Cour Pénale Internationale

International Criminal Court

Original: **English**

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

Date: **18 November 2022**

THE APPEALS CHAMBER

Before: **Judge Luz del Carmen Ibáñez 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

Second Public redacted version of CLRV Observations on the "Defence Appeal Brief Against the Convictions in the Judgment of 4 February 2021", No. ICC-02/04-01/15-1880-Conf, 21 October 2021

Source: **Office of Public Counsel for Victims**

Document 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 Q.C.
Ms Helen Brady

Counsel for the Defence
Mr Krispus Ayena Odongo
Mr Charles Achaleke Taku
Ms Beth Lyons

Legal Representatives of the Victims
Mr Joseph Akwenyu Manoba
Mr Francisco Cox

Common Legal Representatives for Victims
Ms Paolina Massidda

Unrepresented Victims

Unrepresented Applicants (Participation/Reparation)

The Office of Public Counsel for Victims
Ms Paolina Massidda
Mr Orchlon Narantsetseg
Ms Caroline Walter

The Office of Public Counsel for the Defence

States' Representatives

Amicus Curiae

REGISTRY

Registrar
Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

I. INTRODUCTION

1. The Common Legal Representative of the Victims participating in the proceedings[1] (the "CLRV") opposes the Defence Appeal challenging the conviction of the Appellant in its entirety and respectfully requests the Appeals Chamber to confirm the Judgment.

2. In light of the page limit imposed by the Appeals Chamber for the victims to respond to the Defence Appeal, the CLRV addresses selected grounds having a more direct interest for the victims she represents. However, she reserves her right to submit arguments on the other grounds in the course of the appellate proceedings, should the Appeals Chamber decide to hold a hearing or receive further written submissions.

3. The CLRV asks for the dismissal of Grounds 14, 15, 16, 17, 23, 24, 57, 58, 59, 67 and 71, because the Defence does not substantiate on the alleged error(s) committed by the Trial Chamber and on how they affect the outcome of the Judgment.

4. The CLRV leaves to the Prosecution to respond to Grounds 1, 2 and 3 (on article 56 hearings – the CRLV was not appointed at the time), Ground 4 (on the plea of the Appellant), Ground 5 (on the alleged deficiency of the Document Containing the Charges and Confirmation Decision), Ground 6 (on the notice of charges), Ground 12 (on the Prosecution's investigation and disclosure practises), Ground 13 (on the Prosecution's selection of witnesses and collection of evidence), Grounds 20, 21, 22 (on

[1] See the "Decision on contested victims' applications for participation, legal representation of victims and their procedural rights" (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-350 EC PT, 27 November 2015, pp. 19-21; the "Decision on issues concerning victims' participation" (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-369 EC PT, 15 December 2015, pp. 10-11; the "Second decision on contested victims' applications for participation and legal representation of victims" (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/05-384 NM PT, 24 December 2015, pp. 20-23; and the "Decision on the 'Request for a determination concerning legal aid' submitted by the legal representatives of victims" (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-445 EC T, 26 May 2016, para. 13.

cumulative convictions), Ground 64 (on control over the crimes, essential contribution and resulting power to frustrate the commission of the crimes), Ground 51 (on the alleged contact between the Appellant and General Salim Saleh), Ground 65 (on the structure of the LRA and the Appellant's role), Grounds 60, 70, 72 and 73 (on intercept evidence) and Grounds 69 and 74-89 (on individual criminal responsibility).

5. For the remaining grounds, the CLRV argues on their merits *infra*.

II. PROCEDURAL HISTORY

6. On 4 February 2021, Trial Chamber IX (the "Chamber") issued its Judgment, declaring Mr Ongwen guilty of 61 charges of war crimes and crimes against humanity (the "Judgment").[2]

7. On 21 May 2021, the Defence filed the Notification of its Intent to Appeal the Judgment (the "Notice of Appeal").[3]

8. On 8 June 2021, the Appeals Chamber partially granted the Defence's request for an extension of page for its Document in Support of the Appeal against the Judgment,[4] extending the page limit by 150 pages, up to a total of 250 pages.[5] The Appeals Chamber also extended the page limit for the Prosecution's response by 150 pages.[6]

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[2] See the "Trial Judgment" (Trial Chamber IX), No. ICC-02/04-01/15-1762-Red NM T, 4 February 2021 (the "Judgement").
[3] See the "Defence Notification of its Intent to Appeal the Trial Judgment", No. ICC-02/04-01/15-1826 EK A, 21 May 2021 (the "Notice of Appeal").
[4] See the "Defence Request for a Page Limit Extension for its Document in Support of its Appeal against the Trial Judgment", No. ICC-02/04-01/15-1832 NM A, 27 May 2021.
[5] See the "Decision on Defence request for a page limit extension for its appeal brief and order setting time limit for responses to the Prosecutor request for extension of time to file her response to the appeal brief" (Appeals Chamber), No. ICC-02/04-01/15-1850 RH A, 8 June 2021.
[6] *Ibid*.

9. On 11 June 2021, the Appeals Chamber instructed the participating victims to file observations on the Document in Support of the Appeal within 60 days of notification, and not exceeding 80 pages.[7]

10. On 17 June 2021, the Appeals Chamber granted the Prosecution's request[8] for an extension of time to file its response to the Document in Support of the Appeal to 21 October 2021.[9]

11. On 21 July 2021, the Defence filed its Document in Support of the Appeal (the "Appeal Brief").[10]

III. CONFIDENTIALITY

12. In accordance with Regulation 23*bis* (2) of the Regulations of the Court, the present submission is filed confidential following the classification chosen by the Defence and because it contains information bearing said classification. A public redacted version will be filed in due course.

IV. SUBMISSIONS

13. The CLRV opposes the Defence Appeal in its entirety.

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[7] See the "Decision on the modalities of victim participation" (Appeals Chamber), No. ICC-02/04-01/15-1859 NM A, 11 June 2021.
[8] See the "Prosecution Response to 'Defence Request for a Page Limit Extension for its Document in Support of its Appeal against the Trial Judgment' (ICC-02/04-01/15-1832) and Request under regulation 35(2) to extend the time limit for the filing of the Prosecution response to the Defence appeal against the Trial Judgement", No. ICC-02/04-01/15-1836 NM A, dated 1 June 2021 and notified on 2 June 2021.
[9] See the "Decision on the Prosecutor's request for an extension of the time limit to file a response to the appeal brief" (Appeals Chambers), No. ICC-02/04-01/15-1861 NM A, 17 June 2021.
[10] See the "Defence Appeal Brief Against the Convictions in the Judgment of 4 February 2021", No. ICC-02/04-01/15-1866-Conf EK A, 21 July 2021 (the "Appeal Brief").

A. Applicable law

14. Article 81(1)(a) and (b) of the Rome Statute (the "Statute") provides that the parties may appeal a decision of conviction on grounds of a procedural error, error of fact, error of law, or any other ground that affects the fairness or reliability of the proceedings or decision. According to article 83(2) of the Statute, the Appeals Chamber may intervene only if it finds that the proceedings appealed from were unfair in a way that affected the reliability of the decision, or that the decision appealed from was materially affected by error(s) of fact or law or procedural error(s).

15. Regarding errors of law, the Appeals Chamber will not defer to the trial chamber's interpretation of the law. Rather, it will arrive at its own conclusions as to the appropriate applicable law and determine whether or not the trial chamber misinterpreted the law. If the trial chamber committed such an error, the Appeals Chamber will only intervene if the error materially affected the concerned decision.[11]

16. Regarding errors of fact, the Appeals Chamber will apply the standard of reasonableness.[12] In other words, the Appeals Chamber shall review the conviction or acquittal and ensure that the trial chamber correctly appreciated and applied the standard of beyond reasonable doubt.[13] The Appeals Chamber must ensure that the

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[11] See the "Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled 'Judgment'" (Appeals Chamber), No. ICC-01/04-02/06-2666-Red RH A A2, 30 March 2021, para. 36 (the "Ntaganda Appeal Judgment"); the "Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction" (Appeals Chamber), No. ICC-01/04-01/06-3121-Red NM A5, 1 December 2014, paras. 17-18 (the "Lubanga Appeal Judgment"); the "Judgment on the Prosecutor's appeal against the decision of Trial Chamber II entitled 'Judgment pursuant to article 74 of the Statute'" (Appeals Chamber), No. ICC-01/04-02/12-271-Corr EK A, 7 April 2015, para. 20 (the "Ngudjolo Appeal Judgment"); the "Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's 'Judgment pursuant to Article 74 of the Statute'" (Appeals Chamber), No. ICC-01/05-01/08-3636-Red EC A, 8 June 2018, para. 36 (the "Bemba Appeal Judgment"); and the "Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled 'Judgment pursuant to Article 74 of the Statute'" (Appeals Chamber), No. ICC-01/05-01/13-2275-Red NM A A2 A3 A4 A5, 8 March 2018, para. 90 (the "Bemba et al Appeal Judgment").

[12] See the Ntaganda Appeal Judgment, *supra* note 11, para. 37.

[13] *Idem*, para. 38.

trial chamber carried out a holistic evaluation of the evidence, meaning whether it assessed in a connected way and weighing all the relevant evidence taken together, in relation to the fact at issue, rather than evaluating items of evidence without regard to other related evidence.[14] Furthermore, the Appeals Chamber must be satisfied that the trial chamber evaluated all factual findings in deciding that the person's guilt was established beyond reasonable doubt.[15] Therefore, when a factual error is alleged, the Appeals Chamber will determine whether a trial chamber's factual findings were reasonable in the particular circumstances of the case.[16]

17. In assessing the reasonableness of factual findings, the Appeals Chamber will consider whether the trial chamber's evaluation was consistent with logic, common sense, scientific knowledge and experience and whether it took into account all relevant and connected evidence and was mindful of the pertinent principles of law.[17] Beyond the foregoing considerations, the Appeals Chamber will not disturb a trial chamber's factual findings only because it would have come to a different conclusion.[18] Thus, when considering alleged factual errors, the Appeals Chamber will allow the deference considered necessary and appropriate to the factual findings of the trial chamber since the latter has the primary responsibility to determine the reliability and credibility of the evidence and then comprehensively assess the weight of the evidence.[19] In turn, this entails that the trial chamber has the primary responsibility to evaluate the connections - and fairly resolve any inconsistencies - between the items of evidence presented at trial.[20] The trial chamber's function of conducting the trial warrants the presumption that said function has been properly performed, unless and until the contrary is shown.[21]

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[14] *Ibid.*
[15] *Ibid.*
[16] *Idem*, para. 39.
[17] *Ibid.*
[18] *Ibid.* See also the Lubanga Appeal Judgment, *supra* note 11, para. 21.
[19] *Idem*, para. 40.
[20] *Ibid.*
[21] *Ibid.*

18. The appeals review is not a trial *de novo* before the Appeals Chamber.[22] Therefore, the Appeals Chamber may interfere with a trial chamber's factual finding if it is shown to be attended by errors including the following: insufficient support by evidence; reliance on irrelevant evidence; failure to take into account relevant evidentiary considerations and facts; failure to appreciate properly the significance of the evidence in the case record; or failure to evaluate and weigh properly the relevant evidence and facts.[23] The Appeals Chamber may also interfere where it is unable to discern objectively how the trial chamber's conclusion could have reasonably been reached from the evidence in the case record.[24]

19. As a result, in assessing the correctness of a factual finding, the trial chamber's reasoning in support thereof is of great significance. In particular, if the supporting evidence appears weak, or if there are significant contradictions in the evidence, or deficiencies in the trial chamber's reasoning as to why it found that evidence persuasive, the Appeals Chamber may conclude that the finding in question was unreasonable.[25] Where an error of fact is established, the material effect of said error on the trial chamber's decision must not be assessed in isolation; rather the Appeals Chamber must consider the impact of said error in light of the other relevant factual findings relied upon by the trial chamber.[26] A decision is materially affected by a factual error if the Appeals Chamber is persuaded that the trial chamber, had it not so erred, would have convicted rather than acquitted the person or *vice versa* in whole or in part.[27]

20. Regarding procedural errors, the Appeals Chamber will only reverse a trial chamber's decision if it is materially affected by an error which may be based on events

[22] *Ibid.*
[23] *Idem*, para. 41.
[24] *Ibid.*
[25] *Idem*, para. 42.
[26] *Idem*, para. 43.
[27] *Ibid.*

occurred during the trial proceedings and pre-trial proceedings.[28] As for the procedural errors relating to a trial chamber's exercise of its discretion, the Appeals Chamber will not interfere with said exercise of discretion merely because the trial chamber, if it had the power, might have made a different ruling.[29] The Appeals Chamber will only disturb the exercise of a chamber's discretion, where (i) it is based upon an erroneous interpretation of the law; (ii) it is based upon a patently incorrect conclusion of fact; or (iii) the decision amounts to an abuse of discretion. Once it is established that the discretion was erroneously exercised, the Appeals Chamber has to be satisfied that it materially affected the decision.[30] Otherwise, an abuse of discretion will occur when the decision is so unfair or unreasonable as to force the conclusion that the trial chamber failed to exercise its discretion judiciously.[31]

21. Regarding substantiation of arguments, an appellant has to present cogent arguments that set out the alleged error and explain how the trial chamber erred.[32] In alleging that a factual finding is unreasonable, an appellant must explain the reasons for such allegation, for example, by showing that it was contrary to logic, common

[28] See the Ntaganda Appeal Judgment, *supra* note 11, para. 44; the Lubanga Appeal Judgment, *supra* note 11, para 20; the Ngudjolo Appeal Judgment, *supra* note 11, para. 21; the Bemba Appeal Judgment, *supra* note 11, para. 47; and the Bemba et al. Appeal Judgment, *supra* note 11, para. 99.
[29] See the Ntaganda Appeal Judgment, *supra* note 11 , para. 45; the Bemba Appeal Judgment, *supra* note 11, para. 48; the Bemba et al. Appeal Judgment, *supra* note 11, para 100; the Ngudjolo Appeal Judgment, *supra* note 11, para. 21; the "Judgment on the appeal of the Defence against the 'Decision on the admissibility of the case under article 19 (1) of the Statute' of 10 March 2009" (Appeals Chamber), No. ICC-02/04-01/05-408 IO PT OA3, 16 September 2009, paras. 79-80 (the "Kony OA3 Judgment"); the "Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute'" (Appeals Chamber), No. ICC-01/09-01/11-307 NM PT OA, 30 August 2011, para. 89; the "Judgment on the appeals of the Prosecutor and Mr Thomas Lubanga Dyilo against the 'Decision on Sentence pursuant to Article 76 of the Statute'" (Appeals Chamber), No. ICC-01/04-01/06-3122 NM A4 A6, 1 December 2014, para. 41 and the "Judgment on the Prosecutor's appeal against Trial Chamber V(B)'s 'Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute'" (Appeals Chamber)", No. ICC-01/09-02/11-1032 EO T OA5, 19 August 2015, para. 22 (the "Kenyatta OA5 Judgment").
[30] See the Ntaganda Appeal Judgment, *supra* note 11, para. 45.
[31] See the Ntaganda Appeal Judgment, *supra* note 11, para. 46; the Bemba et al. Appeal Judgment, *supra* note 11, para. 101; and the Kenyatta OA5 Judgment, *supra* note 29, para. 25.
[32] See the Ntaganda Appeal Judgment, *supra* note 11, para. 48; the Lubanga Appeal Judgment, *supra* note 11, para 30; and the Kony OA3 Judgment, *supra* note 29, para. 46.

sense, scientific knowledge and experience.[33] In the submissions on appeal, it will be for the parties and participants to draw the attention of the Appeals Chamber to all the relevant aspects of the case record or evidence in support of their respective submissions relating to the impugned factual finding.[34] Furthermore, an appellant is required to demonstrate how the error materially affected the decision.[35] When raising an appeal on the ground of unfairness under article 81(1)(b)(iv) of the Statute, the appellant is required to set out not only how the proceedings were unfair, but also how this fact affected the reliability of the conviction.[36]

B. Grounds for Summary Dismissal

22. The CLRV recalls that the Appeals Chamber held that it will summarily dismiss the arguments which fail to meet the requirements for substantiation in appeals under article 82 of the Statute without analysing their substance.[37] Therefore, the CLRV preliminarily requests the Appeals Chamber to dismiss the following grounds of appeal because they are unsubstantiated.

a) Grounds 14 and 15 (the Chamber erred in law and in fact in its conclusion that it did not discriminate against the Appellant based on mental disability)

23. The Defence argues that the Chamber erred in law and in fact when it reached the conclusion that the allegations of having conducted the proceedings in a

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[33] See the Ntaganda Appeal Judgment, *supra* note 11, para. 48.
[34] *Ibid.*
[35] *Ibid.*
[36] *Ibid.*
[37] See the Lubanga Appeal Judgment, *supra* note 11, paras. 29-30; the Kony OA3 Judgment, *supra* note 29, paras. 50-51; the "Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled 'Decision on the Admissibility and Abuse of Process Challenges'" (Appeals Chamber), No. ICC-01/05-01/08-962 RH T OA3, 19 October 2010, paras. 103-104; the "Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 28 July 2010 entitled 'Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence'" (Appeals Chamber), No. ICC-01/05-01/08-1019 FB T OA4, 19 November 2010, paras. 69-71.

discriminatory manner against the Appellant (a mentally disabled defendant) were baseless and untenable.[38] This ground is argued by incorporating the arguments advanced by the Defence in its Closing Brief.[39]

24. The CLRV preliminarily objects to the Defence's practice of recalling its arguments rejected by the Chamber and arbitrarily "*incorporating*" them in its Appeal Brief without any demonstration, against the clear instruction of the Appeals Chamber regarding the substantiation of arguments on appeal. Most importantly, the Defence's submissions are constructed on a false premise that the Appellant is a mentally disabled person.

