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No.: **ICC-02/04-01/15**
Date: **13 March 2020**

TRIAL CHAMBER IX

Before: **Judge Bertram Schmitt, Presiding Judge**
Judge Péter Kovács
Judge Raul C. Pangalangan

SITUATION IN UGANDA

IN THE CASE OF
THE PROSECUTOR v. DOMINIC ONGWEN

PUBLIC
with Confidential Annexes A-B and Public Annexes C-H

Public Redacted Version of 'Corrected Version of "Defence Closing Brief", filed on 24 February 2020'

Source: Defence for Dominic Ongwen

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I. INTRODUCTION

1. In our Briefs at the beginning of the case, the Defence made it clear that the difference between the case before the Court and cases that have been considered by other international courts is the peculiar factual situation of indoctrination administered in the strangest spiritual realm that has shocked the conscience of the world. What confronts the Court in this case is well captured in an article by Professor Kristof Titeca, one of the Defence expert witnesses. In The Washington Post of 17 January 2020 he writes: "It remains to be seen how willing and able the ICC will be to take spiritual beliefs into account in its rulings."

2. The above quote encapsulates the expectation of the world, including the legal community. Will this Court be bold enough to grope in the dark to establish jurisprudence in this novel area? At issue is whether the beliefs of the Acholi people matter. What the Court is called upon to decide is not what the so-called civilised or religion-based society believes. It is not about what judges and lawyers believe. It is about what Mr Ongwen believed at the time of his conduct for which he has been brought before the Court.

3. As it turned out, the Ten Commandments, which were the grand norm of the Lords Resistance Army ('LRA'), were interpreted and administered in accordance with how Joseph Kony wanted them to be understood, not in accordance with the Christian belief. The LRA system of spiritualism had a departmentalised Council of Spirits with different roles.

4. The testimonies of several witnesses indicate that there were many episodes that Kony effectively used to ingrain spiritualism in the minds of especially the abducted child soldiers; he was believed to be supernatural.

5. The Defence starts from the premise that this case is a case against the LRA, not Mr Ongwen. This sentiment was clearly stated by Mr Ongwen during his first public statement after surrendering. When he was asked at the beginning of the case whether he understood the charges read to him, he replied that he understood them to be charges against the LRA and its leader, Joseph Kony; and not against him. To that extent, he was saying that, since all the powers in the LRA were concentrated in the hands of Kony, only Kony should be held responsible for the atrocities committed by the LRA.

6. The case of Mr Ongwen is a case of conflict between the Government of Uganda ('GoU') and the LRA, jostling for political power in Uganda. Mr Ongwen is only a victim. It is Kony and

many commanders of the Ugandan People's Defence Forces ('UPDF') who prosecuted the war and who should be before the Court to answer these charges. The rule of law should apply with equal force on both sides of the aisle.

7. It is the Defence position that it is pertinent for the Court to commence the evaluation of this case by bearing in mind that Mr Ongwen is a mentally disabled defendant. He has borne the brunt of very severe traumatic events under the extreme conditions in the LRA which are continuing through the present. There is no gainsaying that this is a first for this Court, putting a formidable challenge to this Chamber.

8. Four aspects of the case highlighted below are crucial: 1) the status of Mr Ongwen as a victim; 2) the structure of the LRA; 3) the ominous and overpowering role of spiritualism within the LRA; and 4) the stand-alone nature of the case. All of this should be taken into account when assessing the Prosecution allegation that Mr Ongwen was a willing participant in the LRA atrocities and refused to escape, which the Defence submits is unfounded and false.

9. The Court should treat with caution and avoid overly relying on evidence procured from, or with the assistance of investigations carried out by the GoU, one of the protagonists in the conflict of which the case is a direct consequence.

10. The Defence submits that the Prosecution did not carry out an impartial investigation. The choice and management of witnesses was primarily done by Major Patrick Ocira (P-78), a UPDF officer who acted as a resource person for the Prosecution. According to available records, approximately 40 Prosecution witnesses, of which around 20 were on the Prosecution List of Witnesses, are attributed to this UPDF officer. The intercept evidence – poorly recorded, stored and transmitted to the Prosecution by GoU agents – lacks credibility and should not be be used as a basis to convict Mr Ongwen.

A. Mr Ongwen is a Child Victim of the LRA

11. The Defence submits that the status of Mr Ongwen as a victim with impaired capacity should have been seriously addressed both during pre-trial and trial proceedings. The Prosecution has used a category of victim/perpetrator status for Mr Ongwen. Both the Prosecution and Pre-Trial Chamber II ('Pre-Trial Chamber') failed to fully acknowledge his status as a victim.

12. Mr Ongwen is a victim, not a perpetrator. He was abducted as a young child by the LRA and brutalized for almost three decades before he was able to voluntarily surrender to military

personnel in the Central African Republic. This case cannot be properly adjudicated without considering his shattered life and the catastrophic effects of his experience in the LRA throughout his childhood and adulthood before his surrender. The psychological manipulation and injuries, the constant fear of death or serious bodily harm, and the long-term mental destruction of Mr Ongwen are central to the case before this Court.

13. Given all the evidence, provided by witnesses of all parties, the Defence submits that Mr Ongwen may have chronologically grown into adulthood, but mentally he has remained a child. His child-like conduct, *i.e.* the pranks he used to play with the rank and file child soldiers, should not be held against him as a person.

