defence Response to the *Amici* Observations,³⁹ the Defence submit that its references in paragraphs 51-52, especially footnote 96 on the use of certain psychiatric classification systems, such as the DSM-IV versus DSM-V, and its explanation of the Burundi Study, are a response to an issue raised in the PILPG Brief.⁴⁰ The Defence submits that the use of DSM-IV and DSM-V are “not new issues” in the appeal and that “the issue is raised [by] the amicus which accepts the Trial Chamber’s findings on the unreliability of the Defence Expert’s evidence”.⁴¹

20. As to Annex E of the Defence Response to the *Amici* Observations,⁴² the Defence submit that the research article “addresses the issue of the use of psychometric testing and the impact of culture”. They assert that “standardized testing” was a criterion relied upon by the Trial Chamber, “using Professor Weierstall-Pust’s evidence, to assess the Defence Experts’ evidence and find it unreliable”.⁴³

21. With respect to Annex F of the Defence Response to the *Amici* Observations,⁴⁴ the Defence submit that this article “highlights the impact of culture of mental health issues, and the issue of cultural psychiatry, which is discussed in Professor Braakman’s Brief”.⁴⁵

22. Finally, the Defence submits that, contrary to the views expressed by the CLRV and the Prosecutor, the issues in paragraphs 51-52 are not new – they are based on the

³⁸ [Defence Response to the Prosecutor’s Motion](#), para. 9.

³⁹ [Annex B of the Defence Response to the Amici Observations](#), p.3, para. 1.1, consists of a research article authored, by amongst others, Professor Weierstall-Pust on the study of “the reciprocal relationships of trauma, self-committed violence PTSD symptoms and appetitive aggression” conducted on a group of Burundi soldiers (hereinafter the: “Burundi Study”).

⁴⁰ [Defence Response to the Prosecutor’s Motion](#), paras 21-23.

⁴¹ [Defence Response to the Prosecutor’s Motion](#), para. 29.

⁴² [Annex E of the Defence Response to the Amici Observations](#) consists of a research article by Alfredo Ardila on how culture can affect neuropsychological testing.

⁴³ [Defence Response to the Prosecutor’s Motion](#), para. 31.

⁴⁴ [Annex F of the Defence Response to the Amici Observations](#) consists of an article by Dr Aggarwal on the impact of theories of cultural psychiatry on psychiatric classification systems such as DSM-V.

⁴⁵ [Defence Response to the Prosecutor’s Motion](#), para. 32.

observations of the *amici curiae* as well as the Trial Chamber’s judgment “(which indicates that they were raised in evidence during trial and/or litigated below)”.⁴⁶

23. The Appeals Chamber notes that paragraphs 51-52 of the Defence Response to the *Amici* Observations reads as follows (footnotes omitted):

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.

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*.

- a. In *Al Hassan*, the Experts endorsed the practice of open-ended questions for victims of torture. 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.
- 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. In *Ongwen*, both Dr M and Prof W-P ruled out PTSD in the case of Mr Ongwen. The Trial Chamber denied the relevance of Mr Ongwen’s abduction, and rejected its negative, lasting effects on Mr Ongwen.
- 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. This was accompanied by a view that mental health conditions can change. 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.
- 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. 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).
- e. In *Al Hassan*, Dr M and Prof W-P displayed a professional attitude toward other experts involved in the case. The methodology and reliability of their reports were not criticized. In *Ongwen*, there was no recognition of

⁴⁶ [Defence Response to the Prosecutor’s Motion](#), para. 40.

the Defence Experts' decades of experience as psychiatrists and there was a fundamental critique of the methodology.

- 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. In *Ongwen*, both Experts disregarded the impact of cultural factors on mental health issues.

24. In addition, footnote 96 which appears at the end of paragraph 52 (a) reads, with emphasis added, as follows:

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.*

25. At the outset, the Appeals Chamber considers that issuing a ruling on motions such as the Prosecutor's Motion, is unnecessary as it is not required to rule on specific paragraphs of the parties' and participants' submissions. Nevertheless, the Appeals Chamber considers the Defence's arguments, in paragraphs 51-52 of the Defence Response to the *Amici* Observations, together with the associated footnotes and annexes to be inappropriate. For the reasons that follow, the Appeals Chamber disregards these arguments and will not further consider them in the appeal.

26. The Appeals Chamber disagrees with the Defence's characterisation of the information cited to in the *Al Hassan* case as being responsive to issues raised by the *amici curiae* and "not new issues".⁴⁷ First, the Appeals Chamber notes that it is not disputed that culture and its impact on mental health assessments is a live issue in Mr Ongwen's appeal. It is also not disputed that the *amici* identified by the Defence do indeed make observations on this issue and do so without any reference to the *Al Hassan* case. However, the information as framed in paragraphs 51-52 of the Defence Response to the *Amici* Observations is essentially a comparison between the evidence given by Professor Weierstall-Pust and Doctor Mezey in the *Al Hassan* case (a trial that is ongoing before the Court) with their evidence in the *Ongwen* case. This comparison ultimately seeks to point to inconsistencies in the experts' evidence and or methodology. In the Appeals Chamber's view, such a response by the Defence is unwarranted and inappropriate, especially since none of the *amici* put forward any such observations.