25. The CLRV contends that the reference to Mr Ongwen as a person with mental disabilities has no factual or legal basis. In fact, in the Judgment, the Chamber explicitly rejected such allegations. In particular, it considered as entirely untenable the Defence's submission to the effect that it had discriminated against Mr Ongwen by treating him as if he were not a defendant with mental disabilities. Throughout the trial proceedings, the Chamber assessed Mr Ongwen's mental health and made relevant rulings on information provided by independent medical experts in order to accommodate the Appellant.[40] Most importantly, the Chamber found, based on the expert evidence, that Mr Ongwen is not currently suffering from the mental illnesses suggested by the Defence.[41]

26. The CLRV opines that said factual findings should not be disturbed. Indeed, as held by the European Court of Human Rights (the "ECHR"), when determining whether a person is suffering from a mental illness, the individual in question must reliably be shown to be of unsound mind, meaning that a true mental disorder must

[38] See the Appeal Brief, *supra* note 10, paras. 247-250.
[39] *Ibid.*
[40] See the Judgment, *supra* note 2, paras. 109-113.
[41] *Idem*, paras. 2475-2477, 2484, 2492-2493, 2518, 2538 and 2580.

be established before a first instance court on the basis of objective medical expertise.[42] In making such determination, the first-instance court must be allowed to exercise its discretion since it is for the latter to evaluate the first hand-evidence concerning the mental illness from which the person allegedly suffers, as well as to assess the qualifications of the experts.[43] Consequently, it is for the first instance court to subject the expert advice before it to a strict scrutiny and reach its own decision on whether the person concerned suffers from a mental disorder.[44] Moreover, said first-instance court benefits from visual contacts and verbal interactions with the person in question.[45] For these reasons, the first-instance court enjoys a wide margin of appreciation since it is particularly well placed to determine the mental health status of the person concerned.[46]

27. In addition, the CLRV argues that these grounds of appeal should be dismissed since they are: (a) a mere repetition of arguments unsuccessful at trial, without any demonstration that their rejection by the Chamber constitutes an error warranting the intervention of the Appeals Chamber; (b) mere assertions that the Chamber must have committed an error, without showing that any reasonable trier of fact, based on the evidence, could have reached the same conclusion as the Chamber did; and (c) challenging factual findings on which the conviction does not ultimately rely.[47]

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[42] See ECHR, *Ilnseher v. Germany*, App. No. 10211/12 and 27505/14, Judgement, 4 December 2018, para. 127.
[43] *Idem*, paras. 128-130. See also ECHR, *Sabeva v. Bulgaria*, App. No. 44290/07, Judgement, 10 June 2010, para. 58; *Biziuk v. Poland (No. 2)*, App. No. 24580/06, Judgement, 17 January 2012, para. 47; *Ruiz Rivera v. Switzerland*, App. No. 8300/06, Judgement (Extracts), 18 February 2014, para. 59.
[44] See ECHR, *Ilnseher v. Germany*, Judgement, *supra* note 42, para. 132.
[45] See ECHR, *Shtukaturov c. Russia*, App. No. 44009/05, Judgement, 27 March 2008, para. 73.
[46] *Idem*, para. 87.
[47] See ICTY, *Prosecutor vs. Dragomir Milošević*, Case No. IT-98-29/1-A, Judgment (Appeals Chamber), 12 November 2009, para. 17. The Appeals Chamber ruled that "[…] *it has identified the types of deficient submissions on appeal which are bound to be summarily dismissed. In particular, the Appeals Chamber will dismiss without detailed analysis (i) arguments that fail to identify the challenged factual findings, that misrepresent the factual findings or the evidence, or that ignore other relevant factual findings; (ii) mere assertions that the Trial Chamber must have failed to consider relevant evidence, without showing that no reasonable trier of fact, based on the evidence could have reached the same conclusion as the Trial Chamber did; (iii) challenges to factual findings on which a conviction does not rely, and arguments that are clearly irrelevant, that lend support to, or that are not inconsistent with the challenged finding; (iv) arguments that challenge a Trial Chamber's reliance or failure to rely on one piece of evidence, without explaining why the conviction should not stand on the*

28. Moreover, as part of Ground 15, the Defence argues that the Chamber violated the Appellant's fair trial right in rejecting the request seeking a psychiatric examination of Mr Ongwen, to determine if he was suffering from any mental condition or disorder preventing him to make an informed decision whether or not to testify in his defence.[48] However, in the Notice of Appeal, the Defence only stated that the "[..] *Chamber erred in law when it abused its discretion by refusing to apply, in a timely manner consistent with its obligations under Articles 21(3) and 64(2)31 and based on the medical officer's recommendations on the sitting schedule to accommodate the Appellant's mental disability, relevant standards on equal and meaningful participation by the Appellant, a defendant with mental disabilities, thereby arriving at a wrong decision, causing injustice to the Appellant*".[49] Therefore, it is clear that the Defence's argument concerning the alleged error of the Chamber with regard to the Appellant's right to testify falls outside the scope of Ground 15 as articulated in the Notice of Appeal. If the Defence was in need to add a new ground to its appeal, it must have applied for a variation of its Notice (along with an explanation about why a new argument was not initially included) in accordance with regulation 61 of the Regulations of the Court.[50] Consequently, the Defence's failure to follow the proper appellate procedure entails another reason for summary dismissal.[51]

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basis of the remaining evidence; (v) arguments contrary to common sense; (vi) challenges to factual findings where the relevance of the factual finding is unclear and has not been explained by the appealing party; (vii) mere repetition of arguments that were unsuccessful at trial without any demonstration that their rejection by the Trial Chamber constituted an error warranting the intervention of the Appeals Chamber; (viii) allegations based on material not on record; (ix) mere assertions unsupported by any evidence, undeveloped assertions, failure to articulate error; and (x) mere assertions that the Trial Chamber failed to give sufficient weight to evidence or failed to interpret evidence in a particular manner […]" (the "Milošević Judgment"). See also ICTY, *Prosecutor vs. Momčilo Krajišnik,* Case No. IT-00-39-A, Judgement (Appeals Chamber), 17 March 2009, paras. 16-27; ICTY, *Prosecutor vs. Milan Martić,* Case No. IT-95-11-A, Judgement (Appeals Chamber), 8 October 2008, paras. 14-21; ICTY, *Prosecutor vs. Pavle Strugar*, Case No. IT-01-42-A, Judgement (Appeals Chamber), 17 July 2008, paras. 18-24 (the "Pavle Strugar Judgment"); and ICTY, *Prosecutor vs. Radoslav Brđanin*, Case No. IT-99-36-A, Judgement (Appeals Chamber), 3 April 2007, paras. 17-31.

[48] See the Appeal Brief, *supra* note 10, paras. 251-255.

[49] See the Notice of Appeal, *supra* note 3, p. 9.

[50] See the "Decision and order in relation to the request of 23 December 2013 filed by Mr Thomas Lubanga Dyilo" (Appeals Chamber), No. ICC-01/04-01/06-3057-Corr RH A5 A6, 14 October 2014, para. 7.

[51] See ICTR, *The Prosecutor vs. Aloys Simba*, Case No. ICTR-01-76-A, Judgment (Appeals Chamber), 27 November 2007, paras. 169 and 338. The ICTR Appeals Chamber summarily dismissed a number of Prosecution's arguments on the ground that they exceeded the scope of its Notice of Appeal.

b) Ground 16 (the Chamber erred by denying all but one of the Appellant's request for leave to appeal)

29. The Defence argues that the Chamber erred by denying all but one of the 43 Appellant's requests for leave to appeal interlocutory decisions, resulting in the violation of his fair trial right to appellate review of legal issues which were relevant to, and/or affected the fairness or reliability of the proceedings.[52]

30. The CLRV contends that this ground of appeal, which challenges *en bloc* several dozens of interlocutory decisions of the Chamber at once, is totally unreviewable. By failing to identify the factual finding or ruling challenged in the respective decisions, without specific reference to the pages and paragraphs numbers and without raising the legal and/or factual reasons in support of the ground of appeal or making necessary references to the relevant statutory provisions and any other authority, the Defence is in gross violation of the requirements enshrined in regulation 58 of the Regulations of the Court. Furthermore, the Defence intentionally ignores the clear instruction of the Appeals Chamber regarding the substantiation of arguments raised on appeal. Moreover, the Defence totally fails to present cogent arguments that would clearly explain how the Chamber erred and drawing the attention of the Appeals Chamber to all the relevant aspects of the case record or evidence contained in the impugned factual or legal finding(s). These kind of arguments (which fail to articulate error(s), making mere assertions that the Chamber was wrong) are apt for summary dismissal without conducting a detailed analysis.[53]

c) Ground 17 (The Chamber erred in not granting a permanent stay of the proceedings)

31. The Defence argues that the Chamber erred in finding that the Appellant's allegations of fair trial violations were unfounded and did not warrant the exceptional

[52] See the Appeal Brief, *supra* note 10, paras. 256-259.
[53] See the Milošević Judgment, *supra* note 47, para. 17.

remedy of a permanent stay of the proceedings.[54] The Defence again simply refers to its Closing Brief.[55]

32. The CLRV contends that her arguments included *supra* under Ground 16 on the Defence's failure to identify specific factual finding(s) or ruling(s) challenged in the respective decisions, and the legal and/or factual reasons in support of its ground of appeal apply to this ground as well.[56]

d) Ground 23 (the Chamber erred in law and procedure referring to the assessment of evidence as appropriate)

33. The Defence argues that the Chamber erred in law and procedure in finding that it does not have an obligation to state the outcome of its evidentiary rulings, including on probative value and relevance, for every item of evidence in the Judgment but it only needs to refer to the assessment of evidence as appropriate.

34. The CLRV notes that the Defence admits that this evidentiary regime is in line with the precedent of the Appeals Chamber advocating for the approach set in the *Bemba* case.[57] However, the Defence opines that, while the Appeals Chamber held in said case that the Chamber "*will have to*" consider the relevance, probative value and the potential prejudice of each item of evidence at some point in the proceedings when the evidence is submitted, during or at the end of the trial, it also held in the *Bemba et al.* case that trial chambers "*may*" - but are not obligated - to rule on the admissibility of evidence submitted during its assessment of the guilt or innocence of the accused.[58] In the Defence's view the Appeals Chamber's finding in the *Bemba et al.* case conflicts with the one in the *Bemba* case, leading to an impasse.[59]

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[54] See the Appeal Brief, *supra* note 10, para. 260.
[55] *Ibid.*
[56] See the Milošević Judgment, *supra* note 47, para. 17.
[57] See the Appeal Brief, *supra* note 10, paras. 298-299.
[58] *Ibid.*
[59] *Ibid.*

35. The CLRV contends that in fact the Defence is not challenging the Judgment, but rather the allegedly conflicting jurisprudence of the Appeals Chamber. Further, by arguing that the Chamber followed the approach confirmed by the Appeals Chamber in the *Bemba* case, the Defence is actually lending support to the evidentiary rulings made in the Judgment. In any case, the Defence's arguments fail to identify precise challenged factual findings contained in the Judgment or to demonstrate that the Chamber would have rendered a substantially different decision, had it sided with the Defence on this matter. These reasons strongly militate for a summary dismissal.[60]

e) Grounds 24 and 71 (the Chamber erred in law by making credibility and reliability assessments and predeterminations detached from facts without a discernible criterion)

36. The Defence argues that the Chamber erred in law by making credibility and reliability assessments and predeterminations detached from the facts of the trial, without a discernible criterion or statutory evidentiary standard.

37. The CLRV underlines that the Defence admits that, before detailing its assessment of the evidence in the case record, the Chamber "*correctly*" noted that, in accordance with article 66(3) of the Statute, it must be convinced of the guilt of the Accused beyond reasonable doubt.[61] The Defence also admits that the Chamber explicitly acknowledged that such a standard requires a holistic evaluation and weighing of all the evidence taken together in relation to the facts at issue.[62] The Defence further concedes that, prior to determining the reliability of a witness testimony, the Chamber listed certain factors which it considered indicative of its truthfulness and also took into account more technical considerations relating to the individual circumstances of the witness.[63] In this regard, the Defence expressly states that "[it] *wholly agrees with the above statement and does not expect an entirely accurate*

[60] See the Milošević Judgment, *supra* note 47, para. 17.
[61] See the Appeal Brief, *supra* note 10, para. 731.
[62] *Ibid.*
[63] *Idem*, paras. 733-734.

recollection of events in order to establish the witness's reliability and proof beyond reasonable doubt, especially considering the time that has elapsed since the events in question".[64] However, it argues that the Chamber failed to properly apply the above mentioned evidentiary standard,[65] citing as examples the alleged inconsistencies in the assessment of the testimonies of only three witnesses (P-0205, P-0410 and P-0054).

38. The CLRV notes that, because the Defence itself *wholly agrees* with the Chamber's statements on the applicable evidentiary criteria and standards pronounced in the Judgment, these arguments actually lend support to the manner in which the Chamber elaborated and applied the relevant evidentiary standards, rather than identify a concrete error. The Defence even acknowledges that, in the course of the trial, a total of 130 witnesses testified live before the Chamber, in addition to the evidence of seven witnesses which had been preserved under article 56 of the Statute and the prior recorded testimony of a further 49 witnesses submitted pursuant to rule 68(2)(b) or (c) of the Rules of Procedure and Evidence (the "Rules").[66]

39. Therefore, it can certainly not be concluded that the Judgment and the conviction of the Appellant are "unsafe". Indeed, while challenging the credibility of the three witnesses mentioned *supra*, the Defence merely asserts that the Chamber must have failed to consider *all other evidence*, without showing that no reasonable trier of fact, based *on the totality of the evidence*, could have reached the same conclusion as the Chamber did. The argument amounts to a mere allegation that the Chamber wrongly relied, *arguendo*, on evidence of *three witnesses*, without explaining why the conviction should not stand on the basis of the remaining evidence elicited from *a total of 183 witnesses*.

[64] *Idem*, para. 735.
[65] *Idem*, paras. 731-742.
[66] *Idem*, para. 732.

f) Grounds 57, 59 and 67 (the Chamber erred in law and fact by rejecting without a reasoned statement the evidence of the traumas and disabilities suffered by the Appellant in the LRA and in concluding about the LRA hierarchy)

40. The CLRV notes that, while these grounds of appeal were raised in the Notice of Appeal,[67] the Appeal Brief does not contain corresponding sub-sections including arguments in their support. In this regard, regulation 58(2) of the Regulations of the Court states clearly that the document in support of the appeal shall set out the legal and/or factual reasons in support of *each ground of appeal*, making references to the relevant part of the case record or any other document or source of information as regards any factual issue, as well as any relevant provision and any authority cited in support thereof. The Defence was also under the obligation to precisely identify the finding or ruling challenged in the Judgment, with specific reference to the page and paragraph number. Noting the Defence's failure to properly develop pertinent arguments, Grounds 57, 59 and 67 are unsubstantiated and shall not be considered.

g) Ground 58 (the Chamber erred by failing to respond to the arguments that Uganda had a legal duty to protect the Appellant as a child)

41. The CLRV notes that the Defence, while alleging a series of errors, develops submissions only in relation to the Chamber's alleged failure to respond to the arguments that, under international law, Uganda had a legal duty to protect the Appellant as a child from abduction by the LRA.[68] Needless to say, pursuant to article 25(i) and (ii) of the Statute, the Court has jurisdiction only over natural persons,

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[67] See the Notice of Appeal, *supra* note 3, pp. 20-21.

[68] See the Appeal Brief, *supra* note 10, paras. 604-610. The Defence also states in its Notice of Appeal that the Chamber erred in law and fact by finding that evidence on the age and abduction of the Appellant was not relevant to the charges, thereby materially affecting the entire trial proceedings and rending the Judgment unfair including, *inter alia*: (a) by concluding that the Appellant was culpable as an adult for crimes for which he was convicted and erroneously rejected the Defence expert evidence that the effects of abduction on child soldiers continue beyond the age of 18; (b) concluding that the Appellant's childhood experience in the LRA was not central to his situation as a battalion and brigade commander during the period of the charges; and (c) misrepresenting the Defence's position as implying that victimhood immunized victims from committing crimes. See the Notice of Appeal, *supra* note 3, p. 21.

straightforwardly meaning that the Chamber is empowered exclusively to deal with the individual criminal responsibility of the Appellant in the Judgment.

42. While article 21(3) of the Statute states that the application and interpretation of the statutory provisions must be consistent with internationally recognized human rights, this does not place an obligation on the Court to ensure that States Parties properly apply internationally recognised human rights in their jurisdictions.[69] It only requires trial chambers to ensure that the Statute and the other sources of law set forth in article 21(1) and 21(2) of the Statute are applied in a manner which is not inconsistent with or in violation of internationally recognised human rights.[70] As the Appeals Chamber clearly stated, the Court was not established to be an international court of human rights, sitting in judgment over national legal systems to ensure that they are compliant with international standards of human rights or passing rulings generally on the internal functioning of the domestic legal systems in relation to individual guarantees of human rights.[71] Consequently, the Defence's arguments in this regard should be summarily dismissed as being clearly irrelevant and having no bearing on the conviction of the Appellant.[72]

C. Merits of the appeal

43. Due to the page limit imposed by the Appeals Chamber to provide the Victims' observations on the Appeal Brief, the CLRV will limit her submissions to the grounds of appeal which have a major impact on her clients. Consequently, she leaves the following grounds of appeal to the Prosecution which is best placed to address them

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[69] See the "Decision on an Amicus Curiae application and on the 'Requête tendant à obtenir présentations des témoins DRC-D02-P-0350, DRC-D02-P-0236, DRC-D02-P-0228 aux autorités néerlandaises aux fins d'asile' (articles 68 and 93(7) of the Statute)" (Trial Chamber II), No. ICC-01/04-01/07-3003-tENG CB T, 9 June 2011, para. 62.

[70] *Ibid.*

[71] See the "Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled 'Decision on the admissibility of the case against Abdullah Al-Senussi'" (Appeals Chamber), No. ICC-01/11-01/11-565 NM PT OA6, 24 July 2014, para. 219.

[72] See the Milošević Judgment, *supra* note 47, para. 17.

in details: *Grounds 1, 2 and 3* (on article 56 hearings),[73] *Ground 4* (on the plea of the Appellant), *Ground 5* (on the alleged deficiency of the Document Containing the Charges and Confirmation Decision), *Ground 6* (on the notice of charges), *Ground 12* (on the Prosecution's investigation and disclosure practises), *Ground 13* (on the Prosecution's selection of witnesses and collection of evidence), *Grounds 20, 21, 22* (on cumulative convictions), *Ground 51* (on the alleged contact between the Appellant and General Salim Saleh), *Grounds 60, 70, 72 and 73* (on intercept evidence), *Ground 64* (on control over the crimes, essential contribution and resulting power to frustrate commission of the crimes), *Ground 65* (on the structure of the LRA and the Appellant's role), and *Grounds 69 and 74 to 89* (on individual criminal responsibility).