14. The Defence asserts that it was incumbent upon the Prosecution to prove beyond reasonable doubt that as soon as he attained the age of 18, Mr Ongwen's mental status as a child changed over night. This is contrary to Defence evidence that Mr Ongwen's mental state remains child-like throughout his adulthood. The effects of indoctrination by spiritualism and other mental pressures were not erased by the passage of time and this victim status continued into adulthood.

15. The Defence adds that the withholding of information relating to the child/victim status of Mr Ongwen may have been deliberate. In the Amended Arrest Warrant pleadings, Prosecution clearly identified Kony, his age, based on his attendance of school at Odek until Primary 4, which equates 10 years[1] and the criteria for establishing it[2], but they did not do the same for Mr Ongwen. The Prosecution did not indicate Mr Ongen's age, his mental health state or his status as a victim child soldier in the Amended Application for an Arrest Warrant.[3]

16. During the Confirmation of Charges hearing ('Confirmation Hearing'), the Defence brought the victim status of Mr Ongwen as an abducted child victim to the attention of the Chamber and urged that he should be protected and not prosecuted.

17. On 6 December 2016, the Prosecutor submitted in her opening statement in respect to Mr Ongwen, that:

> He himself [Mr Ongwen], therefore, must have undergone through the trauma of separation from his family, brutalisation by his captors, and initiation into the

[1] Prosecutor's Amended Application for Warrants of Arrest Under Article 58, ICC-02/04-01/15-Conf-Red2, paras 30-31 ('Arrest Warrant Request').
[2] Arrest Warrant Request, paras 30-31.
[3] Arrest Warrant Request, para. 39 states, "Ongwen's origins are unknown."

> violence of the LRA way of life. He has been presented as a victim rather than a perpetrator…The evidence of many child victims in this case, in other circumstances, be the story of the accused himself…One Prosecution witness has told the Court that generally Dominic Ongwen was a good man who would play and joke with boys under his command and was loved by everyone.[4]

18. The Defence submits that it is a double standard for the Prosecution who has been so eloquent to acknowledge the damage caused to Mr Ongwen during his traumatic experiences under Kony, to turn around to say that such that such damage may only be pleaded as a mitigating factor but not as a reason for excluding him from criminal responsibility.

19. The Defence submits that the status of Mr Ongwen as a victim/perpetrator, which the Prosecution has made a key issue in its case, is not tenable. Since it was not raised in the Prosecution pleadings, and does not even form part of the Confirmation Decision which is the authoritative charging instrument before the Court, the Prosecution should not be allowed to be smuggled it in. The Prosecutor made this allegation for the first time in the case, as an afterthought, during her opening statement on 6 December 2016.

20. The Defence reiterates its submissions at the pre-trial and during the trial that Mr Ongwen is a victim and not a victim and perpetrator at the same time. As a result, the Defence urges the Court to disregard the attempt to introduce the victim/perpetrator status through the back door. The Defence reiterates its earlier position that "once a victim always a victim".

21. The Defence further avers that the Prosecution failed to give any empirical evidence on how a child soldier transcended from victimhood into a perpetrator. The Defence submits that the claim of Mr Ongwen remaining a willing partner in the commission of crimes committed by the LRA after attaining the age of 18 is wrong. Mr Ongwen remained a victim and his victimhood continued well after the statutory age of 18.

B. The Structure of the LRA and Mr Ongwen's status

22. The Defence submits that the LRA was not a conventional army. Rather than rely on the hierarchical command structure of the LRA, Kony relied more on the command structure of the Council of Spirits, which was departmentalized. It had a chairman, deputies and departmental heads. Kony acted as the Chief Executive Officer of the LRA with command responsibilities as well as medical functions.

[4] T-26, p. 36, lns 1-12.

23. The GoU and the Prosecution witnesses falsely claimed that the LRA had ranks and structures that can be equated to those of a regular army. The documents on which the Prosecution relies to prove their claim on the structure and hierarchy in the LRA is completely contradicted. It is therefore the Defence submission that the Prosecution has not proved a structure and hierarchy that puts Mr Ongwen in a command position.

C. The Perversion of Acholi Culture by LRA Spiritualism

24. Between 1986 to at least 2005, many rebel groups were formed in Uganda with the intention to fight and remove the National Resistance Movement ('NRM') government headed by Yoweri Kaguta Museveni. One of them relevant to this case was the "Holy Spirit Movement", which later metamorphosed into the LRA.

25. As the two names connote, from the initial stages the group was born out of a belief in spiritual powers. Like his predecessor, Alice Auma Lakwena, Kony alleged that the LRA was formed on orders from God. According to the testimony of D-28, some Spirits possessed Kony as a young man. He was taken to Awere Hills, where some rituals were performed on him and he became the high priest and spirit medium of the LRA.

26. The basic instruction was that the group was on a mission to let the whole of Uganda – especially the Acholi people – turn back to God by adhering to the Ten Commandments, which became the constitution of the LRA. According to testimony, the Ten Commandments were the most important law in the LRA. All other rules, regulations and orders on policy matters were established and issued by the Spirits through Kony as the medium. Kony viewed himself as an Acholi nationalist, who was sent by God to save the Acholi. Although ultimately distorted, Kony's spiritualism initially embodied some Acholi cultural beliefs.