27. Second, while the Defence correctly asserts that the "issue" of culture and its impact on mental health is "not new" in these proceedings, the Appeals Chamber, nevertheless, considers the *arguments* contained in paragraphs 51-52 of the Defence Response to the *Amici* Observations to indeed be 'new or additional'. As correctly pointed out by the Prosecutor, the issues concerning: the use of open-ended questions; the use of different psychiatric classification systems (DSM-IV rather than DSM-V); the impact of childhood experiences on trauma; the use of standardized testing; malingering; professional courtesy; and cultural factors were previously raised by the

⁴⁷ [Defence Response to the Prosecutor's Motion](#), paras 8-9.

Defence in its appeal brief.⁴⁸ However, the arguments comparing these proceedings with the *Al Hassan* case, as raised in paragraphs 51-52 of the Defence Response to the *Amici* Observations, were not included. In this regard, the Appeals Chamber notes that these arguments could have been introduced by the Defence had it availed itself of the opportunity to seek variation of its grounds of appeal.⁴⁹

28. In the circumstances, the Appeals Chamber finds that paragraphs 51-52 of the Defence Response to the *Amici* Observations are inappropriate. Accordingly, these submissions together with Annex B of the Defence Response to the *Amici* Observations, Annex E of the Defence Response to the *Amici* Observations and Annex F of the Defence Response to the *Amici* Observations are disregarded and will not be further considered in the appeal.

C. Defence Motion of 26 January 2022

29. The Defence requests that the Prosecutor be ordered to file annexes to the Prosecutor's Response to the *Amici* Observations pursuant to regulation 23(3) of the Regulations of the Court. The Defence notes that a number of academic articles referred to in the Prosecutor's Annex A -Table of Authorities "do not contain hyperlinks to publicly available versions of the documents" or some of the hyperlinks "send the user to an abstract which requests money to purchase the article" and that "two of the academic articles, Aitala and Amati, are not in one of the working languages of the Court".⁵⁰

30. Regulation 23(3) of the Regulations of the Court provides that

Subject to any order of the Chamber, a participant shall file, with each document, copies of any authorities relied upon or, if appropriate, internet links. Participants are not required to file copies of decisions or orders of the Court. Authorities shall be provided in an authorised version together with a translation in at least one of the working languages of the Court if the original is not in one of those languages.

⁴⁸ [Prosecutor's Motion](#), para. 3.

⁴⁹ See [Decision related to the translation of the Conviction Decision into Acholi](#), 11 October 2021, ICC-02/04-01/15-1876.

⁵⁰ [Defence Motion of 26 January 2022](#), para. 2.

31. The Appeals Chamber notes that on 27 January 2022, in response to the Defence Motion of 26 January 2022, the Prosecutor filed the requested authorities together with additional authorities which the Defence was unable to obtain from the ICC library.⁵¹

32. As a result, the Appeals Chamber considers the Defence Motion of 26 January 2022 to be moot. Accordingly, it is dismissed as such.

D. Defence Motion of 31 January 2022

33. The Defence requests the Appeals Chamber to disregard the CLRV's Response to Ms Mullally's Observations on the basis that it exceeds the page limit allotted by the Appeals Chamber by 2 pages.⁵²

34. The Appeals Chamber recalls that, as submitted by the Defence, a page limit of no more than 3 pages was imposed on any responses by the parties and participating victims to Ms Mullally's Observations.⁵³ The CLRV's Response to Ms Mullally's Observations has indeed exceeded the page limit set by the Appeals Chamber by 2 pages. In the face of non-compliance with an order of the Appeals Chamber, regulation 29 of the Regulations of the Court permits the Chamber to "issue any order that is deemed necessary in the interests of justice".

35. In the circumstances, the Appeals Chamber considers that disregarding the CLRV's Response to Ms Mullally's Observations in its entirety would not be in the interests of justice and thus rejects the Defence Motion of 31 January 2022.

36. The CLRV is, however, cautioned to comply with all future orders of the Court, in particular those related to page limits.

⁵¹ See [Filing of authorities; Annex A to the Filing of authorities](#).

⁵² [Defence Motion of 31 January 2022](#), para. 1.

⁵³ See [Decision on the request for leave to file observations pursuant to rule 103 of the Rules of Procedure and Evidence](#), para. 17.

Done in both English and French, the English version being authoritative.



Judge Luz del Carmen Ibáñez Carranza
Presiding

Dated this 9th day of February 2022

At The Hague, The Netherlands