44. The CLRV addresses *infra* the merits of the remaining grounds of appeal. For the purposes of her reasoning, similar grounds are treated jointly.

a) Grounds 7, 8, 10 (in part), 25 and 45 (concerning the application by the Chamber of the standard "beyond reasonable doubt")

45. The Defence acknowledges that the Chamber correctly articulated in the Judgment the standard of proof beyond reasonable doubt, referring to article 66 of the Statute.[74] However, it avers that the Chamber failed to apply and/or misapplied said standard throughout the Judgment.[75] In particular, the Defence argues that the Chamber – while referring to the term "*reasonable doubt*" in some paragraphs - made only one finding in respect to the evidence and reasonable doubt at paragraph 656 of the Judgement. According to the Defence, this renders it impossible to discern whether the Chamber properly applied the standard to the evidence since it failed to articulate whether or not an evidentiary finding or a conclusion is reached based on proof beyond reasonable doubt.[76]

[73] The CLRV underlines that she had not yet been appointed at the time of the article 56 proceedings.
[74] See the Appeal Brief, *supra* note 10, para. 199.
[75] *Ibid.*
[76] *Idem*, paras. 200-201.

46. In this regard, the Appeals Chamber held that only the elements of the crime and the mode of liability alleged against an accused, as well as the facts which are indispensable for entering a conviction, must be established beyond reasonable doubt.[77] The CLRV submits that the Chamber strictly followed this guidance[78] and assessed all the evidence under the prescribed standard in entering convictions against the Accused. The arguments raised by the Defence fail to identify the specific references to the findings or ruling challenged in the Judgment, as well as the relevant pages and paragraphs numbers. Moreover, in compliance with the specific instruction of the Appeals Chamber, the Defence was obliged to present cogent arguments setting out the alleged error and explaining how the Chamber erred, drawing the attention of the Appeals Chamber to all the relevant aspects of the case record relating to the impugned factual findings. In this regard, the simple statement that the Chamber erred because it could not discern whether the former properly applied the relevant standard to the evidence is not sufficient.

47. On the Defence's argument that the reference to "*ample evidence*", used throughout the Judgment, is not a legal surrogate for the standard of proof beyond reasonable doubt,[79] the CLRV submits that the examples provided by the Defence allegedly showing this error misrepresent the findings of the Chamber. For example, the Defence contends that the Chamber allegedly found D-0133's evidence related to escape "*incredible considering the ample evidence received to the contrary*" and thus it was incorrect to equate "ample" with proof beyond a reasonable doubt.[80] However, in this instance, the Chamber was simply referring to the level of credibility of a witness in light of the amount of evidence concerning the issue of possibility of escapes from the LRA.[81] Consequently, the assertion of the Defence that the Chamber equated "*ample evidence*" with proof beyond reasonable doubt is misplaced. More importantly, the

[77] See the Lubanga Appeal Judgment, *supra* note 11, para. 22; the Bemba et al Appeal Judgment, *supra* note 11, paras. 96 and 868; the Ngudjolo Appeal Judgment, *supra* note 11, paras. 123-125.
[78] See the Judgment, *supra* note 2, para. 227.
[79] See the Appeal Brief, *supra* note 10, para. 202.
[80] *Idem*, para. 203.
[81] See the Judgment, *supra* note 2, para. 612.

Chamber found that the evidence of that specific witness does not go to issues of relevance to the disposal of the charged crimes.[82] Therefore, the Chamber did not at all rely on D-0133's evidence in convicting the Appellant.

48. The Defence further argues that, while the Chamber stated correctly that the general provisions of article 66(2) and (3) apply to affirmative defences ("*which means the Prosecution bears the burden to disprove grounds excluding criminal responsibility beyond reasonable doubt*"), the Judgment does not indicate whether or not the Prosecution met its burden in respect to the elements of the mental health and duress defences in articles 31(1)(a) and (d) of the Statute.[83]

49. The CLRV observes that the Defence is misstating the ruling of the Chamber on the matter. In particular, the Chamber held that:

> "[…] *there is no specific provision in the Statute regulating the burden and standard of proof with respect to grounds excluding criminal responsibility. However, this is not a lacuna in the Statute. According to Article 66(2) and (3), the burden of proof (incumbent on the Prosecution) and the standard of proof (beyond reasonable doubt) relate to the 'guilt of the accused'. When a finding of the guilt of the accused also depends on a negative finding with respect to the existence of grounds excluding criminal responsibility under Article 31 of the Statute, the general provisions of Article 66(2) and (3) on the burden and standard of proof equally apply, operating (as is always the case for the determination on the guilt or innocence of the accused) solely with respect to the facts 'indispensable for entering a conviction', namely, in this case, the absence of any ground excluding criminal responsibility and, thus, the guilt of the accused*".[84]

[82] *Ibid.*
[83] See the Appeal Brief, *supra* note 10, paras. 211-212.
[84] See the Judgment, *supra* note 2, para. 231.

50. Thus, the Chamber never held that the Prosecution must disprove each element of the affirmative defence beyond reasonable doubt as suggested by the Defence.[85] Rather, the Chamber's unambiguously stated that, in order to convict the Accused, it must make "*a negative finding*" with respect to the existence of grounds excluding criminal responsibility under article 31 of the Statute, and, at the same time, the Prosecution will still have to prove the guilt of the Accused beyond reasonable doubt.

51. Accordingly, the Chamber concluded, with regard to the defence under article 31(1)(a) of the Statute, that:

> "[…] [B]*ased on the expert evidence of Professor Mezey, Dr Abbo and Professor Weierstall-Pust* [or the Prosecution experts witnesses], *who did not identify any mental disease or disorder in Dominic Ongwen during the period of the charges, further based on the corroborating evidence heard during the trial, which is incompatible with any such mental disease or disorder, and noting that the evidence of Professor Ovuga and Dr Akena* [the Defence experts witnesses] *cannot be relied upon, the Chamber finds that Dominic Ongwen did not suffer from a mental disease or defect at the time of the conduct relevant under the charges. A ground excluding criminal responsibility under Article 31(1)(a) of the Statute is not applicable*".[86]

52. Also, with regard to the defence of duress under article 31(1)(d) of the Statute, the Chamber found that:

> "[…] *Based on a thorough analysis of the evidence, the Chamber finds that Dominic Ongwen was not under threat of death or serious bodily harm to himself or another person when engaging in conduct underlying the charged crimes. It is therefore not possible to further discuss specifically the imminence of the threatened harm, in the sense that it would follow, without delay, Dominic Ongwen's failure to perform as*

[85] See the Appeal Brief, *supra* note 10, para. 210.
[86] See the Judgment, *supra* note 2, para. 2580.

> *required by the source of the threat. It is also conceptually not possible to discuss the other requirements of Article 31(1)(d) of the Statute, namely the necessity and reasonableness of the act undertaken to avoid the threat, and the requirement that the person did not intend to cause a greater harm than the one sought to be avoided*. […] *The actions which Dominic Ongwen took and which underlie the crimes charged and found in this judgment were, within the meaning of Article 31(1)(d), free of threat of imminent death or imminent or continuing serious bodily harm. Duress as a ground excluding criminal responsibility under Article 31(1)(d) of the Statute is therefore not applicable*".[87]

53. Both findings are perfectly in line with the Chamber's pronouncement on the burden of proof under article 66(2) and (3) of the Statute, mentioned *supra*. More importantly, the fact that the Prosecution met its burden in respect to the elements of mental health and duress defences is inherent in these conclusions since the Chamber entered a conviction against the Appellant based on the incriminating evidence presented by the Prosecution, proving his guilt beyond reasonable doubt, as well as demonstrating the absence - or "*a negative finding*" - with respect to the existence of grounds excluding criminal responsibility. Thus, the Chamber never shifted the evidentiary burden to the Defence.

54. Furthermore, the Defence argues that the Chamber erred by granting the Prosecution's request for rebuttal evidence from P-0447 (which was allegedly repetitive) by not requiring any standard to be articulated or applied in respect to said evidence.[88] The Defence concludes that, essentially, if the rebuttal evidence were not before the Chamber, the article 31(1)(a) defences would not have been rejected.[89]

[87] *Idem*, paras. 2669 and 2670.
[88] See the Appeal Brief, *supra* note 10, paras. 220-224.
[89] *Idem*, para. 226.

55. The CLRV recalls that the Chamber issued a decision, specifically addressing the possibility for the Prosecution to present rebuttal evidence and developing a set of strict rules for its admission. In particular, the Chamber held the following: (i) under regulation 43 of the Regulations of the Court, the questioning of witnesses and the presentation of evidence had to be fair and effective, avoiding delays and ensuring the effective use of time. The Prosecution had already indicated that it will call a rebuttal witness since P-0447 did not have a chance to comment and address the second report of the Defence expert witnesses (which contained new information and was unavailable during his questioning); (ii) the rebuttal evidence was not caused by any negligence or fault of the Prosecution; (iii) the rebuttal evidence appeared to be necessary in light of the content of said second report and expected expert testimonies (which were not foreseeable by the Prosecution); (iv) the rebuttal evidence concerned only points and facts previously not addressed by the Prosecution expert witness; (v) pursuant to the principles of a fair trial and the rights of the Accused, the Defence could present evidence in rejoinder; and (vi) P-0447 could attend the testimony of D-0041 and D-0042 in order to prepare his report, and the same was granted to the Defence experts.[90]

56. Indeed, the Chamber set these stringent rules (covering the necessity, scope of rebuttal evidence and its prior disclosure to the Defence) and enforced them during the presentation of the rebuttal evidence.[91] The Prosecution also had to fulfil the requirements of rule 68(3) of the Rules for admission of the report of the witness.[92] The Chamber further allowed the Defence to respond by presenting evidence in rejoinder in order to ensure the fairness of the proceedings.[93]

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[90] See the "Decision on Requests related to the Testimony of Defence Expert Witnesses D-0041 and D-0042" (Trial Chamber IX), No. ICC-02/04-01/15-1623 EK T, 1 October 2019, paras. 13-20.
[91] See T-252, p. 7, line 16 to p. 8, line 10 (re-affirming the rules for rebuttal evidence) and p. 14, line 11 to p. 15, line 6 (sustaining the Defence's objections concerning the scope of the rebuttal evidence).
[92] *Idem*, p. 9, lines 19-20.
[93] See T-254 p. 3 line 11 – p. 39 line 7 and T-255 p. 2 line 23 – p. 23 line 21.

57. Consequently, the Defence's allegation that the Chamber heard the rebuttal evidence from P-0447 without requiring or applying any standard is demonstrably incorrect. Moreover, the Defence does not show that the article 31(1)(a) defences would not have been rejected but for the rebuttal evidence. In fact, it fails to establish that the rebuttal evidence lacked relevance or probative value or was prejudicial to a fair trial or to a fair evaluation of evidence on the matter. Thus, Grounds 7, 8, 10 (in part), 25 and 45 must be dismissed.

b) Grounds 9 and 10 (the Chamber erred in law in rejecting the defence submissions on the prejudicial evidentiary regime)

58. The Defence argues that the Chamber erred in law in rejecting the Defence's submissions on the prejudicial evidentiary regime.[94] In particular, it contests that the Chamber rejected the Defence's claim that the Appellant was prejudiced by the evidentiary regime or admissibility of evidence regarding PCV-0001, P-0447 or P-78.[95]

59. The CLRV recalls the arguments concerning P-0447 raised and addressed *supra*. As for P-78, she recalls her submissions about the fact that the Defence incorporates arguments contained in its Closing Brief,[96] without substantiating them on appeal.

60. With respect to PCV-1, the Defence argues that the Chamber erred in denying the Defence' s motion to exclude portions (pages 38 to 42) of his expert report which expressed opinion on acts and conduct charged against the Appellant and included numerous references to anonymous witnesses.[97] The Defence also avers that this expert witness never used a term in his report – "*sex slave*" – which was a legal conclusion.[98]

[94] See the Appeal Brief, *supra* note 10, p. 48.
[95] *Idem*, para. 227.
[96] *Ibid.*
[97] *Idem*, para. 228.
[98] *Idem*, para. 230.

61. The CLRV notes that the Defence simply restates arguments already raised, litigated and decided upon during the trial. Moreover, the Chamber recalled in the Judgment that it had previously rejected the Defence's arguments concerning PCV-0001, since it "*would have made the exact same finding applying a different procedure for the submission of evidence – any purported prejudice in this regard is thus unrelated to the general procedure set out by the Chamber for the submission of documentary evidence at trial*".[99]

62. In any case, the Chamber ruled that, while PCV-0001 testified and offered a detailed account of the methodology and terminology adopted in his expert report and its outcomes, focusing on the psychological impact of rape and other forms of sexual violence on men and women in the cultural context of the charged crimes, his evidence "*does not directly underlie any part of the Chamber's analysis as to whether the facts alleged in the charges are established*".[100]

63. Yet, the Defence argues that "[it] *has no idea what assessment the Chamber ultimately made of this evidence*" and the Chamber should have ruled on the relevance, probative value and potential prejudice of each piece of formally submitted evidence.[101] The Chamber did conduct its detailed assessment of the expert report and oral testimony provided by PCV-0001 and found his evidence not related to the acts and conduct of the Accused. This conclusively means that the Chamber did not at all rely on any aspect of PCV-0001's evidence in entering the conviction against the Appellant. *Arguendo*, even if the Chamber did not admit the expert report in question, as requested by the Defence, the outcome of the Judgment would not have been substantially or by any measure different. Consequently, Grounds 9 and 10 must be dismissed.

[99] See the Judgment, *supra* note 2, para. 100.
[100] *Idem*, para. 600.
[101] See the Appeal Brief, *supra* note 10, para. 233.

c) Ground 11 (the Chamber erred in law and procedure by failing to provide translations and interpretations)

64. The Defence argues that the Chamber erred in law and procedure by failing to provide translations and interpretation, in violation of the Appellant's fair trial rights under article 67(1)(f) of the Statute,[102] resulting in a miscarriage of justice which materially affected the Judgment.[103]

65. The CLRV posits that the Appeals Chamber has already made a clear pronouncement on this matter when ruling that a defendant's right under article 67(1)(f) of the Statute "*requires a chamber to determine what is 'necessary to meet the requirements of fairness'. It does not,* per se, *require that a full translation of the decision under article 74 of the Statute be provided to a convicted person before filing a notice of appeal*."[104] The Appeals Chamber added that "*it must also take into account the circumstances as a whole and the convicted person's ability to understand the details of his conviction by other means*".[105]

66. Indeed, in line with the reasoning of the Appeals Chamber, during the pre-trial and trial proceedings: (i) the Appellant had been provided with full Acholi translations of the core documents of the case; (ii) he had followed the pre-trial and trial hearings with Acholi interpretation; (iii) he had also had, throughout the proceedings, the assistance of a Defence team whose members (including the lead counsel) are fluent in English and Acholi.[106] This combination of having the assistance of a competent defence counsel, fluent in English and Acholi, together with the translation into Acholi of core documents (and pieces of evidence) has been found as satisfying the

[102] *Idem*, p. 49.
[103] *Idem*, para. 238.
[104] See the "Decision on Mr Ongwen's request for time extension for the notice of appeal and on translation" (Appeals Chamber), No. ICC-02/04-01/15-1781 EC A, 24 February 2021, para. 10 (emphasis added).
[105] *Ibid.*
[106] *Idem*, para. 11.

requirement of fairness of the proceedings.[107] In fact, the Appellant has heard the entire trial through Acholi interpretation and has instructed his Defence team throughout the trial without any discernible impediments.[108] If need be, he was also able to consult the Acholi recordings of court hearings.[109]

67. As established by the Appeals Chamber, the crux of the matter is whether the *requirements of fairness* were met in this case in the context of the pre-trial and trial proceedings. However, the Defence does not show how exactly the Chamber failed to determine what is "*necessary to meet the requirements of fairness*" in violation of article 67(1)(f) of the Statute and committed a procedural error in issuing the Judgment. Accordingly, Ground 11 is without merit and should be dismissed.

d) Ground 18 (the Chamber erred in finding that its denial of a SGBC expert to the Appellant did not violate his fair trial rights)

68. The Defence argues that the Chamber erred in finding that its denial to add D-158, an expert on Sexual and Gender-Based Crimes (SGBC), to the Defence witness list, did not violate the Appellant's fair trial rights.[110] The Defence adds that, while about one-quarter of the confirmed charges against the Appellant were SGBC, the Chamber denied its request since the proposed testimony would have been additional evidence for topics for which direct evidence had already been elicited by the Defence.[111]

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[107] See the "Decision Setting the Regime for Evidence Disclosure and Other Related Matters" (Pre-Trial Chamber II), No. ICC-02/04-01/15-203 NM PT, 27 February 2015, para. 33.
[108] See the "Decision on Defence Request for Findings on Fair Trial Violations Related to the Acholi Translation of the Confirmation Decision" (Trial Chamber IX), No. ICC-02/04-01/15-1147 EK T, 24 January 2018, para. 20.
[109] See the "Decision on Defence Request for Reconsideration of or Leave to Appeal the Directions on Closing Briefs and Closing Statements" (Trial Chamber IX), No. ICC-02/04-01/15-1259 EC T, 11 May 2018, para. 15.
[110] See the Appeal Brief, *supra* note 10, para. 264.
[111] *Idem*, paras. 264-265.

69. The CLRV contends that the Defence is blatantly mischaracterising the reasoning of the Chamber[112] in rejecting the request to call D-0158. In that ruling, the Chamber noted that (i) the Defence's request was filed over a year after the deadline to provide the final list of witnesses and of evidence had expired; (ii) such late addition could have been granted even after the presentation of the evidence had begun in exceptional circumstances and with sufficient cause (*which was absent in the circumstances*); (iii) the Defence request came at a very late stage in the proceedings after it had already called two thirds of its *viva voce* witnesses; (iv) D-0158 had been known to the parties and participants for a considerable period of time and at least since the beginning of the trial in 2017. In the absence of any explanation by the Defence as to the reasons for adding D-0158 only at that late stage in the trial,[113] the Chamber rejected the request partly due to the lack of due diligence on the part of the Defence itself.