27. Appointments or promotions in the LRA, as well as policy formulations and pronouncements, were the preserve of Kony on the orders that came directly from the Spirits. Kony is quoted to have said that the LRA was not his army but belonged to the Holy Spirit, and he was merely their messenger. There was a widespread and firm belief that the orders of the Spirits that Kony gave were mystical. Following the orders were a must for survival on the battlefield, while disregarding them would have dire consequences. Testimonies were given about how violations of the rule against having sexual intercourse on some occasions resulted in grave injuries during battles. Thus, the rules played a restraining function and gave a sense of protection against harm and thereby tied the individual further into the movement.

28. The only way to survive in the bush was to follow the edicts of the Spirits. Even the thought of escaping was dangerous. It was believed that the shea butter and the camaplast smeared on the new recruits acted as transmitters that attached the individual to the Spirits. It was believed that, apart from confusing those attempting to escape, as soon as a person was initiated into the the LRA, it enabled Kony to peer into their minds and discern who was planning to escape. This discouraged and prevented escape because some of them would be executed or severely punished in advance for contemplating escape. Everybody in the LRA believed Kony's spiritual attributes as a messenger of the omnipotent and omnipresent God. Every commander – division, brigade, coy and unit – knew that he or she had no choice but to implement Kony's orders.

29. The LRA fighters, especially those abducted as children like Mr Ongwen, were never introduced to any other law except the laws and orders issued by the Spirits and interpreted by Kony. The Ten Commandments and spiritualism in the LRA were effectively used as the main tool of control by Kony to exact fear throughout the LRA.

D. The stand-alone nature of the case

30. The Defence submits that what makes this case stand out is its peculiar factual situation, shrouded in spiritualism and the mystical. This role of spiritualism is a novel issue in international courts and tribunals. Its significant impact on the conduct and actions of groups like the LRA has never been litigated. Spiritualism in the LRA was the main tool used by Kony to remain on top of the LRA. It is in this context that spiritualism and duress – its direct consequence – can be assessed and understood as the main drivers of the conduct of the LRA and the victimisation of Mr Ongwen. The Defence submits that the absolutism with which Kony ran the LRA, using spiritualism, is a stand-alone experience in international criminal law.

II. FAIR TRIAL AND OTHER HUMAN RIGHTS VIOLATIONS

A. Introduction

Right from the outset of the proceedings, Mr Ongwen was deprived of a fair trial.

31. In the present section of the Brief, the Defence will provide an account of fair trial and other human rights violations, and their material impact – individually and in aggregate – on the fairness and reliability of the proceedings. The section will first lay out the legal framework relevant to the demonstration of the fair trial and other human rights violations arising in the

Ongwen case.

32. It will then enter into an examination of particular breaches, which will be structured as follows: **i)** the first set of issues stemming from the proceedings before the Pre-Trial Chamber; **ii)** the second set of issues concerning the Trial Chamber's errors and other grounds that affected the fairness of the proceedings, and the manner in which it exercised its discretion during the trial; and **iii)** the third set of issues arising from the Prosecution's disclosure violations. At last, in light of the interconnection between the fair trial and other human rights violations, the Defence will also address the discrimination of Mr Ongwen as a mentally disabled defendant, and breaches of his right to family life and unjustified restrictions upon his liberty.

33. Any of these violations alone would suffice to cast serious doubts upon the fairness and reliability of the process against Mr Ongwen. And, in view of their cumulative effect, they provide a legal ground for the Defence to request that the Trial Chamber immediately declare a permanent stay of the proceedings.[5]

B. Relevant Legal Framework

34. Having regard to the sources and order of preference set out in Article 21 of the Statute, the following legal provisions are relevant to the Defence submissions: Article 21(3) of the Statute;[6] Article 22 of the Statute obligating the Court to convict if "the conduct in question constitutes at the time it takes place, a crime within the jurisdiction of the Court;"[7] Article 54 of the Statute obligating the Prosecution "to […] investigate incriminating and exonerating circumstances equally"; Article 55 of the Statute establishing "[w]here there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request under Part 9, that person shall also have the following rights of which he or she

[5] This is with prejudice to the Prosecution's right to re-prosecute the case at a later time.
[6] 'The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national ethnic or social origin, wealth, birth or other status'.
[7] Considering that the definition of a crime shall be strictly construed and shall not be extended by analogy, with the caption that in the event of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted […]";

shall be informed prior to being questioned";[8] Article 59 of the Statute requiring that "[a] person arrested shall be brought promptly before the competent judicial authority in the custodial State";[9] Article 64 of the Statute requiring that Trial Chamber's functions and powers are exercised in accordance with the Statute and the RPE; Article 67(1) of the Statute providing that "[i]n the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the […] minimum guarantees, in full equality"; Article 67(2) of the Statute;[10] Article 69 of the Statute;[11] Article 72 of the Statute;[12] and Article 74(5) of the Statute requiring that the Trial Chamber issue "a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions".

35. Furthermore, Rule 20 of the RPE obligating the Registrar "to organize the staff of the Registry in a manner that promotes the rights of the defence, consistent with the principle of fair trial as defined in the Statute";[13] Rule 64(2) of the RPE requiring the Trial Chamber to "give reasons for any rulings it makes on evidentiary matters"; Rule 77 of the RPE requiring the Prosecution to permit the Defence to inspect any items "in the possession or control of the Prosecutor, which are material to the preparation of the defence or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or a trial"; Rules 111, 112 and 113 of the RPE establishing the rights of a person to whom Article 55, paragraph 2, applies, or for whom a warrant of arrest or a summons to appear has been issued; and Rule

[8] Those rights are: '(a) To be informed, prior to being questioned, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court; (b) To remain silent, without such silence being a consideration in the determination of guilt or innocence; (c) To have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case of the person does not have sufficient means to pay for it; and (d) to be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel.

[9] In accordance with the law of the State, the State is required to determine that: (a) The warrant applies to that person; (b) The person has been arrested in accordance with the proper process; and (c) The person's rights have been respected

[10] Obligating the Prosecution to "as soon practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence".

[11] Vesting the Trial Chamber with a power to, *inter alia*, 'rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness"

[12] Provisions (1), (4) and (5) of article 72 of the Statute concerning the disclosure of information *vis-à-vis* protection of natural security are of particular relevance.

[13] The relevant rules are, *inter alia*, Rule 20(1)(b) of the RPE 'provide support, assistance, and information to all defence counsel appearing before the Court and, as appropriate, support for professional investigators necessary for the efficient and effective conduct of the defence'; and Rule 20(1)(c) of the RPE 'assist arrested persons, persons to whom article 55, paragraph 2, applies and the accused in obtaining legal advice and the assistance of legal counsel'.

135 of the RPE laying out the provisions regarding the medical examination of the accused.

36. The following provisions from International Human Rights Law are of relevance: Article 14(3) of the International Covenant on Civil and Political Rights ('ICCPR'); Article 6 of the European Convention on Human Rights ('ECHR'); Article 8(1) of the American Convention on Human Rights; Article 7 of the African Charter on Human and Peoples' Rights ('ACHR'); Article 12 of the International Covenant on Economic, Social and Cultural Rights ('ICESCR');[14] Articles 2, 4(2), 5(3) and 13(1) of the Convention on the Rights of Persons with Disabilities ('CRPD').[15]

37. In this broader context, the Defence notes as relevant the Appeals Chamber's 'Judgment on the appeal of Mr Ongwen against Trial Chamber IX's 'Decision on Defence Motions Alleging Defects in the Confirmation Decision''.[16] Wherein it held that because "the Trial Chamber dismissed the Defects Series, which had alleged defects in the Confirmation Decision and raised matters relating to notice, *in limine* for untimeliness", the Trial Chamber "did not consider […] whether Mr Ongwen had received sufficient notice of the charges".[17]

38. Similarly, the Appeals Chamber declined to address several new arguments advanced by Mr Ongwen in his Further Submissions[18] and ruled "[t]hese arguments, however, were never presented before the Trial Chamber and were therefore not considered and addressed in [the Decision on Defects Series]". According to the Appeals Chamber "if it were to decide on the new arguments advanced on appeal, this would mean that it would have advanced an opinion on issues that may eventually be presented before the Trial Chamber and potentially the Appeals Chamber in the subsequent proceedings".[19]

39. The Appeals Chamber thus ruled that "Mr Ongwen is entitled to advance the arguments

[14] Under this article '[t]he State Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health'.
[15] Requiring the Parties to ensure effective access to justice for persons with disabilities on an equal basis with others.
[16] Judgment on the appeal of Mr Dominic Ongwen against Trial Chamber IX's 'Decision on Defence Motions Alleging Defects in the Confirmation Decision, ICC-02/04-01/15-1562 ('*Ongwen* OA4 Judgment').
[17] *Ongwen* OA4 Judgment, para. 69.
[18] These arguments, *inter alia*, include: (i) the Prosecution disclosure failures; (ii) the questioning of witnesses on events that occurred outside the temporal scope of the charges; (iii) the prejudice from failure to translate the Confirmation Decision into the Acholi language; (iv) the inability to object in a timely manner to the Confirmation Decision due to inequality of resources between the defence and the prosecution; (v) Mr Ongwen's mental health conditions and disability; (v) the prejudicial regime adopted by the Trial Chamber; *see* *Ongwen* OA4 Judgment, paras 36, 38 and 40, and Defence's Further Submissions, ICC-02/04-01/15-1536-Corr ('*Ongwen* Further Submissions').
[19] *Ongwen* OA4 Judgment, para. 154.

presented in the Defects Series in his final submissions before the Trial Chamber, and eventually before the Appeals Chamber, should a conviction be entered and an appeal lodged against it". In this respect, the Appeals Chamber noted that "in the past, convicted persons have raised on appeal challenges to the formulation of charges".[20]

40. In light of the Appeals Chamber's rulings referred to above, the Defence incorporates the entirety of its submissions – including remedies sought – presented in the following motions: NCTA Motion;[21] Burden and Standard of Proof Motion;[22] Defects Series Part I;[23] Defects Series Part II;[24] Defects Series Part III;[25] Defects Series Part IV;[26] Evidentiary Regime Motion;[27] SGBC Defects;[28] Standard to Assess Multiple Charging and Convictions Motion;[29] and Dismissal of the Charge of Enslavement Motion.[30]

C. Proceedings before the Pre-Trial Chamber

> **What are we going to say if tomorrow it occurs to some African state to send its agents into Mississippi and to kidnap one of the leaders of the segregationist movement there? And what are we going to reply if a court in Ghana or the Congo quotes the Eichmann case as precedent?[31]**