70. As for the content of the expected testimony of D-0158, the Chamber reviewed the Defence's terms of reference and found that: (i) the evidence to be elicited from D-158 was repetitive because already discussed by other witnesses, including other Defence's witnesses (D-0133 and D-0060); (ii) the Defence had already questioned Prosecution's witnesses who provided direct testimonies on the matter; (iii) the Prosecution had undertaken not to object to any submission of D-0158's already existing academic work and thus the Defence could submit said material; and (iv) the testimony of D-0158 and his prospective report would have been additional evidence for topics for which direct evidence had already been elicited by the Defence. Further, the Chamber took into account that both the Prosecution and the CLRV objected to the addition of D-0158.[114] In the Judgment, the Chamber reiterated these facts.[115]

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[112] See the "Decision on Defence Request to Add Two Witnesses to its List of Witnesses and Accompanying Documents to its List of Evidence" (Trial Chamber IX), No. ICC-02/04-01/15-1565 NM T, 13 August 2019.
[113] *Idem*, paras. 13-15.
[114] *Idem*, paras. 16-22.
[115] See the Judgment, *supra* note 2, para. 72.

71. Consequently, the Defence's allegation of double-standard is hollow in substance. In fact, there is no measure of comparison which can genuinely be made between the proposals to call D-0158 and PCV-0001. In the case of the latter, (i) the CLRV submitted her request within the deadline set by the Chamber; (ii) his proposed testimony was found to be not repetitive and asked much earlier in the proceedings (*given the presentation of the evidence by the victims immediately following the end of the Prosecution's case and thus before the commencement of the Defence's case, in particular, prior to the testimonies of D-133 and D-60*); (iii) the anticipated expert testimony was intended to assist the Chamber to assess the impact of rape and SGBC on the lives of the victims in a more universal manner, including victims who did not testify; and lastly, (iv) the proposed testimony affected the interests of the victims and was necessary for the determination of the truth.[116]

72. Most importantly, even if the Chamber would have allowed the Defence to call D-0158, his anticipated report and testimony will not have touched upon the acts and conducts of the Accused, given the distinct subject matter on which he was instructed to produce his report. As a result, the Chamber would not have relied in any way on his evidence in entering a conviction or rendering a judgment of acquittal. Therefore, D-0158's evidence is doomed to be irrelevant for the central issues of the trial. As held by the ECHR, the requirements of a fair trial do not impose on a court an obligation to accept an expert opinion merely because a party has requested it since the former is free to refuse to accept evidence proposed by the defence if such evidence is not relevant to the subject matter in question.[117] Consequently, Ground 18 should be equally dismissed.

[116] See the "Decision on the Legal Representatives for Victims Requests to Present Evidence and Views and Concerns and related requests" (Trial Chamber XI), No. ICC-02/04-01/15-1199-Red EK T, 6 March 2018, paras. 33-37.
[117] See ECHR, *Hodžić v. Croatia*, App. No. 28932/14, Judgment, 4 April 2019, paras. 61, 72 and 73.

e) Grounds 19 and 42 (the Chamber erred in not relying on Professor De Jong's report)

73. The Defence argues that the Chamber erred by not relying on the content of Professor de Jong's report and totally disregarding it in the Judgment but for its assessment of the Appellant at the time of the interviews during the trial proceedings.[118] The Defence adds that if the Chamber had considered the complete report, it would have reached a different conclusion on the affirmative defence under article 31(1)(a) of the Statute.[119]

74. The CLRV notes that the report of Prof. de Jong was made according to the Chamber's instructions ordering a psychiatric examination of Mr Ongwen in order to: (i) make a diagnosis as to any mental condition or disorder he may suffer at the time of the ongoing trial; and (ii) provide specific recommendations on any necessary measure/treatment that may be required to address any such condition or disorder at the detention centre.[120] The Chamber stressed that Prof. de Jong discussed Mr Ongwen's mental health at the time of the preparation of the report and properly did not attempt to make a historical diagnosis.[121] Consequently, the Chamber rightly considered that it could not rely on said report directly for its conclusions with respect to the issue at hand, since it was prepared for a different purpose, *i.e.* the examination of the Appellant's mental health at the time of the examination during the trial, not at the time of his conduct relevant to the charges.[122]

75. The CLRV also stresses that Prof. de Jong was a Court-appointed expert with a very narrow mandate to make a diagnosis as to any mental condition or disorder Mr Ongwen was suffering at the time of the trial. Hence, he was not an expert witness

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[118] See the Appeal Brief, *supra* note 10, p. 58.
[119] *Idem*, paras. 275-276.
[120] See the "Decision on the Defence Request to Order a Medical Examination of Dominic Ongwen" (Trial Chamber IX), No. ICC-02/04-01/15-637-Red EC T, 16 December 2016, p. 18.
[121] See the Judgment, *supra* note 2, para. 2576.
[122] *Idem*, para. 2578.

per se called by the parties in order to prove their case or assist the Chamber to make its determination on the ultimate issue – the guilt or innocence of the Appellant.

76. As the ICTY Appeals Chamber has held, "*the evidence of an expert witness is meant to provide specialised knowledge – be it a skill or knowledge acquired through training – that may assist the fact finder to understand the evidence presented*. [So] [t]*he Trial Chamber must determine itself whether an accused had the state of mind required by the applicable law (mens rea); however, a medical analysis of an accused's mental state at the time of the crime is a distinct piece of evidence which may be relied upon in support of the Trial Chamber's conclusion*".[123] Consequently, a distinction must be drawn between asking an expert to make a conclusion of fact on behalf of the Chamber *versus* providing medical information upon which it may rely in its determination about the conviction or acquittal of an accused.[124] In the present case, the Chamber's request for Prof. de Jong to give his expert opinion on Mr Ongwen's mental health at trial was a medical question rather than a request to make a finding of fact on one of the elements of the crimes charged. Consequently, the Chamber could rightly not rely on said report for the ultimate issues of this case, including the affirmative defences.

77. Moreover, according to the Initial Directions on the Conduct of the Proceedings, the parties and participants were required to comply with specific requirements in order to present expert evidence.[125] Further, the parties and participants were to test conclusions of the experts instructed by the opposing party via questioning which is inherent in party-driven adversarial proceedings provided in the Statute.[126]

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[123] See ICTY, Contempt Proceedings Against Dragan Jokic, Case No. IT-05-88-R77.1-A, Judgement on Allegations of Contempt (Appeals Chamber), 25 June 2009, para. 18 (emphasis added).
[124] *Ibid.*
[125] See the "Initial Directions on the Conduct of the Proceedings" (Trial Chamber IX), No. ICC-02/04-01/15-497 EC T, 13 July 2016, paras. 32-33.
[126] See the "Judgment on the appeal of Mr Bosco Ntaganda against the 'Decision on Defence request for leave to file a 'no case to answer' motion'" (Appeals Chamber), No. ICC-01/04-02/06-2026 SL T OA6, 5 September 2017, para. 50.

78. Furthermore, rule 135 of the Rules, under which Prof. de Jong was instructed as a Court-appointed expert, does not provide any possibility for the parties or participants to challenge his qualification or test his findings. For these reasons: (i) his report was not required to meet the stringent procedural prerequisites of rule 68 of the Rules; (ii) consequently, he could not be called to testify or to be questioned by the parties or participants about the Appellant's state of mind during the charged period; and (iii) ultimately, his evidence will not have been probative or relevant to the central issue in the case, including the affirmative defences.

79. As a result, the Chamber could not have relied on his report in its Judgment. Or else, it would have erroneously relied on Prof. de Jong's report, regardless of its irrelevance and without fulfilling all the procedural requirements that guarantee its impartiality, as well as the fairness towards the parties and participants operating in an adversarial setting. Consequently, Grounds 19 and 42 must be dismissed.

f) Grounds 26, 47, 28 and 68 (errors in respect of the Appellant's childhood, abduction, life in the LRA)

80. The Defence argues that Chamber erred in failing to assess and evaluate the evidence of the impact of the age, abduction and indoctrination of the Appellant and his childhood development within the LRA, together with its enduring effects on the Appellant - when making an evaluation of the affirmative defences, especially with regard to duress.[127] According to the Defence, the Chamber should have considered the background experiences of the Appellant from his childhood immediately before and after his abduction, the vicissitudes and uncertainties of his life in a coercive environment, his traumatic injuries, the consequences of his contact with General Salim Saleh and his peculiar cumulative special attributes leading to his rise in ranks.[128] Within Ground 28, the Defence makes similar arguments in stating that the Chamber

[127] See the Appeal Brief, *supra* note 10, p. 70.
[128] *Idem*, para. 311.

erred in disregarding evidence of the abduction of the Appellant and holding that the evidence of his abduction, indoctrination and childhood experience was not central to the affirmative defences.[129] Within Ground 68, the Defence also argues a similar issue according to which the Chamber allegedly failed to apply its findings on the conditions of recruitment, initiation, training and service in the LRA to the personal experiences of the Appellant.[130]

81. The CLRV posits that any factual finding about the abduction of the Appellant and his childhood or alleged indoctrination in the hands of the LRA cannot be in itself or alone sufficient and thus determinative of the central issues of the case. Indeed, the trial against the Appellant was strictly about the crimes he allegedly committed between 2003 and 2005 when he had already reached adulthood. If at all, such evidence, when considered *only* in relation to the specific legal requirements of the affirmative defences under article 31 of the Statute, might be relevant and probative in the circumstances of the case. Therefore, the Chamber's finding (that it must focus on the situation of Mr Ongwen as battalion and brigade commander during the period of the charges as his childhood experience in the LRA was not central to the disputed issue between the parties)[131] is legally correct.

82. In any case, the Defence is misrepresenting the relevant findings and rulings of the Chamber on the matter. In fact, the Chamber did assess the evidence relating to the Appellant's abduction and his childhood in the bush. In particular, the Chamber took into account one of the main expert witnesses' evidence - Dr Abbo - suggesting that, until the time of his abduction, the complex interactions between individual, societal, and ecological factors over the course of Mr Ongwen's life had gone on satisfactorily well and his intelligence and "*bush socialisation*" could have helped him to cope with his situation.[132] Dr Abbo's findings (suggesting that Mr Ongwen seemed to have

[129] *Idem*, paras. 420-429.
[130] *Idem*, paras. 681-702.
[131] See the Judgment, *supra* note 2, para. 2592.
[132] *Idem*, para. 2480.

matured developmentally against all odds with flexibility of moral reasoning) were also noted by the Chamber in relation to the assessment of evidence relevant to the defence under article 31(1)(a) of the Statute.[133] In this regard, the Chamber found that the expert report and testimony, in particular in relation to her assessment of the level of Mr Ongwen's moral development, were pertinent and valuable for use in its findings.[134] The Chamber also took into account the evidence from factual witnesses in making its determination (such as P-0142 who testified about Mr Ongwen's personal growth in the LRA, before reaching the brigade commander's position).[135] In addition, the Chamber considered the evidence of several witnesses, including D-0007, D-0008, D-0012, D-0032 who testified about Mr Ongwen's date of birth and his abduction.[136]

83. Consequently, the Defence's arguments that the Chamber chose to ignore or disregard the evidence about the age, abduction and childhood development of the Appellant in the LRA are erroneous and therefore without merit.

84. In Ground 68, the Defence also argues that the Chamber erred in law and fact by disregarding evidence of the Appellant's conditions of recruitment, initiation, training and service in the LRA which made him function as a tool of Kony.[137] The CLRV reiterates that any factual finding about these matters cannot be in itself or alone sufficient and thus determinative of the central issues of the case, because the charges brought against the Appellant concern only the crimes he allegedly committed between 2003 and 2005 when he was already an (adult) commanding officer in the LRA. Consequently, the Chamber's finding (that it must focus on the situation of Mr Ongwen as battalion and brigade commander during the period of the charges as his childhood experience in the LRA was not central to the guilt or innocence of the Appellant) is again legally correct.[138]

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[133] *Ibid.*
[134] *Idem*, para. 2485.
[135] *Idem*, para. 2506.
[136] *Idem*, para. 29.
[137] See the Appeal Brief, *supra* note 10, p. 158.
[138] See the Judgment, *supra* note 2, para. 2592.

85. Indeed, the Chamber explained clearly in the Judgment that, while it had acknowledged the fact that the Appellant was abducted at a young age, "[he] *committed the relevant crimes when he was an adult and, importantly, that, in any case, the fact of having been (or being) a victim of a crime does not constitute, in and of itself, a justification of any sort for the commission of similar or other crimes – beyond the potential relevance of the underlying facts to the grounds excluding criminal responsibility expressly regulated under the Statute*".[139]

86. *Arguendo*, even if the Chamber had considered all the evidence pertaining to the Appellant's conditions of recruitment, initiation, training and service in the LRA, it would not have been lawful to rely on them given the fact that the relevant factual findings concerning these matters fall short of meeting the requirements of the affirmative defences under article 31(1)(a) and (d) of the Statute. Certainly, there is no showing that, had the Chamber considered the evidence in question, the final outcome of the Judgment would have been substantially different. As a result, Grounds 26, 47, 28 and 68 should be dismissed.

g) Grounds 27, 29, 31, 32 and 35 to 41 (the Chamber erred in rejecting the Appellant's article 31(1)(a) affirmative defence)

87. The Defence argues that the Chamber erred in law and fact in its unequivocal rejection of the Defence experts' (D-0041 or D-0042) evidence.[140] In particular, the Defence alleges that the Judgment disregards the content of the experts' findings and conclusions *solely* on the basis of their methodology.[141] Again, the Defence "*incorporates*" its arguments in its Closing Brief.[142]

88. The CLRV posits that the Defence is misrepresenting the relevant findings and conclusions of the Judgment. Indeed, the methodology employed by the experts was

[139] *Idem,* para. 2672.
[140] See the Appeal Brief, *supra* note 10, para. 323.
[141] *Idem*, paras. 326-327.
[142] *Idem*, para. 328.

only one of the reasons of the Chamber for rejecting the evidence. In fact, the Chamber noted that the experts made the ultimate conclusion on the question of the guilt or innocence of the Appellant by stating that "[in their considered opinion, Mr Ongwen] *is not criminally liable for his actions while he was in the bush*."[143] Yet, as was stressed in the Judgment, "*the judges of a trial chamber are themselves the triers of facts responsible for the ultimate fact-finding on the guilt or innocence of the accused* […]".[144]

89. As held by Trial Chamber V(a), a trial chamber, in assessing the admissibility of expert evidence pursuant to article 64(9)(a) and 69(4) of the Statute, must determine, *inter alia*, whether said evidence falls within the expertise of the witness and does not usurp the functions of the chamber as the ultimate arbiter of fact and law.[145] And, an expert evidence which would qualify as usurping the functions of a trial chamber by going into the "*ultimate issues*" of the trial would include opinions as to an accused's guilt or innocence, or whether the contextual, material or mental elements of the crimes charged are satisfied.[146] The Defence experts did exactly that by openly stating that the Appellant is not guilty of the crimes charged.

90. Further, the Chamber concluded that the blurring of the experts' role as both treating physicians and forensic experts has led to a loss of objectivity on their part.[147] As held by the Chamber, "*there is an inherent incompatibility between the duties of a treating physician and the duties of a forensic expert. The duty of a treating doctor is primarily towards the patient, whereas an expert engaged by a court for a forensic examination is primarily in the service of the court. It is not in the role of a forensic expert to sustain a*

[143] See the Judgment, *supra* note 2, para. 2525.
[144] *Idem*, para. 246.
[145] See the "Decision on Sang Defence Application to exclude Expert Report of Mr Hervé Maupeu" (Trial Chamber V(a)), No. ICC-01/09-01/11-844 NM T, 7 August 2013, para. 12, citing ICTR, *The Prosecutor v. Ferdinand Nahimana et al*, Case No. ICTR-99-52-A, Judgement (Appeals Chamber), 28 November 2007, para. 212 (the "Nahimana Appeals Judgment").
[146] *Idem*, para. 13.
[147] See the Judgment, *supra* note 2, paras. 2528 to 2531.

relationship of trust and confidence with the person to be examined for the court, and the expert must in fact take care to remain as objective and detached as possible".[148]

91. These findings unequivocally reflect the established practise of international criminal law. In this regard, the ICTR Appeals Chamber held that an expert is obliged to testify "*with the utmost neutrality and with scientific objectivity*".[149] In fact, in order to be entitled to appear, an expert witness must not only be recognized as such in his or her field, but must also be impartial in the case.[150] Consequently, when assessing an expert report, a trial chamber must evaluate whether it contains sufficient information as to the sources used in support of its conclusions and whether those conclusions were drawn independently and impartially.[151] Thus, the Chamber was well within its discretionary power to accept or reject, in whole or in part, the contribution of an expert witness.[152]

92. Yet, the Defence also argues that the Chamber erred in concluding that the experts blurred the line between treating and forensic specialists. However, when questioned by the Prosecution, D-0041 admitted in his own words that he entered into a therapeutic alliance with Mr Ongwen and that, as a treating physician, it was his duty towards his patient to attempt to secure for him the most beneficial treatment.[153] Therefore, the Chamber's finding concerning the blurring of the Defence experts' role as both treating physicians and forensic experts - which led to the loss of their objectivity - is factually correct and beyond reproach.

93. The Defence also argues that the Chamber erred in concluding that the experts did not apply scientifically validated methodology and tools in reaching their

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[148] *Idem*, para. 2531.
[149] See the Nahimana Appeals Judgment, *supra* note 145, para. 199.
[150] See ICTR, *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Decision on a Defence Motion for the Appearance of an Accused as an Expert Witness (Trial Chamber I), 9 March 1998, p. 2.
[151] See the Pavle Strugar Appeal Judgment, *supra* note 47, para. 58.
[152] *Ibid.*
[153] See T-248, p. 87-88, and T-248, p. 29.

conclusions.[154] In this regard, the CLRV notes that the Defence only provides arguments showing a disagreement with the Chamber's assessment of evidence and seems to labour under the wrong impression that the Chamber had to accept the evidence produced by the Defence experts unconditionally. However, just as for any other evidence presented at trial, it is for the Chamber to assess the reliability and probative value of the expert report and testimony. In this regard, the ICTY Appeals Chamber held that the trial chamber may accept or reject, in whole or in part, the contribution of an expert witness as its decision to consider expert evidence is a discretionary one.[155] In exercising its discretion, a chamber evaluates whether the expert evidence contains sufficient information as to the sources used in support of its conclusions and whether those conclusions were drawn independently and impartially.[156] None of the Defence's arguments show that the exercise of the Chamber's discretion was so unreasonable to constitute an abuse of discretion.

94. As recalled in the section discussing the applicable legal standard on appeal, a trial chamber's abuse of discretion will occur when the decision is so unfair or unreasonable as to force the conclusion that the chamber failed to exercise its discretion judiciously. Nothing in the Judgment allows to conclude that the Chamber's assessment of evidence was so unfair or unreasonable. In addition to the two important factors affecting the reliability of the Defence's expert evidence - *the conclusions on the ultimate question* and *the loss of objectivity* –, the Chamber did express its reasons for rejecting it, including: (i) the experts' heavy reliance on the clinical interview, disregarding the evidence from the trial; (ii) their illogical use of "outdated" DSM-IV rather than the updated DSM-V which was entirely unconvincing; and (iii) unexplained contradictions in the evidence of the experts.[157] Particularly with regard to the last issue, the Chamber noted a number of inconsistencies including about the Appellant's mood or suicidal tendencies, and the existence of mental illness along with

[154] See the Appeal Brief, *supra* note 10, p. 78. See also paras. 342-380 and 393-416.
[155] See the Pavle Strugar Appeal Judgment, *supra* note 47, para. 58.
[156] *Ibid.*
[157] See the Judgment, *supra* note 2, paras. 2535-2536.

careful planning exhibited by him and his alleged loss of memory.[158] Thus, the Chamber concluded that, while mental health assessments may contain some contradictory information, these contradictions identified in the Defence expert evidence were major and readily apparent.[159]

95. As held by the ICTY Appeals Chamber, a trial chamber must determine, *inter alia*, whether there is transparency in the methods and sources used by the expert witness, including the established or assumed facts on which he or she relied.[160] Hence, when a body of piece of evidence may be so lacking in terms of the indicia of reliability, a trial chamber may consider it not probative and therefore inadmissible,[161] or unreliable. In this regard, the ICTY Appeals Chamber noted a number of instances where trial chambers have ruled as inadmissible the evidence of an expert witness on the ground that said evidence was so lacking in terms of the indicia of reliability because of lack of impartiality and independence or appearance of bias, that it was not probative.[162]

96. Likewise, the Chamber's rejection of the expert evidence of D-0041 and D-0042 was well within the proper exercise of its discretion. All the factors mentioned *supra* concerning the deficiencies contained in the Defence's expert report were in fact relevant to the judicial assessment of all evidence going to the acts and conduct of the Appellant and thus the Chamber afforded it the amount of weight it deserved. Consequently, the Defence fails to show that the Chamber's decision on the matter was so unfair or unreasonable, or that the Chamber gave weight to extraneous or irrelevant considerations or failed to give weight or sufficient weight to the expert evidence in question when exercising its discretion.

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[158] *Idem*, paras. 2536-2543.
[159] *Idem*, para. 2544.
[160] See ICTY, *The Prosecutor v. Vujadin Popovic et al*, Case No. IT-05-88-AR73.2, Decision on Joint Defence Interlocutory Appeal Concerning the Status of Richard Butler as an Expert Witness (Appeals Chamber), 30 January 2008, para. 29 (the "Popovic Decision on Experts").
[161] *Idem*, para. 22.
[162] *Idem*, footnote 87.

97. The Defence further argues that the Chamber erred in its reliance on evidence from lay witnesses that Appellant exhibited no symptoms of mental illness,[163] asserting that said category of witnesses cannot observe symptoms of mental illness since only an expert or someone who is competent to make a clinical judgment can make such observation.[164]

98. The CLRV notes, first, that the Chamber considered evidence of lay persons *only* as corroborating evidence,[165] in addition to the expert evidence which in fact constituted the core of the objective medical expertise determining the state of mind of the Appellant during the charged period. While being guided by the testimonies of the experts, the Chamber assessed the evidence for indication of any symptoms of mental health disorders in the Appellant.[166] The Chamber explained clearly that, contrary to what is implied by the Defence, it did not look into the evidence of lay persons for diagnoses of mental disease or defect since they are not qualified to make such diagnoses.[167] It rightly concluded that many witnesses who spent a considerable period of time in close proximity of the Appellant by living and fighting alongside him did not provide information indicating any symptom of the mental disorders or corroborating a historical diagnosis of mental disease or defect.[168] Therefore, the Defence's allegation that the Chamber erroneously relied on the evidence from lay witnesses in making medical diagnosis is plainly incorrect.

99. Secondly, the Defence's arguments are disingenuous and insincere. *Arguendo*, even if the Defence is seriously faulting the Chamber for considering the evidence of lay persons in making its determination on the mental health of the Appellant, then the former should look into the evidence presented by its own expert witnesses. In fact, the first expert report prepared by D-0041 and D-0042 is full of references to

[163] See the Appeal Brief, *supra* note 10, paras. 381- 392.
[164] *Ibid*.
[165] See the Judgment, *supra* note 2, p. 883.
[166] *Idem*, para. 2497.
[167] *Idem*, para. 2501.
[168] *Idem*, paras. 2517 and 2520.

observations of lay people. In explaining the methodology leading to their assessment, the experts stated in Annex 1 that:

> *"Collateral interviews Introduction: Following the first meeting with Mr Dominic Ongwen, in February 2016, there was information that needed to be corroborated from collateral sources. We then asked the defense lawyers to identify individuals who had been close to Dominic while he was still within the LRA ranks*. […] *Methods: Between the months of April and September 2016, we conducted detailed interviews with 4 individuals, two males and two females*".[169]

100. Furthermore, the Defence's experts draw various conclusions about the Appellant's mental health based on the observations made by said lay persons, including his social and psychiatric history.[170] For example, as to his personality, the experts noted that "[t]*he interviewees all described the Mr Ongwen as a kind man who liked to help his colleagues. They also described him as a fearless soldier who didn't shy away from gun fights. One of the interviewees reports that it was Mr Ongwen who gave him shelter within his unit while he was injured.* ***Our conclusion regarding the above subject matter****: Mr Ongwen displayed a personality of a jovial man, kind in nature and generally talkative. The personality traits are those of a man who like cracking jokes and helping others ties up with his current personality. Mr Ongwen has offered to help older colleagues in the detention centre with some chores*".[171]

101. The Defence's experts themselves relied on the observations of four lay persons to make medical diagnoses concerning the mental health of the Appellant. In particular, they referred to: "[…] [REDACTED]".[172]

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[169] See UGA-D26-0015-0004, Annex 1, pp. 2-3 and p. 17.
[170] *Idem*, pp. 2-3 and 7.
[171] *Idem*, p. 19.
[172] *Ibid.*

102. The Chamber also noted that D-0041 and D-0042 agreed during their testimonies that, albeit lay persons could not make a mental diagnosis, they would have noted at least some symptoms of mental disorders.[173] These remarks plainly show that even the Defence's experts themselves acknowledged the fact that accounts of lay persons can indeed provide information indicating the presence or absence of symptoms of the mental disorders or corroborating a historical diagnosis of mental disease or defect. The arguments to the contrary are devoid of any merit. Thus, Grounds 27, 29, 31, 32 and 35 to 41should be dismissed.

h) Grounds 30, 34, 36 and 43 (the Chamber erred in respect to its conclusion related to culture and mental health)

103. The Defence argues that the Chamber erred in respect to its conclusions related to culture and mental health issues and its assessment of the Prosecution's experts on culture.[174] In particular, the Defence asserts that its experts unequivocally indicated that the mental illnesses of the Appellant was to be understood as a result and in the context of the mass trauma experienced in Acholiland in the period 2002-2005, and the Chamber erroneously concluded that the Appellant was not affected by or was immune from said mass trauma.[175]

104. The CLRV notes that the trial was about the criminal responsibility of the Appellant during the charged period, not about the mass trauma he may or may not have experienced along with the people of Northern Uganda. Obviously, a cultural difference is not a defence. PCV-0002 and PCV-0003 were called by the CLRV in order to assist the Chamber to understand the various types of harms suffered and expressed by the victims, not to contribute to the determination of the guilt or innocence of the Appellant.[176] Thus, the Chamber correctly found that their evidence does not directly

[173] See the Judgment, *supra* note 2, para. 2500.
[174] See the Appeal Brief, *supra* note 10, p. 97 and para. 432.
[175] *Idem*, paras. 433-450.
[176] See the Decision on the Victims Requests to Present Evidence, *supra* note 116, paras. 27-32 and 38-41.

underlie any part of its analysis as to whether the facts alleged in the charges were established nor provided specific information in relation to the question whether the Appellant suffered from a mental disease or defect during the period of the charges.[177] In other words, the Chamber did not at all rely on said evidence when entering a conviction against the Appellant or rejecting his affirmative defences.

105. The Defence fails to substantiate its arguments and to demonstrate how exactly the Chamber erred and how the alleged error materially affected the Judgement. *Arguendo*, even if the Chamber would have considered those cultural aspects of Acholiland or the mass trauma allegedly affecting the Appellant, there is no showing that the outcome of the Judgment would have been different.

106. Further, the Defence argues that the Chamber erred in concluding that the Prosecution's experts, P-0446 and P-0447, did not ignore nor dismissed cultural factors in evaluating the mental health of the Appellant[178] - contesting the fact that the experts are non-Ugandan professionals and thus allegedly not qualified to make an assessment of an Ugandan citizen. These arguments are self-defeating and riddled with contradictions given the evidence in the case record on the matter.

107. In particular, one of the Defence's experts, D-0041, testified on this exact topic. When asked specifically about whether he agrees or not with the fact that core symptoms of PTSD manifest themselves more or less similarly across cultures, Dr Akena said *verbatim*:

> *"Yes, so 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 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. They rely on a*

[177] See the Judgment, *supra* note 2, paras. 601-602 and 2579.
[178] See the Appeal Brief, *supra* note 10, paras. 451-458.

number of things. And that's why when we are reporting, when you read text, when you read literature everywhere you come across things like the prevalence of PTSD or depression, varies or is -- they usually give a range, so they will give a range of maybe 5 to 7 per cent, and then even the world mental health surveys, they will tell you, maybe in Africa this is the prevalence, in East Asia it's this, in Western Europe, it's that, in the US -- so how do we come up with those variations? We come up with those variations because of these kinds of differences. We come up with those variations because even when you administer the same instrument in English, the US, and then you administer the same instrument in Uganda to somebody who speaks English, for example, chances are that you may not get the same responses, you may not get the same way they understand this. And these are the things that affect the prevalences to the burden of mental illness across. So whereas patients who would all complain or present with in the case of post-traumatic stress disorder, they have been exposed, they are avoiding situations, they are hypervigilant, etc. The way in which each of those symptoms manifest may vary based on where somebody comes from, and two, how they understand the question that they have been asked, whether it makes sense to them or not".[179]

108. The same view was expressed by the Prosecution's expert as also noted in the Judgment.[180] Consequently, the Chamber cannot possibly be faulted for accepting a position commonly shared by both Prosecution and Defence experts.

109. Furthermore, the Defence's arguments as to the Chamber's conclusion in relation to examples of the Appellant's food request for termites and the absence of the word "*blues*" in many African languages are trivial and without any serious link to the issue under consideration.[181] The Defence submits that, when the Appellant asked the psychiatrist of the detention centre to get him termites for food, the latter believed that the former was joking, while such termites are indeed a delicacy in Acholi culture.[182]

[179] See T-248, p. 46, line 1 to p. 47, line 5.
[180] See the Judgment, *supra* note 2, para. 2461.
[181] See the Appeal Brief, *supra* note 10, p. 103.
[182] *Idem*, paras. 459-460.

According to the Defence, P-0447 did not initially understand this as he had no idea how the word "*termite*" is interpreted in Acholi culture and then he also took it as a joke.[183] The Defence stresses that said episode was not trivial because the heart of the Prosecution case theory was that the Appellant appeared happy and joking, thus displaying no symptoms of mental illness to anyone around him, theory which was allegedly adopted by the Chamber in its findings and conclusions rejecting the affirmative defence of article 31(1)(a) of the Statute.[184]

110. The CLRV posits that the Chamber was correct in finding this episode to be a trivial matter given the plenty of evidence demonstrating the opposite. Again, any piece of evidence must be assessed holistically in light of the totality of evidence presented at trial. As mentioned *supra*, in relation to the symptoms of mental illness, the Chamber resorted to expert evidence as well as testimonies of factual witnesses (as corroborating evidence).[185] In particular, the Chamber reasoned with regard to the latter that it has assessed the evidence of fact witnesses relating to the events during the charged period for indication of any symptoms of mental health disorders in the Appellant since, as pointed out by the experts, an assessment of mental health cannot be made in the abstract, but only on the basis of the facts and evidence relating to the period under examination.[186]

111. With regards to the fact that the Appellant frequently appeared jovial and made jokes, the Chamber made references to multiple accounts of fact witnesses who share the cultural background of Mr Ongwen. In particular, D-0019, testified that the Appellant was a happy man, talkative, playful, never got angry and was always joking.[187] D-0026 testified that Mr Ongwen was a person who loved to joke with others

[183] *Idem*, para. 460.
[184] *Idem*, para. 462.
[185] See *supra* para. 96.
[186] See the Judgment, *supra* note 2, para. 2497.
[187] *Idem*, para. 2512.

a lot of times as he had lot of jokes and fun making[188] and he was a carefree person.[189] P-0142 also testified that Mr Ongwen was a people's person, staying amongst people and talking to them and sharing laughter and jokes.[190] In fact, even the Defence's expert witnesses D-0041 and D-0042 reached in their first report the same conclusion about Mr Ongwen's personality.[191]

112. This evidence makes it absolutely clear that the Appellant was indeed a man of jokes. Any arguments to the contrary are self-defeating and disingenuous. As held by the Appeals Chamber, if an accused person chooses to present evidence, the credibility, reliability and weight of that evidence falls to be assessed in the same manner as evidence presented by the Prosecution.[192] Indeed, the Chamber could not but have assessed these pieces of evidence and made corresponding factual findings. The fact that a Prosecution's expert witness (who is a non-Ugandan) did not know that termites were considered a delicacy in Acholi culture was indeed trivial and inconsequential given that the mental health experts, as well as fact witnesses called by the Defence itself, provided enough evidence actually supporting the Chamber's finding that the Appellant was known to be a man of jokes and fun-making. Therefore, an assessment of these facts in the sense suggested by the Defence would not have ultimately changed the outcome of the Judgement in any way when it comes to the conviction.

113. The Defence also argues that the second example referred to as "*trivial*" by the Chamber is that there was no translation for the word (feeling) "*blues*" in many African languages and thus it needs to acknowledge instances of reasonable doubt where alternative explanations are available based on traditional cultural practices.[193] According to the Defence, the Chamber did not take this into account in the Judgement

[188] *Idem*, para. 2513.
[189] *Ibid*.
[190] *Idem*, para. 2506.
[191] See UGA-D26-0015-0004, p. 19, cited *supra* note 169.
[192] See the Ntaganda Appeal Judgment, *supra* note 11, para. 13.
[193] See the Appeal Brief, *supra* note 10, paras. 467 and 470.

because, "*based on its own cultural constructs*", dismissed the evidence of language and somatization as "*trivial*".[194]

114. The expression termed as "*feeling blue*" appeared in the testimony of D-0042. The relevant parts are reproduced below:

> "[…] *The way in which each of* [symptoms of mental illness] *manifest may vary based on where somebody comes from, and two, how they understand the question that they have been asked, whether it makes sense to them or not. Some questions don't -- are difficult to assess. I'll give an example. There's a famous screening instrument for depression called a 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 in our setting? That's just one of the examples of how context matters. If you talk about feeling blue in Western Europe, in the US, everybody understands what you mean. If you talk about feeling blue in Africa, people don't understand what you're saying. They don't know what blues means. Yes. So it is those little differences that makes these variations that we see happen. Yeah. So I don't know whether they entirely outweigh the cultural and ethnic differences. I don't know what that means. I don't know what it means to outweigh by what percent, by what effect size, I don't know. It's difficult for me to appreciate that statement*".[195]

115. From the very wording of these statements, it is clear that the expert witness was talking only about various ways that symptoms of mental illness may manifest themselves (around the world or across different cultures) and, more importantly, about what kind of questions may or may not be asked in order to better discern them

[194] *Ibid.*
[195] See T-248, p. 47, lines 1 to 22.

from a patient, based on his or her ethnicity or location. At any measure, these explanations were only theoretical at best since D-0042 was making very general remarks about *any person* who may or may not be affected by a mental illness. Hence, D-0042 was not at all talking about the Appellant or his mental health since the latter was never asked any question using such words as "*blues*" or "*feeling blue*". In this regard, it is important to recall that the Prosecution's experts (who did not have any opportunity to interview the Appellant) never used these terms in any way to describe the Appellant or make any conclusions concerning his mental health. Consequently and obviously, the Chamber did not rely on or, in fact, could not have made any reference to D-0042's above mentioned accounts (about feeling blue) in its Judgment. In other words, these theoretical explanations were without any use for the Chamber in either entering a conviction against the Appellant or dismissing his affirmative defences under article 31 of the Statute.

116. As a result, the Chamber was correct to reject the relevant arguments raised by the Defence in this regard. Therefore, Grounds 30, 34, 36 and 43 should be dismissed.

i) Ground 33 (the Chamber erred in its selective use of P-0445's testimony)

117. The Defence argues that the Chamber erred in its selective use of P-0445's testimony to reject the Appellant's affirmative defence under article 31(1)(a) and its disregard of potentially exculpatory evidence, particularly in respect to the effects of the adverse and toxic LRA environment on the Appellant's development, including his moral development and "child-like" personality when he was an adult.[196] The Defence adds that expressions of remorse in 2016 or 2017 (cited in P-0445's report) about events from an earlier period, particularly 2002 - 2005 (or at least more than a decade earlier), are not proof beyond a reasonable doubt that the Appellant had the same understanding of his conduct at the time of the crimes.[197]

[196] See the Appeal Brief, *supra* note 10, paras. 471-474.
[197] *Ibid.*

118. These arguments are illogical, as well as incorrect. First, the Defence seems to argue that the expression of remorse is a mental aptitude divorced from the mental and emotional development of the Appellant in the sense that he may not have had the same understanding of his acts and conducts during the charged period but somehow managed to develop it afterwards. This simply rails against common sense.