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[20] *Ongwen* OA4 Judgment, para. 160.
[21] Defence Request for Leave to File a No Case to Answer Motion and Application for Judgment of Acquittal, ICC-02/04-01/15-1300 ('NCTA Motion').
[22] Defence Request for the Chamber to Issue an Immediate Ruling Confirming the Burden and Standard of Proof Applicable to Articles 31(1)(a) and (d) of the Rome Statute, ICC-02/04-01/15-1423 ('Burden and Standard of Proof Motion'); *see also* Defence Request for Leave to Appeal 'Decision on Defence Request for the Chamber to Issue an Immediate Ruling Confirming the Burden and Standard of Proof Applicable to Articles 31(1)(a) and (d) of the Rome Statute, ICC-02/04-01/15-1499 ('LTA Burden and Standard of Proof Motion').
[23] Defence Motion on Defects in the Confirmation Decision: Decision in Notice and Violations of Fair Trial (Part I of the Defects Series), ICC-02/04-01/15-1430 ('Defects Series Part I').
[24] Defence Motion on Defects in the Confirmation of Charges: Defects in the Modes of Liability (Part II of the Defects Series), ICC-02/04-01/15-1431 ('Defects Series Part II').
[25] Defence Motion on Defects in the Confirmation of Charges Decision: Defects in Notice in Pleading of Command Responsibility under Article 28(a) and Defects in Pleading of Common Purpose Liability under Article 25(3)(d)(i) or (ii) (Part III of the Defects Series), ICC-02/04-01/15-1432 ('Defects Series Part III').
[26] Defence Motion on Defects in the Confirmation of Charges Decision: Defects in the Charged Crimes (Part IV of the Defects Series), ICC-02/04-01/15-1433 ('Defects Series Part IV'); *see also* Defence Request for Leave to Appeal 'Decision on Defence Motions Alleging Defects in the Confirmation Decision, ICC-02/04-01/15-1480 ('LTA Defects Series I-IV').
[27] Defence Request and Observations on Trial Chamber IX's Evidentiary Regime, ICC-02/04-01/15-1519 ('Evidentiary Regime Motion'); *see also* Defence Request for Leave to Appeal the 'Decision on Defence Request regarding the Evidentiary Regime', ICC-02/04-01/15-1550 ('LTA Evidentiary Regime').
[28] Motions on Defects in the Confirmation Decision Regarding SGBC, ICC-02/04-01/15-1603-Red ('SGBC Defects'); *see also* Defence Request for Leave to Appeal 'Decision on Further Defence Motion Alleging Defects in the Confirmation Decision, ICC-02/04-01/15-1636 ('LTA SGBC Defects').
[29] Motion for Immediate Ruling on Standard to Assess Multiple Charging and Convictions, ICC-02/04-01/15-1697 ('Standard to Assess Multiple Charging and Convictions Motion').
[30] Motion for Immediate Ruling on the Request for Dismissal of the Charge of Enslavement, ICC-02/04-01/15-1708 ('Dismissal of the Charge of Enslavement Motion').
[31] Hannah Arendt, Eichmann in Jerusalem: A Report on the Banality of Evil (1963).

41. The Pre-Trial Chamber's role in the proceedings against Mr Ongwen was to verify that the judicial process was properly followed and the rights of Mr Ongwen as an arrestee and/or a suspect were protected, as envisaged under Articles 21(3), 55(2), 59(2) and 67(1)(g) of the Statute. The Pre-Trial Chamber failed in its role.

42. It failed because the fairness and outcome of the pre-trial proceedings was largely affected with the violations of the rights of Mr Ongwen in the process of bringing him to the Court as well as during the prejudicial 'Article 56 Proceedings'.

i. Violation of Mr Ongwen's Right to Counsel and His Right to Remain Silent

43. The essence of the Defence submission is that the Pre-Trial Chamber failed to protect Mr Ongwen's human rights prior to his appearance before the Court. Pursuant to Articles 21(3), 55(2) and 59(2) of the Statute, it was the role and duty of the Pre-Trial Chamber to verify that Mr Ongwen was not subjected to any violation of his fundamental rights in the process of his arrest and transfer to the Court. It was in this process that breaches of Mr Ongwen's rights to legal assistance and to remain silent occurred and were ignored by the Pre-Trial Chamber.

44. The Court obtained the custody over Mr Ongwen through the actions of the authorities of Uganda and Central African Republic ('CAR').[32] The Ugandan and CAR authorities' conduct in respect to Mr Ongwen – his arrest, custody, interview and a request to sign legal documents – was based on the issuance of the warrant of arrest by the Pre-Trial Chamber.[33] No counsel for Mr Ongwen was present during this conduct.

45. The Defence notes that Article 55(2) of the Statute is applicable "[w]here there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request made under Part 9". It furthers notes "that person **shall also have the following rights** of which her or she shall be informed prior to being questioned: […]; (b) To remain silent […]; (c) To have legal assistance of the person's choosing, or, […] to have legal assistance assigned to him […]; (d) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel". (Bold added)

[32] For a detailed analysis of the process leading to Mr Ongwen's arrest and handover to the Court, *see* **ANNEX A** – Mr Ongwen's Right To Counsel and of His Right to Remain Silent.