119. Moreover, according to P-0445, "[M]*oral concepts are largely formed in infancy and early childhood. Moral development involves the formation of a system of values on which to base decisions concerning 'right' and 'wrong', or 'good' and 'bad'. There are three distinct stages of moral reasoning according to Kohlberg's theory of moral reasoning development. According to this theory, progression is a stage-by stage process in which it is not possible to jump stages. Individuals progress from the pre-conventional level, a stage dominated by the avoidance of punishment and seeking crude fairness, through the conventional level stage during which action is directed towards gaining the approval of others and abiding by the law and obligations, and presumably to the post-conventional level characterized by the pursuance of impartial interests for each member in society as well as the establishing of self-chosen moral principles. Once individuals can divert their attention from superficial aspects of a situation in order to understand the perspective of others and the wider situation, then their moral reasoning has passed beyond the level of self-centredness. DJ reports on page 14 that DO hated most punishing, by beating or putting soldiers in prison who tortured and killed civilians. In order to realize this, moral reciprocity and the inferred underlying meaning of events must have become incorporated into his moral judgments. Additionally, this realization can motivate or oblige the individual to make 'right the wrong' they may have committed when fairness is violated or an imbalance appears*".[198] Thus, P-0445 concluded that Mr Ongwen attained the highest level of moral development, the post conventional level.[199]

120. This in turn shows that the Appellant had managed to attain mental and emotional ability to express remorse since his early childhood. Surely, then, he was

[198] See UGA-OTP-0280-0732, para. 5.1.1.
[199] *Idem*, para. 5.1.3.

able to understand the consequences of his acts and conducts as an adult or, in particular, between the years of 2003 and 2005. Consequently, the Chamber was correct to consider Dr Abbo's expert report and give appropriate weight in determining the level of Mr Ongwen's moral development. There is no expert evidence contradicting these factual findings in the case record.

121. Finally, on the arguments that the Chamber erred in disregarding the potentially exculpatory evidence of P-0445 who testified that the Appellant was removed from his normal environment and put in an unfavourable situation,[200] the Defence is ignoring the fact that the Chamber reached its conclusion based on a holistic assessment of evidence or, in other words, overall content of the expert evidence. Thus, the Defence's arguments to the effect that the Chamber allegedly disregarded potentially exculpatory evidence are meritless. Therefore, Ground 33 should also be dismissed.

j) Grounds 44, 48, 50, 52, 53, 54, 55 and 56 (alleged Chamber's errors in fact and in law in interpreting article 31(1)(d) of the Statute)

122. The Defence argues that the Chamber erred in fact and in law in its statutory interpretation of article 31(1)(d) of the Statute and its findings that said provision was not applicable.[201] The Defence further argues that the Chamber wrongly defined the word "*imminent*" and "*continuing*" in isolation from "*threat*", indicating that the two terms "*refer to the nature of the threatened harm, and not the threat itself*".[202] Rather, according to the Defence, the operative word in article 31(d)(i) and (ii) is "*threat*", which must be understood from the perspective of the person receiving it, regardless of whether death or bodily harm was indeed going to materialise[203] and, if the recipient

[200] See the Appeal Brief, *supra* note 10, paras. 487-497.
[201] *Idem*, p. 111.
[202] *Idem*, para. 500.
[203] *Idem*, para. 508.

of the threat genuinely fears these consequences, then there would be a situation of duress.[204]

123. The Chamber's holding in this regard reads as follows:

> "[…] *Duress in Article 31(1)(d) of the Statute has three elements. The first element is that the conduct alleged to constitute the crime has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person. The threat in question may either be: (i) made by other persons or (ii) constituted by other circumstances beyond that person's control. The threat is to be assessed at the time of that person's conduct*. […] *From the plain language of the provision, the words 'imminent' and 'continuing' refer to the nature of the threatened harm, and not the threat itself. It is not an 'imminent threat' of death or a 'continuing or imminent threat' of serious bodily harm – the Statute does not contain such terms. Rather, the threatened harm in question must be either to be killed immediately ('imminent death'), or to suffer serious bodily harm immediately or in an ongoing manner ('continuing or imminent serious bodily harm'). On this understanding, duress is unavailable if the accused is threatened with serious bodily harm that is not going to materialise sufficiently soon. A merely abstract danger or simply an elevated probability that a dangerous situation might occur – even if continuously present – does not suffice*".[205]

124. The CLRV posits that these findings of the Chamber are without error. In fact, the Appeals Chamber held that:

> "[…] *The interpretation of treaties, and the Rome Statute is no exception, is governed by the Vienna Convention on the Law of Treaties (23 May 1969), specifically the provisions of articles 31 and 32. The principal rule of interpretation is set out in article*

[204] *Ibid.*
[205] See the Judgment, *supra* note 2, paras. 2581-2582 (footnote removed.)

31(1) that reads: A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. The Appeals Chamber shall not advert to the definition of "good faith", save to mention that it is linked to what follows and that is the wording of the Statute. The rule governing the interpretation of a section of the law is its wording read in context and in light of its object and purpose. The context of a given legislative provision is defined by the particular sub-section of the law read as a whole in conjunction with the section of an enactment in its entirety. Its objects may be gathered from the chapter of the law in which the particular section is included and its purposes from the wider aims of the law as may be gathered from its preamble and general tenor of the treaty."[206]

125. The Chamber strictly followed these guidelines. First, it read "*the plain language of the provision*" of article 31(d) of the Statute and then, interpreted that "*the words 'imminent' and 'continuing' refer to the nature of the threatened harm, and not the threat itself. It is not an 'imminent threat' of death or a 'continuing or imminent threat' of serious bodily harm – the Statute does not contain such terms. Rather, the threatened harm in question must be either to be killed immediately ('imminent death'), or to suffer serious bodily harm immediately or in an ongoing manner ('continuing or imminent serious bodily harm')*".[207]

126. Thus, it is evident that the Chamber did not add onto nor omit any meaning from the exact wording of the provision, but simply interpreted it based on the ordinary meaning of its words.

127. The Chamber also held that "[o]*n this understanding, duress is unavailable if the accused is threatened with serious bodily harm that is not going to materialise sufficiently soon. A merely abstract danger or simply an elevated probability that a dangerous situation might*

[206] See the "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal"(Appeals Chamber), No. ICC-01/04-168 UM PT OA3, 13 July 2006, para. 33 (the "Judgment on Judicial Interpretation").
[207] See the Judgment, *supra* note 2, para. 2582.

occur – even if continuously present – does not suffice."[208] This interpretation is correct given the context of the provision contained in article 31(1)(d) of Statute.

128. Indeed, as held by the Appeals Chamber, the context of a given legislative provision is defined by the particular sub-section of the law read as a whole in conjunction with the section of an enactment in its entirety.[209] The Chamber did also provide guidance as to the remaining elements of duress as follows: "[t]*he second element of duress in Article 31(1)(d) of the Statute is that the person acts necessarily and reasonably to avoid the threat. The person is not required to take all conceivable action to avoid the threat, irrespective of considerations of proportionality or feasibility. The Chamber must specifically consider what, if any, acts could 'necessarily and reasonably' avoid the threat, and what the person should have done must be assessed under the totality of the circumstances in which the person found themselves. Whether others in comparable circumstances were able to necessarily and reasonably avoid the same threat is relevant in assessing what acts were necessarily and reasonably available*. […] *Finally, the third element of duress in Article 31(1)(d) of the Statute is that the person does not intend to cause a greater harm than the one sought to be avoided. This is a subjective element – it is not required that the person actually avoided the greater harm, only that he/she intended to do so. The Chamber considers that assessment of whether one intended harm is 'greater' than another depends on the character of the harms under comparison*".[210] Therefore, the Chamber did not just stop its reasoning after defining the nature of threat of imminent death or of continuing or imminent serious bodily harm ("first element"), but interpreted the entirety of the provision defining the constitutive elements of duress (or "second and third element").

129. This interpretation is also supported by relevant international jurisprudence. According to the ICTY practice, the criminal act in question must be done to prevent an immediate danger both serious and irreparable while there was no other adequate

[208] *Ibid*.
[209] See the Judgment on Judicial Interpretation, *supra* note 206, para. 33.
[210] See the Judgment, *supra* note 2, paras. 2583-2584.

means to escape[211] or avert such evil.[212] Moreover, this element requires the person's actions to be strictly proportional, meaning that the remedy was not disproportionate to the evil confronted by the defendant.[213] It is therefore a balancing exercise of relative harms,[214] meaning that the harm done must not be disproportionate to the one threatened,[215] in other words, it must be the lesser of two evils.[216]

130. As recalled *supra*, the Appeals Chamber held that the object of a particular legal provision may be inferred from the chapter of the law in which the particular section is included, and its purposes, from the wider aims of the law as may be understood from its preamble and the general tenor of the treaty.[217] Article 31 is contained in Part 3 of the Statute, which defines the general principles of law applicable to anyone suspected or accused of crimes falling under the Statute. The Preamble of the Statute contains several ideals that are applicable to the interpretation of article 31 of the Statute. These are the facts that, during last centuries, millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity and threaten the peace, security and well-being of the world; and thus such

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[211] See ICTY, *The Prosecutor v. Drazen Erdemovic*, Case No. IT-96-22-T, Sentencing Judgment (Trial Chamber), 29 November 1996, para. 17 (the "Erdemovic Sentencing Judgment"), citing *Trial of Alfried Felix Alwyn Krupp von Bohlen and Halbach and eleven others*, Case No. 58, U.S. Military Tribunal, Nuremberg, 17 November 1947-30 June 1948, The United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, Vol. X, p. 147, London 1949 (this Sentencing Judgment was later reversed on appeal due to the finding made by the majority of the Appeals Chamber to the effect that duress does not afford a complete defence to a soldier charged with a crime against humanity and/or a war crime involving the killing of innocent human beings. Yet, the majority of the Appeals Chamber did not question the constitutive elements of duress applied by the Trial Chamber). See ICTY, *The Prosecutor v. Drazen Erdemovic*, Case No. IT-96-22-T, Appeals Chamber, Appeals Judgement and Separate and Dissenting Opinion of Judge Li, 7 October 1997, para. 5 (the "Opinion of Judge Li").

[212] See ICTY, *Prosecutor v. Drazen Erdemovic*, Case No. IT-96-22-A, Appeals Chamber, Appeals Judgement; and the Separate and Dissenting Opinion of Judge Cassese, 7 October 1997, para. 16.

[213] See the Erdemovic Sentencing Judgment, *supra* note 211, para. 17; and the Opinion of Judge Li, *supra* note 211, para. 5.

[214] See ICTY, *Prosecutor v. Drazan Erdemovic*, Case No. IT-96-22-A, Appeals Chamber, Appeals Judgement; and the Joint Separate Opinion of Judge McDonald and Judge Vohrah, 7 October 1997, para. 81 (the "Erdemovic Appeal Judgment").

[215] See ICTY, *Prosecutor v. Drazan Erdemovic*, Case No. IT-96-22-A, Appeals Chamber, Appeals Judgement; and the Separate and Dissenting Opinion of Judge Stephen, 7 October 1997, para. 67 (the "Opinion of Judge Stephen").

[216] See the Opinion of Judge Cassese, *supra* note 212, para. 16.

[217] See the Judgment on Judicial Interpretation, *supra* note 206, para. 33.

serious crimes of concern to the international community as a whole must not go unpunished in order to put an end to impunity for the perpetrators of these crimes.

131. From these wider aims of the Statute and its general tenor, it is clearly understood that article 31 must be interpreted strictly. Each element of duress has to be assessed rigorously against the evidence presented at trial so that only those limited instances (where the perpetrator was subjected to genuine duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against him or her or another person, and he or she acted necessarily and reasonably to avoid the threat without any intent to cause a greater harm than the one sought to be avoided) are exceptionally excused from a criminal responsibility because of the lack of a moral choice or blameworthiness. Consequently, the Chamber's interpretation of article 31(1)(d) is legally correct.

132. On the Defence's argument that the word "*threat*" in the provision must be understood from the perspective of the person receiving it,[218] no authority support said interpretation. *Arguendo*, even if the Defence insists otherwise, the jurisprudence of international criminal courts and tribunals does indeed require that consequences resulting from the threat must be immediate and real. In this regard, the ICTY held that threats constituting duress must be imminent or immediate[219] to "*cause severe and irreparable harm to life or limb*".[220]

133. On the Defence's argument that the Chamber erred in finding that a merely abstract danger or simply an elevated probability that a dangerous situation might occur – even if continuously present – does not suffice to constitute a threat with death or serious bodily harm,[221] the jurisprudence of international criminal tribunals is unequivocally in agreement with the Chamber's interpretation. In particular, the ICTY

[218] See the Appeal Brief, *supra* note 10, para. 508.
[219] See the Erdemovic Sentencing Judgment, *supra* note 211, paras. 17-18.
[220] See the Opinion of Judge Cassese, *supra* note 212, para. 16.
[221] See the Appeal Brief, *supra* note 10, para. 509.

held that threats constituting duress must be clear and present, real and inevitable.[222] Thus, the Chamber's interpretation is correct in this regard too.

134. On the Defence's argument that the Chamber erred in concluding that duress does not occur if the accused is threatened with death or serious bodily harm that is not going to materialise "*sufficiently soon*", without defining said terms,[223] again the Defence fails to provide any authority in support of these arguments. While the words "*sufficiently soon*" are not expressly contained in article 31(1)(d) of the Statute, immediacy of death or bodily harm is inherent in a threat that is *imminent* or immediate. Therefore, the Chamber's interpretation is also correct in this respect.

135. Furthermore, article 31(2) states that the Chamber shall determine the applicability of the grounds for excluding criminal responsibility provided for in the Statute to the case before it. In the Judgment, the Chamber assessed the totality of evidence and applied the above mentioned legal criteria carefully.

136. On the alleged factual errors, the Defence contends that the Chamber failed to explain why it did not believe that, in the circumstances of the Appellant, the latter could not have genuinely feared that he would have been killed or seriously harmed if he defied the orders of Kony.[224] In this regard, the Chamber did provide sufficient reasoning for its decision to reject duress as a defence. It noted that while the LRA ensured obedience in its ranks via violence and brutality, there was a difference between the status of low-ranking LRA members and the higher commanders as the Appellant.[225]

137. Moreover, the Chamber found - based on evidence in the case record - that Mr Ongwen, as one of the high-ranking commanders of the LRA, did not always

[222] See the Erdemovic Sentencing Judgment, *supra* note 211, para. 18.
[223] See the Appeal Brief, *supra* note 10, para. 509.
[224] *Idem*, para. 503.
[225] See the Judgment, *supra* note 2, paras. 2590-2591.

execute Kony's orders.[226] Specially, the Chamber heard live evidence (corroborated by intercept evidence) demonstrating that, in fact, the Appellant did not only execute Kony's orders but also intervened if he deemed it necessary, including asking for more information and, clearly told Kony that "*this thing is bad, don't do it*".[227] Therefore, the Chamber rightly concluded that the relationship between the Appellant and Kony was not characterised by the complete dominance of the former and subjection of the latter, who was a self-confident commander taking his own decisions on the basis of what he thought was right or wrong.[228]

138. Similarly the Chamber did not err in finding that the evidence presented at trial does not provide any basis for consideration of spies or a spy network that Kony employed in order to control his subordinates, in particular the Appellant.[229]

139. Indeed, the Chamber cannot reach a conclusion about a particular fact in absence of evidence. In this regard, the Appeals Chamber held that "[…] *it is an essential tenet of the rule of law that judicial decisions must be based on facts established by evidence. Providing evidence to substantiate an allegation is a hallmark of judicial proceedings; courts do not base their decisions on impulse, intuition and conjecture or on mere sympathy or emotion. Such a course would lead to arbitrariness and would be antithetical to the rule of law*".[230] Hence, the Chamber's conclusion on the matter is correct.

140. The Chamber also did not err in finding that, while some persons did believe in the spiritual powers of Kony, there is consistent evidence showing that the belief in or fear from the spirits was stronger in the young, new and impressionable abductees but

[226] *Idem*, paras. 2593-2597.
[227] *Idem*, paras. 2597-2598 and 2603-2606.
[228] *Idem*, para. 2602.
[229] See the Judgment, *supra* note 2, para. 2607.
[230] See the "Judgment on the appeals of the Defence against the decisions entitled 'Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06' of Pre-Trial Chamber II" (Appeals Chamber), No. ICC-02/04-01/05-371 RH PT OA2, 23 February 2009, para. 36.

then subsided and disappeared in those who stayed in the LRA longer.[231] In this regard, upon a careful review of the evidence, the Chamber concluded that LRA members with some experience in the organisation did not generally believe that Kony possessed spiritual powers.[232] Most importantly, the Chamber noted that *there is also no evidence indicating that the belief in Kony's spiritual powers played a role for the Appellant* and in fact, the evidence of him defying Kony speaks clearly against any such influence.[233]

141. Moreover, in support of its conclusion rejecting duress, the Chamber also made the following additional findings, which are plainly correct in law.