[33] Warrant of Arrest for Dominic Ongwen, ICC-02/04-01/15-6. In view of the evidence and circumstances surrounding Mr Ongwen's arrest, custody, questioning and transfer to the Court, the Defence position is that there were two custodial States: Uganda and CAR. AU and the United States Special Forces played logistical roles.

46. Article 55(2) of the Statute was thus applicable in this case because both Uganda and CAR took the measures "at the behest of the Court"[34] and their illegal actions apply to the period after the arrest of warrant[35] was received by both States.[36]

47. Article 59 of the Statute regulates arrest proceedings in the custodial State(s), *i.e.* proceedings following the receipt by the State(s) of a request for arrest issued by the Court. The Appeals Chamber in the *Lubanga* case and the Pre-Trial Chamber in the *Gbagbo* case held that Article 59(2) of the Statute is designed to ensure that i) the arrest of warrant applies to the person arrested; ii) the process followed is the one envisaged by national law; and that iii) the person's rights have been respected.[37] In this respect, these Chambers further found that: "[The Court's] task is to see that the process envisaged by [national] law[s] was duly followed and that the rights of the arrestee were properly respected".[38] In other words, the Pre-Trial Chamber's role with respect to Mr Ongwen's arrest proceedings under Article 59(2) of the Statute was to verify that Mr Ongwen's human rights envisaged by Ugandan and CAR national laws were respected.

48. Therefore, given that both Uganda and CAR were directly involved in the process of Mr Ongwen's arrest, questioning and transfer to the Court, and they both acted based on the Court's arrest of warrant, Article 59(2) of the Statute was applicable in this case.

49. There is evidence in this case that shows that the arrest process was illegal and that it did not take place in accordance with the following legal provisions:

i) Mr Ongwen's right to remain silent under Article 55(2)(b) of the Statute;

ii) Mr Ongwen's right to have legal assistance under Article 55(2)(c) of the Statute;

iii) Mr Ongwen's right to be questioned in the presence of counsel unless he has voluntarily waived his right to counsel under Article 55(2)(d) of the Statute;

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[34] *Gbagbo*, Decision on the "Corrigendum of the challenge to the jurisdiction of the International Criminal Court on the basis of articles 12(3), 19(2), 21(3), 55 and 59 of the Rome Statute filed by the Defence for President Gbagbo, ICC-02/11-01/11-212 ('*Gbagbo* Ruling on Applicability of Articles 55 and 59'), paras 97 and 108.

[35] Noting there are reasonable grounds to believe that Mr Ongwen committed crimes within the jurisdiction of the Court, see Warrant of Arrest for Dominic Ongwen, ICC-02/04-01/15-6.

[36] *Katanga et al.*, Decision on the Prosecution's Bar Table Motion, ICC-01/04-01/07-2635, para. 59: In respect to Article 55(2), the Trial Chamber found: "[T]he drafters of the Rome Statute agreed to adopt a provision explicitly requiring that suspects be questioned in the presence of counsel even though, domestically, this right is not always guaranteed".

[37] *Lubanga* OA4 Judgment, para. 41; *Gbagbo* Ruling on Applicability of Articles 55 and 59; paras 101-103.

[38] *Lubanga* OA4 Judgment, para. 41; *Gbagbo* Ruling on Applicability of Articles 55 and 59; paras 101-106.

iv) Mr Ongwen's rights under Article 59(2)(c) of the Statute, including:

a. Chapter 4, Articles 23(3)-(4) and Article 28(3)(d)-(e) of the Uganda 1995 Constitution,[39]

b. Title 1, Articles 3 and 4 of the Central African Constitution of 2016;[40]

v) Mr Ongwen's rights under Articles 14(3)(d) and (g) of the ICCPR.[41]

50. Following Mr Ongwen's escape from the LRA and his voluntary surrender to the hands of the rebel group Aboro, Mr Ongwen ended up in the custody of the United States Special Forces ('USSF'). Mr Ongwen remained in the custody of USSF from 6 to 14 January 2015. Meanwhile, on 12 January 2015, the Registry appointed Ms Hélène Cissé as a duty counsel to represent Mr Ongwen before the Court. In particular, the letter informed Ms Cissé that the mandate requires her to assist Mr Ongwen on 12-14 January 2015 in Bangui, CAR.[42]

51. USSF transferred Mr Ongwen to the custody of the Ugandan's authorities, resp. UPDF. Mr Ongwen was held in the custody at the UPDF HQ in Obo from 14 to 16 January 2015. After his two-day stay at the UPDF HQ, Mr Ongwen was transferred to the CAR authorities in Bangui. On the same day, the CAR authorities handed Mr Ongwen to the ICC Registry officials.[43] Importantly, it was later that day, on 16 January 2015, at 18.35h, when Mr Ongwen was, for the first time, asked by the Court's representatives "whether he would want the assistance of a Duty Counsel and, should he so wish, such a Duty Counsel could be made available to him". Following Mr Ongwen's indication that he would want the assistance of a

[39] Uganda 1995 Constitution; While there is no explicit mention of the right to remain silent, the Luanda Guidelines, adopted by the African Commission on Human and Peoples' Rights in May 2014, expanded those constitutional rights to include, "specific rights to the ones in Ugandan law, such as: the right to silence and freedom from self-incrimination". Moreover, Article 8(a) of the Luanda Guidelines require States to establish a legal aid service framework through which legal services for persons in police custody and pre-trial detention are guaranteed, *see* Pre-Trial Detention at 8.

[40] The Central African Constitution of 2016; Title 1, Article 3 of the Central African Constitution of 2016 provides that "no one may be arbitrarily arrested or detained". The right to counsel is purported to be guaranteed by Title 1, Article 4 of the Constitution, which states, "Every defendant is presumed innocent until their culpability has been established following a procedure offering to them the guarantees indisputable for their defense. The rights of defense are exercised freely before all the jurisdictions and the administration of the Republic", at Title 1, Article 4.

[41] Under Article 21(3) of the Statute, its provisions must be interpreted and more importantly applied in accordance with internationally recognized human rights. Ergo, the provisions of Articles 55 and 59 of the Statute had to be interpreted in accordance with, *inter alia*, the Article 14 of the ICCPR: Uganda acceded to the ICCPR in 1995 and CAR in 1981.

[42] Annex: Notification of the appointment of Ms. Helene Cissé as Duty Counsel of Mr. Dominic Ongwen, ICC-02/04-01/15-186-Anx; *see also* **ANNEX A** – Violation of Mr Ongwen's Right to Counsel and of His Right to Remain Silent.

[43] The Report of the Registry on the voluntary surrender of Dominic Ongwen and his transfer to the Court, ICC-02/04-01/15-189-Anx10; *see also* Decision on the applicability of article 101 of the Rome Statute in the proceedings against Dominic Ongwen, ICC-02/04-01/15-260 ('101 Decision').

lawyer, the Registry representatives introduced Ms Cissé to Mr Ongwen.[44]

52. The illegality of the process and the breach of Mr Ongwen's rights are documented in the Prosecution's evidentiary material: **UGA-OTP-0283-1449**. This item is a video from the time of Mr Ongwen's custody at the UPDF HQ.[45] It depicts the direct involvement of the Ugandan authorities and their actions which led to the handover of Mr Ongwen to the CAR authorities, the ICC Registry and, ultimately, his first appearance before the Pre-Trial Chamber.

53. The video shows that on 16 January 2015, UPDF informed Mr Ongwen that he is an "ICC indictee" and that he "is being held and released on charges of war crimes". After this Mr Ongwen was given several documents to sign.[46] The rest of the video shows Mr Ongwen's interview taken at the UPDF HQ.[47] In addition, the Registry's report on Mr Ongwen's voluntary surrender notes that the CAR authorities "questioned Mr Ongwen as to his intention to voluntary surrender to the Court". This questioning occurred prior to Mr Ongwen's introduction to his duty counsel by the Registry.[48]

54. It is thus evident that Mr Ongwen had no assistance of counsel during the process that took place on 14-16 January 2015. It is also clear that Mr Ongwen was neither afforded an opportunity to ask for the presence of a lawyer at that time, nor was he asked to waive his right to counsel. Accordingly, given that Mr Ongwen was questioned and requested to sign documents in the absence of counsel, his right to legal representation was violated.

55. The key importance of Mr Ongwen's right to counsel during the process was to protect his human rights, which is to remain silent and not to be forced to self-incriminate.[49] In other words, it is highly probable that would he have obtained legal advice from a counsel at that time, he would have never made the statement and exposed himself to the risk of self-incrimination. Although Mr Ongwen never knowingly and freely waived his right to remain silent, his actions and statement made at the UPDF HQ were used in the proceedings against him. This violated his right to remain silent.

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[44] The Report of the Registry on the voluntary surrender of Dominic Ongwen and his transfer to the Court, ICC-02/04-01/15-189 ('*Ongwen* Surrender Report'), para. 5.
[45] UGA-OTP-0283-1449, Wrong Elements full VO STENG-252495084-ECERPT.mp4. This item was labelled as incriminatory against Mr Ongwen and disclosed by the Prosecution on 9 March 2018 (Trial INCR package 60). The Trial Chamber it as formally submitted through Prosecution Witness P-446.
[46] UGA-OTP-0283-1449, time stamp: 3:56:14 - 8:55:07.
[47] UGA-OTP-0283-1449, time-stamp: 13:11:18 - 15:39:06.
[48] *Ongwen* Surrender Report, paras 3 and 5.
[49] *Katanga et al*., Decision on the Prosecution's Bar Table Motion, ICC-01/04-01/07-2635, para. 62.

56. Prior to the appearance of Mr Ongwen before the Court, the Pre-Trial Chamber was required to verify the efficacy of the process leading to Mr Ongwen's arrest and handover to the Court, including that his rights were respected. However, based on the record, nothing indicates that the Pre-Trial Chamber recognized the violations by Uganda and CAR in the impugned process.[50] Therefore, the Pre-Trial Chamber's failure to verify the legality of the process and protection of Mr Ongwen's rights, as required under Articles 21(3), 55(2) and 59(2) of the Statute has deprived Mr Ongwen of a fair trial.

1. Violation of Mr Ongwen's Right to Remain Silent under Article 67(1)(g) of the Statute

57. The Pre-Trial Chamber's failure prejudicially impacted on Mr Ongwen's rights as an accused during the trial proceedings. The impact was that Mr Ongwen was denied his right "not to be compelled to testify or to confess guilt and to remain silent".[51]

58. The same video capturing the statement of Mr Ongwen at the UPDF HQ was disclosed by the Prosecution and given to its mental health experts.[52] Specifically, the Prosecution expert witness P-446 (Ms Mezey) relied on the video as one of the materials to reach her conclusion that Mr Ongwen was not suffering from any mental illness.[53]

59. In summary, Mr Ongwen's impugned statement was obtained in non-compliance with the requirements of Articles 21(3), 55(2) and 59(2) of the Statute, by Uganda and CAR acting at the request of the Court. Hence, using the evidence during the trial proceedings against Mr Ongwen is in violation of his right to remain silent and of the privilege against self-incrimination under Article 67(1)(g) of the Statute.