142. The Chamber found that, in the LRA, low-level members or recent abductees were frequently placed in situations where they had to perform certain actions under threat of imminent death or physical punishment and the Appellant was also personally the source of such threats.[234] In this regard, the Extraordinary Chambers in the Courts of Cambodia (the "ECCC") held that duress cannot be invoked when the threat results from the implementation of a policy in which the accused himself has willingly and actively participated.[235] The Chamber also mentioned that the Appellant explicitly threatened P-0226 and a number of other girls with death in order to make them beat a captured government soldier to death.[236] Indeed, the Accused's attempt to reduce the brutality of his actions or lessen the nature of harm suffered by his victims must be considered in assessing duress. Obviously, the Appellant's acts showed the

[231] See the Judgment, *supra* note 2, para. 2645.
[232] *Idem*, para. 2658.
[233] *Ibid*.
[234] *Idem*, para. 2591.
[235] See ECCC, *The Co-Prosecutors v. Kaing Guek Eav alias Duch*, Case File/Dossier No. 001/18-07-2007/ECCC/TC, Judgment (Trial Chamber), 26 July 2010, para. 557 (the "Duch Trial Judgment"). The issue was discussed on appeal only in relation to the sentence of the accused, see the Appeal Judgment, 3 February 2012, paras. 360-365.
[236] See the Judgment, *supra* note 2, para. 2591.

opposite. In fact, according to the ICTR, brutal means to execute criminal acts are indicative of absence of duress.[237]

143. The Chamber also found that, during the period of the charges, the Appellant was a battalion and brigade commander, meaning one of the high ranking LRA commanders.[238] According to the ICTY, the rank held by an accused giving or receiving orders is relative to assessing the duress under which he laboured:[239] the lower the rank of the recipient of an order accompanied by duress, the less it is likely that he enjoyed any real moral choice.[240] Indeed, according to the Special Court for Sierra Leone, duress is not available as a defence in cases where the accused was personally in a superior position, issuing orders and having an effective control over the forces under him, even if he found himself in an organisation that operated in an atmosphere of duress and fear since being recruited.[241] Especially, according to the ECCC, even if the accused's promotions to higher ranks were against his will, his acceptance of those appointments reflects his sense of duty and thus duress cannot be accepted as a ground for excluding criminal responsibility.[242]

144. The Chamber also found that the Appellant was considered and praised as an exemplary commander by Kony himself.[243] Similarly, the ECCC held that the fact that an accused possessed and exercised significant authority and carried out his functions with a high degree of efficiency and zeal, negates duress.[244] Moreover, according to the

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[237] See ICTR, *The Prosecutor v. Athanase Seromba*, Case No. ICTR-2001-66, Judgment (Trial Chamber), 13 December 2006, paras. 239 and 382. ("Athanase Seromba Judgment")
[238] See the Judgment, *supra* note 2, paras. 1038, 2591 and 2592.
[239] See the Erdemovic Sentencing Judgment, *supra* note 211, para. 18, citing *Trial of Lieutenant General Shigeru Sawada and three others*, Case No. 25, U.S. Military Commission, Shanghai, 27 February 1946-15 April 1946, L.R.T.W.C, Vol. V, pp. 18-19.
[240] See the Opinion of Judge Cassese, *supra* note 212, para. 45.
[241] See SCSL, *Prosecutor v. Issa Hassan Sesay et al*, Case No. SCSL-04-15-A, Sentencing Judgment (Trial Chamber I), 8 April 2009, paras. 258-262. These findings were confirmed on appeal, see the Judgment (Appeals Chamber), 26 October 2009, paras. 1279-1282.
[242] See the Duch Trial Judgment, *supra* note 235, para. 556.
[243] See the Judgment, *supra* note 2, para. 2604.
[244] See the Duch Trial Judgment, *supra* note 235, paras. 555-558

ICTR, an accused's use of sophisticated means to execute criminal acts is indicative of absence of duress.[245]

145. The Chamber also found that Otti Lagony, Okello Can Odonga and Vincent Otti were killed on Kony's orders but these instances of executions do not indicate that the commanders were executed for failing to execute orders to engage in operations.[246] In this regard, the ECCC also held that the fact that other members of the organization, regardless of their high-rank, could be categorized as enemies and killed for disobedience, is not determinative in invoking duress.[247]

146. The Chamber also found that the Appellant did not escape from the LRA even when opportunities presented themselves.[248] In this regard, the ICTY held that the absence of any meaningful sign that the accused wanted to dissociate himself from criminal acts negates duress.[249]

147. Lastly, the Chamber found that the Appellant was not under threat of death or serious bodily harm to himself or another person when engaging in conduct underlying the charged crimes and thus, that it was not possible to further discuss the other requirements of article 31(1)(d) of the Statute, namely the necessity and reasonableness of the act undertaken to avoid the threat, and the requirement that the person did not intend to cause a greater harm than the one sought to be avoided.[250] No evidence presented at trial demonstrated that the Appellant engaged in the criminal conducts in question in order to avoid threat of imminent death or of continuing or imminent serious bodily harm against him or another person provided that he did not intend to cause a greater harm than the one sought to be avoided. These findings are

[245] See the Athanase Seromba Judgment, *supra* note 237, paras. 239 and 382.
[246] See the Judgment, *supra* note 2, paras. 2609-2614.
[247] See the Duch Trial Judgment, *supra* note 235, para. 555.
[248] See the Judgment, *supra* note 2, paras. 2619-2642.
[249] See ICTY, *Prosecutor v. Darko Mrđa*, Case No. IT-02-59-S, Sentencing Judgement (Trial Chamber I), 31 March 2004, para. 66.
[250] See the Judgment, *supra* note 2, para. 2669.

equally valid with regards to Ground 54. Therefore, Grounds 44, 48, 50, 52, 53, 54, 55 and 56 must be rejected as well.

k) Ground 46 (on Kony's control over the Appellant)

148. The Defence argues that the Chamber erred in finding that the Appellant exercised free will and was not subjected to duress in the execution of the orders of Kony.[251] The CLRV recalls her submissions *supra* in relation to duress.

149. On the argument that the Chamber's findings on the hierarchical nature of the LRA structure, under an effective command and on the role of the Appellant within the LRA contradicts the decision confirming the charges,[252] a careful reading of the

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[251] See the Appeal Brief, *supra* note 10, paras. 514-515.

[252] *Idem*, paras. 516-519, footnotes 582 and 583. See also the "Decision on the confirmation of charges against Dominic Ongwen" (Pre-Trial Chamber II), No. ICC-02/04-01/15-422-Red EC PT, 23 March 2016, para. 56. The Pre-Trial Chamber held that "[…] *The evidence demonstrates that, at the relevant time, the LRA was an organised entity disposing of a considerable operational capacity. The undisputed leader of the organisation was Joseph Kony, from whom emanated all important decisions. To maintain his tight grip on the organisation, Joseph Kony also successfully invoked possession of mystical powers. Directly under Joseph Kony were a central organ known as Control Altar and a so-called Division, which was also an operational unit. Most importantly, however, the operational units of the LRA were its four brigades: Sinia, Gilva, Trinkle and Stockree. These brigades were composed of a considerable number of individuals under an effective command structure, which ensured that orders were executed. A strict system of discipline was used for this purpose, which included capital punishment and imprisonment as sanctions for disobedience. The Chamber notes the argument of the Defence that the LRA was not a proper army and that Joseph Kony frequently bypassed the chain of command (Transcript T-22, pp. 69-70), but does not consider dispositive this objection to the charges. The evidence overwhelmingly shows that the hierarchical structure was effective, notwithstanding the possibility of deviations as described by the Defence"*; and See the Judgment, *supra* note 2, paras. 123-124 and 873. The Chamber held that *"[…] At the time relevant for the charges, i.e. from 1 July 2002 to 31 December 2005, the LRA had a hierarchical structure. Joseph Kony was the highest authority in the LRA. During the time period relevant for the charges, his deputy was Vincent Otti, who led a headquarters unit called Control Altar. Further, the LRA was divided into four brigades: Sinia, Stockree, Gilva and Trinkle. From 2003, there was also a division called Jogo. The brigades were divided into battalions and further into companies or 'coys'. Each of these units was led by a commander. […] Orders were generally communicated from Joseph Kony directly or through Vincent Otti to the brigade commanders, who communicated them to the battalion commanders, who in turn passed them to their subordinates. Joseph Kony's orders were generally complied with. At the same time, in particular when Joseph Kony was geographically removed from LRA units, brigade and battalion commanders took their own initiatives. This was regularly the case during the period of the charges, when Joseph Kony was in Sudan while various LRA units operated in Northern Uganda. […] In sum, the Chamber finds that the LRA had a functioning hierarchy, but that it relied also on the independent actions and initiatives of commanders at division, brigade and battalion levels. For the organisation to operate and sustain itself, coordinated action by its leadership, including the brigade and battalion commanders, was necessary. In other words, the LRA was a collective project, and the Chamber does not accept*

rulings reveals that the Chamber's factual findings generally overlap with those made by the Pre-Trial Chamber and thus remain within the parameters of the confirmed charges. The only difference is that the Chamber found that, while having a functioning hierarchy, the LRA also relied on the independent actions and cooperation of commanders at division, brigade and battalion levels which was necessary for the functioning of the organisation.

150. However, this inevitably transpired from the totality of evidence presented at trial. The Defence does not in fact challenge the veracity or credibility of the evidence, which serves as the basis of these findings. As a result, those factual findings remain intact, uncontested and thus valid. Indeed, there is no legal impediment to the Chamber re-evaluating the totality of evidence presented at trial and reaching conclusions that are more precise than the findings contained in the decision confirming the charges issued by the Pre-Trial Chamber, so long as the facts and circumstances or the parameters of the case defined by the latter remain basically the same.

151. The Pre-Trial Chamber is required to evaluate whether the evidence is sufficient to establish substantial grounds to believe that the person committed each of the crimes charged, which is substantially different from the standard of proof – beyond reasonable doubt – applied by the Trial Chamber. The former's main function is only to separate those cases and charges which should go to trial from those which should not (in order to ensure the efficiency of judicial proceedings and to protect the rights of persons by ensuring that cases and charges go to trial only when justified by sufficient evidence).[253]

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the proposition of the Defence that the LRA should be equated with Joseph Kony alone, and all its actions attributed only to him".

[253] See the "Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled 'Decision on the confirmation of charges'" (Appeals Chamber), No. ICC-01/04-01/10-514 FB PT OA4, 30 May 2012, para. 39.

152. In particular, the Appeals Chamber held in this regard that:

> "[…] [T]*he Pre-Trial Chamber's ability to evaluate the evidence is [not] unlimited or that its function in evaluating the evidence is [not] identical to that of the Trial Chamber. The Appeals Chamber recalls that the confirmation of charges hearing is not an end in itself but rather serves the purpose of filtering out those cases and charges for which the evidence is insufficient to justify a trial. This limited purpose of the confirmation of charges proceedings is reflected in the fact that the Prosecutor must only produce sufficient evidence to establish substantial grounds to believe the person committed the crimes charged. The Pre-Trial Chamber need not be convinced beyond a reasonable doubt, and the Prosecutor need not submit more evidence than is necessary to meet the threshold of substantial grounds to believe*".[254]

153. Additionally, the Chamber did not err in not providing reasoned statements about the command-and-control authority of Kony, including his powers and the degree of subordination of the Appellant to Kony within the LRA.[255] The CLRV avers that these arguments should not have been presented under an independent or separate ground of appeal since all of these issues were discussed and resolved by the Chamber in relation to duress. Thus, these arguments are only repetitive of the same arguments raised by the Defence in other grounds of appeal. In conclusion, Ground 46 must be dismissed.

l) Ground 49 (the Chamber erred in law and in fact about evidence on SGBC and duress)

154. The Defence argues that the Chamber erred in law and in fact by disregarding and misrepresenting evidence that neither men nor women had a choice when partners were distributed in the LRA, and by accepting the Prosecution's argument

[254] *Idem*, para. 47.
[255] See the Appeal Brief, *supra* note 10, paras. 520-532.

that evidence on SGBC had "*persuasive force*" for the Chamber's conclusion that duress does not apply.[256] The Defence further argues that the Chamber misrepresented the evidence on record by imputing that, because some of the alleged SGBC were committed in private, it was further indicative that the Appellant had not been subjected to a threat.[257] The Defence adds that there were strict orders to obey in the LRA regarding the possession of women that predated the Appellant's adulthood and neither men nor women had a choice in case they were given a partner by Kony.[258]

155. The CLRV posits that, firstly, the Defence is mischaracterising the Chamber's finding. The fact that the Chamber mentioned a part of the closing statement of the Prosecution in the Judgment dealing with the applicability of duress to the SGBC committed by the Appellant[259] is not representative of the totality of its factual findings and legal rulings on the matter. Indeed, the Chamber expressly held that "[as] *found above in the relevant section, the conduct underlying the crimes charged under counts 50-60 includes to a large extent conduct performed in the relative privacy of Dominic Ongwen's household, or even in complete privacy of his sleeping place*".[260] In footnote 7080,[261] the Chamber directly referred to IV.C.10 of the Judgment, which extensively deals with SGBC committed during the charged period. Thus, in paragraph 2667, the Chamber simply noted that it had applied the legal criteria for pleading duress to the factual findings made on the SGBC perpetrated by the Appellant. Therefore, if the Defence wished to challenge the applicability of the defence of duress to the charges of SGBC, it should have contested each and every factual and legal finding made in part IV.C.10

[256] *Idem*, p. 120.
[257] *Idem*, para. 536.
[258] *Idem*, paras. 537-540.
[259] See the Judgment, *supra* note 2, paras. 2666-2667. The Chamber stated that "[d]*uring the closing statements, the Prosecution made the following argument, which relates to the portion of the charges concerning direct perpetration of sexual and gender-based violence by Dominic Ongwen: They want to persuade your Honours that after having caused these young girls to be beaten into submission and then having brought them to the privacy of his tent, it would have been impossible on the pain of death for him to have said quietly to them, 'Actually, I am not so wicked and monstrous as to rape a young girl like you. I have only done this to satisfy Joseph Kony. But if you lie here quiet and safe, we can pretend in the morning that we had sex.' He didn't do that*. […] *The Chamber finds this argument persuasive*" .
[260] *Idem*, para. 2667 (footnotes removed and emphases added).
[261] *Idem*, footnote 7080.

of the Judgment against the elements of duress contained in article 31(1)(d) of the Statute.

156. Even if the Defence insists otherwise, there is simply no evidence showing that the acts and conducts of the Appellant charged in relation to the SGBC have been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against him or another person. Further, there is also no evidence presented at trial demonstrating that the Appellant acted necessarily and reasonably to avoid the threat by committing those SGBC while he did not intend to cause a greater harm than the one sought to be avoided. Consequently, Ground 49 must be dismissed.

m) Grounds 61, 62 and 63 (the Chamber erred in law, in fact and procedure regarding expert evidence D-0133)

157. The Defence argues that the Chamber erred in law, in fact and in procedure regarding the expert evidence of D-0133 on child soldiers,[262] since it erroneously rejected his general conclusions, finding his evidence on escape "*incredible*" and holding that the remainder of his testimony did not go to the issues relevant to the charged crimes.[263]

158. The Chamber's ruling with regard to D-0133 is reproduced below:

> "*Pollar Awich testified live before the Chamber. The witness testified about having been abducted as a child and integrated in the National Resistance Army and about the experiences of persons who were forced to be soldiers as children. He testified about his own experience, provided evidence on children in the LRA and wrote a report on this issue, which was submitted into evidence. Pollar Awich answered in a clear and*

[262] See the Appeal Brief, *supra* note 10, p. 140.
[263] *Idem*, paras. 612-613.

structured manner. The Chamber deems his testimony to be credible. However, the Chamber also notes Pollar Awich's general conclusions concerning the enduring effect on the mental health of having been a child soldier, the conditions within the LRA on abductees and the influence on their free will as a grown up and whether they are, ultimately, responsible for any of their actions undertaken as an adult. First, Pollar Awich is not a mental health expert and, more importantly, the question of whether Article 31(1)(a) or (d) of the Statute are fulfilled can only be determined by the Chamber. Lastly, the Chamber finds Pollar Awich's statement that 'there are no cases where children escaped […] voluntary' incredible considering the ample evidence received to the contrary. The remainder of Pollar Awich's testimony does not go to issues of relevance to the disposal of the charged crimes".[264]

159. Differently from the Defence's assertions, the Chamber never treated D-0133 as a fact witness.[265] A fact witness is someone who testifies about what he or she has first-hand knowledge of and who describes only facts about the crimes adjudicated at a court of law.[266] D-0133 was never in the LRA or counted personally among the victims of the crimes committed by the Appellant. He never testified about what he has seen, heard, or otherwise observed in the course of the commission of the crimes charged against the Appellant. Thus, the Chamber did not at all give any indication suggesting that he was considered as a fact-witness.

160. The fact that the Chamber allegedly[267] disregarded D-0133's conclusions as expert witness does not transform him into a fact witness. The Chamber explained that D-0133's testimony about the enduring effect on the mental health of having been a child soldier, the conditions within the LRA on abductees and the influence on their

[264] See the Judgment, *supra* note 2, para. 612 (footnotes removed).
[265] See the Appeal Brief, *supra* note 10, paras. 617-618.
[266] See ICTR, *The Prosecutor v. Augustin Ndindiliyimana et al*, Case No. ICTR-00-56-T, Decision on the Prosecutor's Motion Opposing the Testimony of Witness DE4-30 As a Factual Witness (Trial Chamber), 16 May 2007, para. 9.
[267] See the Appeal Brief, *supra* note 10, para. 617.

free will were not considered in the Judgment because D-0133 was not a mental health expert.

161. Indeed, it is for the Chamber to accept or reject, in whole or in part, the contribution of an expert witness since its decision with respect to evaluation of expert evidence is a discretionary one.[268] There is no obligation on the Chamber to accept whatever expert evidence a party or participant may produce. Thus, accepting a person as an expert and allowing him or her to testify does not automatically entail his or her evidence being admitted and considered in the judgment.[269] As mentioned *supra*, a chamber, in assessing the admissibility of expert evidence pursuant to article 64(9)(a) and 69(4) of the Statute, must determine, *inter alia*, whether the expert evidence falls within the expertise of the witness.[270]

162. An expert witness is a person who, by virtue of some specialised knowledge, skill, or training, can assist the judges to understand or determine an issue in dispute and thus, in assessing whether a particular witness meets this standard, a chamber may take into account the witness's former/present positions and professional expertise by means of reference to his or her *curriculum vitae*, scholarly articles, publications or any other pertinent information.[271]

163. With regard to D-0133, the Chamber was correct in finding that he was not a mental health expert while he testified about issues related to the mental health of individuals in the captivity of the LRA. As noted in the Judgment, D-0133's conclusions on the enduring effect on the mental health of having been a child soldier,

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[268] See the Pavle Strugar Appeal Judgment, *supra* note 47, para. 58.
[269] See the Popovic Decision on Experts, *supra* note 160, para. 31.
[270] See the Decision on Sang Defence Application to exclude Expert Report of Mr Hervé Maupeu, *supra* note 145, para. 12.
[271] See ICTY, *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Prosecution Motion to Exclude the Expert Report of Kosta Čavoški (Trial Chamber), 5 April 2013, para. 13. See also ICTY, *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Decision on Expert Status of Reynaud Theunens (Trial Chamber III), 12 February 2008, para. 28; and ICTY, *Prosecutor v. Vlastimir Đorđević*, Case No. IT-05-87/1-T, Decision on Defence Notice Under Rule 94*bis* (Trial Chamber II), 5 March 2009, para. 6.

the conditions within the LRA on abductees and the influence on their free will as a grown up were indeed issues related to mental health, which fell outside of D-0133's professional expertise. Lastly, regardless of his impressive career, D-0133 did not have the professional qualification, expertise or knowledge to make scientific conclusions or diagnoses on mental health of others.

164. Moreover, a chamber, in assessing the admissibility of expert evidence pursuant to article 64(9)(a) and 69(4) of the Statute, must determine, *inter alia*, whether the expert usurps the functions of the chamber as the ultimate arbiter of fact and law. While the report and testimony of an expert witness may be based on facts narrated by ordinary witnesses or facts from other evidence, an expert witness cannot testify himself or herself on the acts and conduct of an accused.[272] Thus, an expert evidence which would qualify as usurping the functions of a chamber by going into the "*ultimate issues*" of the trial would include opinions as to an accused's guilt or innocence, or whether the contextual, material or mental elements of the crimes charged are satisfied.

165. As noted in the Judgment, D-0133's testimony covered issues including whether the LRA abductees were responsible for any of their actions undertaken as an adult, but such questions - in particular, whether they were subject to duress pursuant to article 31(1)(a) or (d) of the Statute - can only be determined by the Chamber. In fact, the Defence admits itself that D-0133's conclusion was central to the Defence's affirmative defence of duress.[273] Therefore, the Chamber was again correct in not considering the expert evidence of D-0133. As eloquently put by the ICTY Appeals Chamber, "[facts concerning the acts and conducts of an accused] *are facts which the Trial Chamber is obliged to consider and in relation to which it must make its own findings before coming to the issue of the accused's guilt in relation to them. That task does not require expertise beyond that which is within the capacity of any tribunal of fact, that of analysing the factual material put forward by the witnesses. Whatever expertise* [an expert witness] *may*

[272] See the Nahimana Appeals Judgment, *supra* note 145, para. 212.
[273] See the Appeal Brief, *supra* note 10, paras. 620, 630 and 631.

claim to have in relation to such a task, the Trial Chamber [is] *entitled to decline his assistance in the very task which it had to perform for itself*".[274]

166. On the argument that the Chamber failed to provide a full and reasoned opinion as to its rejection of D-0133's expert conclusion about the enduring effect on mental health of having been a child soldier,[275] the Chamber's decision to not consider D-0133's evidence was based on two independent reasons clearly articulated in the Judgment.

167. On the argument that the Chamber erred in law and in fact by concluding that the remainder of D-0133's testimony did not go to issues of relevance to the disposal of the charged crimes,[276] the CLRV notes that the Defence itself acknowledges that D-0133 testified on the subject of child soldiering and its effects on the child soldier's life.[277] Indeed, these are very general topics not directly relevant to the specific crimes or acts and conducts charged against the Appellant. Moreover, the Chamber had also heard evidence on similar issues from PCV-0002, called by the CLRV, and equally ruled that his evidence did not directly underlie any part of its analysis as to whether the facts alleged in the charges are established.[278]

168. On the Defence's argument that the Chamber's finding that D-0133's evidence about escape was incredible, it is erroneous and disregards the cultural and language issues involved in the concept of escape.[279] The Chamber made said finding considering the ample evidence received to the contrary. When appearing in Court, D-0133 testified to the effect that abducted children escaped when opportunities presented themselves, including instances of combat between the LRA and the UPDF

[274] See ICTY, *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.2, Decision on Admissibility of Prosecution Investigator's Evidence (Appeals Chamber), 30 September 2002, para. 17.
[275] See the Appeal Brief, *supra* note 10, para. 631.
[276] *Idem*, p. 145.
[277] *Idem*, para. 637.
[278] See the Judgment, *supra* note 2, para. 601.
[279] See the Appeal Brief, *supra* note 10, p. 146.

(in the process, those children were left by the LRA).[280] He also added that he was not aware about a normal bush situation of the LRA where children planned to escape when, for example, the commanders were sleeping.[281]

169. The CLRV posits that the Chamber's assessment of the oral testimony of D-0133 was correct and reasonable. In fact, just as for any other evidence, it is for the Chamber to assess the reliability and probative value of the expert report and testimony.[282] The Chamber rightly concluded that D-0133's evidence about the impossibility of children escaping voluntarily was unbelievable since there is enormous amount of evidence in the case record demonstrating the opposite. Counting each voluntary escape narrated by witnesses during the trial would be too numerous. Thus, the Chamber observed that escapes from the LRA were relatively common.[283]

170. Moreover, D-0133 admitted that he never conducted any scientific research into the LRA and was speaking only out of his own personal experience.[284] Lastly, it was quite obvious that, regardless of one's personal experience with abducted children, it is impossible for any single individual to make an overarching conclusion about the fate of *all* abducted or returned children (*in particular, exactly how they managed to escape*) in Northern Uganda during an armed conflict that lasted decades.

171. In conclusion, as held by the ICTR Appeals Chamber, once having heard testimonial evidence as proffered by the parties, it is up to a chamber to decide, by a reasoned opinion, to accept or to reject, in whole or in part, the testimony of an expert witness, provided the reasons for its decision are reasonable.[285] Indeed, the legal and factual reasons of the Chamber for not considering the evidence of D-0133 were

[280] See T-203, p. 81, lines 4-15; T-204, p. 33, line 22 – p. 34, line 7, p. 35, lines 10-18.
[281] See T-204, p. 35, lines 10-18.
[282] See the Aloys Simba Appeal Judgement, *supra* note 51, para. 174.
[283] See the Judgment, *supra* note 2, para. 2619.
[284] See T-204, p. 33, lines 16-19.
[285] See ICTR, *The Prosecutor v. Climent Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-A, Judgment (Reasons) (Appeals Chamber), 1 June 2001, para. 210.

reasonable. Even if the Defence insists otherwise, there is no showing that the exercise of the Chamber's discretion with regard to this witness amounted to an abuse of discretion or, in other words, that the Chamber's decision in question was so unfair or unreasonable as to force the conclusion that it failed to exercise its discretion judiciously. As a result, Grounds 61, 62 and 63 must be dismissed.

n) Grounds 90 and 66 (the Chamber erred in law and in fact in respect to "forced marriage")

172. In incorporating arguments from its Closing Brief, as well as from other documents extraneous to the present appeal,[286] the Defence argues that the Chamber erred in law and in fact with respect to "*forced marriage*" since it is not a cognizable crime under the Statute.[287] In particular, the Defence contends that "[t]*here is a comprehensive record of litigation in this case on the issue of whether forced marriage is a crime against humanity under the Statute. The Defence urges the Appeals Chamber to consider the arguments raised prior to the Judgment. The Chamber's disregard for the issue of legality of this offence, and its rejection of Defence's repeated objections in this regard led to egregious fair violations against the Appellant in this case*".[288]

173. The CLRV notes that once more the Defence fails to present cogent arguments, clearly explaining how the Chamber erred and drawing the attention of the Appeals Chamber to all the relevant aspects of the record or evidence contained in the impugned factual or legal finding(s), if there exists any. Since the Defence fails to even raise a proper argument in support of its ground of appeal, there is no showing of how the alleged error materially affected the Judgment.

174. In any case, the CLRV contends that the Chamber's legal finding on the crime of forced marriage is correct. The interpretation of the Statute is governed by the

[286] *Idem*, para. 976.
[287] See the Appeal Brief, *supra* note 10, para. 975.
[288] *Idem*, para. 978 (footnote removed).

Vienna Convention on the Law of Treaties, therefore article 7(1)(k) of the Statute shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.[289] The Chamber faithfully followed these guidelines and interpreted said provision in a strict manner, especially given its incriminatory nature.[290]

175. The Chamber also read the exact terms or wording of the provision in question and interpreted them based on their ordinary meaning.[291] By doing so, the Chamber

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[289] See the Judgment on Judicial Interpretation, *supra* note 206, para. 33.

[290] See the Judgment, *supra* note 2, para. 2741. In particular, the Chamber held that: "*h. Other inhumane acts, including forced marriage (Article 7(1)(k)) Dominic Ongwen is charged with the crime of other inhumane acts, including forced marriage, within the meaning of Article 7(1)(k) of the Statute. In conformity with the principle of legality, this category of crimes against humanity must be interpreted conservatively and – with due regard to Article 22(2) of the Statute – must not be used to expand uncritically the scope of crimes against humanity. Judicial interpretation within Article 7(1)(k) of the Statute must be consistent with the essence of the offence and in a manner which could have been reasonably foreseen*". See also the Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled 'Judgment pursuant to Article 74 of the Statute', *supra* note 11, para. 675. The Appeals Chamber held that " […] *the principles of treaty interpretation set out in article 31 of the Vienna Convention also apply to the interpretation of the Statute. Therefore, its provisions are to be interpreted according to their ordinary meaning in their context and in the light of the object and purpose of the treaty. However, this method of interpretation needs to be applied taking into account the nature of the Statute, in particular, as in the present instance, with respect to its incriminating provisions. The Appeals Chamber emphasises that its interpretation in this regard must be guided by the principle of legality as reflected, inter alia, in article 22 of the Statute. Notably, any interpretation of such provisions shall comply with the principle of strict construction under article 22 (2) of the Statute*". See also Paragraph 1 of the Introduction of Crimes Against Humanity of the Elements of Crimes, which states that "[s]*ince article 7 pertains to international criminal law, its provisions, consistent with article 22, must be strictly construed, taking into account that crimes against humanity as defined in article 7 are among the most serious crimes of concern to the international community as a whole, warrant and entail individual criminal responsibility, and require conduct which is impermissible under generally applicable international law, as recognized by the principal legal systems of the world*" (emphasis added).

[291] *Idem*, paras. 2743 - 2747. In particular, the Chamber held that "[…] [t]*he crime of other inhumane acts is committed, either by act or omission, when the following two material elements are fulfilled: 1. The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act. 2. Such act was of a character similar to any other act referred to in article 7, paragraph 1, of the Statute*. […] *The prior jurisprudence of this Court has understood Article 7(1)(k) of the Statute as a residual category of crimes against humanity, requiring that the specific act in question fails to qualify as any of the enumerated crimes under Article 7(1) of the Statute. The Chamber agrees that the crime of 'other inhumane acts' has indeed a residual nature. It notes in this regard that Article 7(1)(k) of the Statute was included in recognition of the impossibility of exhaustively enumerating every inhumane act which could constitute a crime*. […] *If the act is the same as one of the enumerated acts, with an identical 'character' in terms of its nature, harm suffered and protected interests involved, then the second material element under Article 7(1)(k) is not satisfied*. […] *The Chamber notes that 'character' under the second material element of Article 7(1)(k) refers to the nature and gravity of the act. The Chamber can enter a conviction under Article 7(1)(k) if the perpetrator inflicts great suffering, or serious injury to body or to mental or physical health, by means of a course of conduct which, despite comprising also acts falling*

did not add onto nor omit any meaning from the exact terms of the provision, but merely stated what they mean in their ordinary sense so that no crime shall fall within article 7(1)(k), which does not comprise all the elements which in fact constitute the exact offence as defined by the Statute.[292]

176. As also recalled *supra*, the Appeals Chamber held that the context of a given legislative provision is defined by the particular sub-section of the law read as a whole in conjunction with the section of an enactment in its entirety.[293] The Chamber not only interpreted the terms of article 7(1)(k), but also referred to the entirety of article 7(1) of the Statute in order to differentiate the crime of forced marriage from other similar crimes.[294]

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under one or more of the enumerated crimes, is, in its entirety, not identical, but is nonetheless 'similar' in character in terms of nature and gravity, to those enumerated crimes […]".

[292] See ICTY, *Prosecutor v. Zdravko Mucic et al*., Case No. IT-96-21-T, Judgment (Trial Chamber), 16 November 1998, paras. 410-411. The ICTY held that "[t]*he rule of strict construction requires that the language of a particular provision shall be construed such that no cases shall be held to fall within it which do not fall both within the reasonable meaning of its terms and within the spirit and scope of the enactment. In the construction of a criminal statute no violence must be done to its language to include people within it who do not ordinarily fall within its express language. The accepted view is that if the legislature has not used words sufficiently comprehensive to include within its prohibition all the cases which should naturally fall within the mischief intended to be prevented, the interpreter is not competent to extend them. The interpreter of a provision can only determine whether the case is within the intention of a criminal statute by construction of the express language of the provision*. […] *A strict construction requires that no case shall fall within a penal statute which does not comprise all the elements which, whether morally material or not, are in fact made to constitute the offence as defined by the statute. In other words, a strict construction requires that an offence is made out in accordance with the statute creating it only when all the essential ingredients, as prescribed by the statute, have been established* […]".

[293] See the Judgment on Judicial Interpretation, *supra* note 206, para. 33.

[294] See the Judgment, *supra* note 2, paras. 2747 and 2750. The Chamber held that "[…] *this does not mean that a conviction under Article 7(1)(k) of the Statute can be entered only when the conduct in question, considered in its entirety, falls completely outside any act under Article 7(1)(a)-(j). Rather, a conviction can be entered also under Article 7(1)(k) when the full scope of the culpable conduct is not reflected by its qualification under the enumerated crime(s) alone*. […] *The Chamber can enter a conviction under Article 7(1)(k) if the perpetrator inflicts great suffering, or serious injury to body or to mental or physical health, by means of a course of conduct which, despite comprising also acts falling under one or more of the enumerated crimes, is, in its entirety, not identical, but is nonetheless 'similar' in character in terms of nature and gravity, to those enumerated crimes*. […] *The conduct underlying forced marriage – as well as the impact it has on victims – are not fully captured by other crimes against humanity. To focus on sexual slavery and rape in particular, these crimes and forced marriage exist independently of each other. While the crime of sexual enslavement penalises the perpetrator's restriction or control of the victim's sexual autonomy while held in a state of enslavement, the 'other inhumane act' of forced marriage penalises the perpetrator's imposition of 'conjugal association' with the victim. Forced marriage implies the imposition of this conjugal association and does not necessarily require the exercise of ownership over a person, an essential element for the existence of the crime of enslavement. Likewise, the crime of rape does not penalise the*

177. Moreover, the Appeals Chamber also held – as recalled *supra* -that the objects of a particular legal provision may be inferred from the chapter of the law in which the particular section is included and its purposes from the wider aims of the law as may be understood from its preamble and general tenor of the treaty.[295] Article 7(1)(k) of the Statute is part of the same article that defines all the crimes against humanity. Thus, the Chamber also made reference to the common elements applicable to all crimes against humanity.[296]

178. When reading the Preamble, expressing the wider aims of the Statute and its general tenor (protecting the fundamental rights of all persons),[297] in conjunction with the terms of article 7(1), the purpose of the provision in subparagraph (k) becomes clear. Thus, the Chamber defined that the purpose of the crime of forced marriage is to protect every person's fundamental right to enter a marriage voluntarily.[298]

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imposition of the 'marital status' on the victim. When a concept like 'marriage' is used to legitimatise a status that often involves serial rape, victims suffer trauma and stigma beyond that caused by being a rape victim alone".

[295] See the Judgment on Judicial Interpretation, *supra* note 206, para. 33.

[296] See the Judgment, *supra* note 2, para. 2753.

[297] See the "Judgment on the appeal of Mr Al Hassan against the decision of Pre-Trial Chamber I entitled 'Décision relative à l'exception d'irrecevabilité pour insuffisance de gravité de l'affaire soulevée par la défense'"(Appeals Chamber), No. ICC-01/12-01/18-601-Red EK T O, 19 February 2020, para. 122.

[298] See the Judgment, *supra* note 2, paras. 2748, 2749, 2751 and 2752. In particular, the Chamber held that: "[…] *Every person enjoys the fundamental right to enter a marriage with the free and full consent of another person. Marriage creates a status based on a consensual and contractual relationship – it is an institution and also an act or rite. The central element, and underlying act of forced marriage is the imposition of this status on the victim, i.e. the imposition, regardless of the will of the victim, of duties that are associated with marriage – including in terms of exclusivity of the (forced) conjugal union imposed on the victim – as well as the consequent social stigma. Such a state, beyond its illegality, has also social, ethical and even religious effects which have a serious impact on the victim's physical and psychological well-being. The victim may see themselves as being bonded or united to another person despite the lack of consent. Additionally, a given social group may see the victim as being a 'legitimate' spouse. To the extent forced marriage results in the birth of children, this creates even more complex emotional and psychological effects on the victim and their children beyond the obvious physical effects of pregnancy and child-bearing.* […] *Accordingly, the harm suffered from forced marriage can consist of being ostracised from the community, mental trauma, the serious attack on the victim's dignity, and the deprivation of the victim's fundamental rights to choose his or her spouse.* […] *The Chamber thus interprets Article 7(1)(k) of the Statute and its elements to include the inhumane act of forced marriage, namely forcing a person, regardless of his or her will, into a conjugal union with another person by using physical or psychological force, threat of force or taking advantage of a coercive environment. Such an act does not fall under any of the acts enumerated in Article 7(1)(a)-(j) of the Statute, but is similar in character to them.* […] *It follows that forced marriage is a continuing crime, in the sense that it covers the entire period of the forced conjugal relationship, and only ends when the individual is freed from it* […]".

179. Consequently, the Chamber's interpretation of article 7(1)(k) is correct in law. The way it proceeded to properly interpret the constitutive elements of the crime of forced marriage fulfils all the requirements previously set out by the Appeals Chamber on the interpretation of the Statute. Accordingly, Grounds 90 and 66 should be dismissed.

V. CONCLUSION

180. For the foregoing reasons, the Common Legal Representative of the Victims respectfully requests the Appeals Chamber to reject the Defence Appeal in its entirety and to confirm the Judgement.

Paolina Massidda
Principal Counsel

Dated this 18th day of November 2022

At The Hague, The Netherlands