60. In addition, Mr Ongwen's statement must be excluded from the evidence as inadmissible, because it was illegally obtained in violation of the Statute and Mr Ongwen's internationally recognized human rights. As demonstrated above: (i) the violation casts doubt on the reliability of the statement; and (ii) the admission of Mr Ongwen's statement is antithetical to

[50] 101 Decision, para. 11; *see also* Mr Ongwen's first appearance before the Pre-Trial Chamber, T-4.
[51] Article 67(1)(g) of the Statute.
[52] See the Prosecution Witness P-446's report (UGA-0280-0786, at 0828, point 2); *see also* "List of Materials for the Examination of Prosecution Witnesses P-445, P-446 and P-447, p. 13, tab 41 (UGA-OTP-0283-1449, Video Recording of Mr Ongwen speaking shown in an excerpt from Jonathan Littell's documentary film entitled "Wrong Elements".
[53] Transcript of P-446's testimony, T-162, p. 17, lns 11-22.

and seriously damages the integrity of the proceedings.[54] Therefore, Ms Mezey's conclusions should be disregarded by the Trial Chamber.

ii. The Conduct of the Article 56 Proceedings and Subsequent Use of its Evidence in the Confirmation of Charges Hearing Violated Mr Ongwen's Right to a Fair Trial

61. The SGBC were fraught with fair trial violations, starting from the proceedings under Article 56 of the Statute ('Article 56 Proceedings'), which commenced before the charges were confirmed. These were: 1) lack of notice as to the charges for which evidence was being preserved at the Article 56 hearings; 2) the dual role of the Single Judge, presiding over both the Article 56 hearings and the CoC hearings; 3) the refusal of the Single Judge to hear procedural violations; and 4) the failure of the Single Judge to investigate and properly determine the status of witnesses at the hearing.

1. Lack of Notice, in Violation of Article 67(1)(a) of the Statute

62. As a former member of the Prosecution team in this case noted:

> What was unusual about these [Article 56] proceedings was that at the time the Article 56 testimony began, Dominic Ongwen had not even been charged with any crimes relating to these women. His trial was not to start for over a year. Yet when the Article 56 testimony concluded, a significant part of the trial was over before it had even begun.[55]

63. As a result, Mr Ongwen was not informed of the charge(s) for which the evidence was taken, and in addition, the scope of the evidence elicited exceeded the counts of the SGBC which were eventually confirmed. The Single Judge erroneously found that the summaries of witnesses were sufficient to constitute notice in lieu of formal charges.

2. The Dual Role of the Presiding Judge, in Violation of Article 67(1)(a) and (e) of the Statute

64. While technically permitted by the Statute, the roles of a Single Judge in the two pre-trial proceedings create a conflict. The conflict is that the Single Judge collected evidence in Article 56 Proceedings and then he ruled on the same evidence in the Confirmation of Charges Hearings ('Confirmation Hearings'). The decision to confirm the SBGC charges was

[54] Article 69(7) of the Statute.
[55] Paul Bradfield, Preserving Vulnerable Evidence at the International Criminal Court – The Article 56 Milestone in *Ongwen* (2019), p. 374; *see also* **ANNEX B**– Amendment of the Charges and 'Article 56 Proceedings'.

based in large part on the transcripts of the Article 56 Proceedings.[56] In the Article 56 Proceedings, Judge Tarfusser had the opportunity to view the witnesses' demeanour and make an assessment of the evidence, which is the role of the Trial Chamber. His dual role had, at a minimum, the appearances of impropriety. Moreover, the Single Judge provided no legal justification for this conflict of duality.

3. The Single Judge Erred in Refusing to Consider Procedural Challenges to 'Article 56 Evidence' in Violation of Articles 23(1) and 67(1) of the Statute

65. The Single Judge precluded the Defence from raising objections to the nature, scope, and purpose of the Article 56 Proceedings. The Single Judge stated: "I expect no preliminary procedural issues as to the nature, scope, and purpose of this hearing".[57] This oral decision indicated that the Single Judge was not open to Mr Ongwen raising any challenges. Thus, the Defence's inability to contest the Article 56 evidence violated Mr Ongwen's rights.[58]

4. The Single Judge's Failure to Determine the Status of the Witnesses Violated Mr Ongwen's Article 67(1)(e) Rights

66. The Single Judge never asked the witnesses for whom they intended to testify, the Defence or the Prosecution. Instead, he stated: "I think a witness is a witness. It's not a prosecution witness, it's not a Defence witness, but it's just a person who has just to come here to tell the truth. Therefore it's a matter of who starts the questioning".[59] Thus, the status of the Article 56 witnesses was resolved erroneously by the Single Judge.

67. The Single Judge's statement confused and misled the witnesses and the Defence and prejudiced Mr Ongwen.[60] The Defence had contacted the witnesses and obtained witness statements from them to testify for Mr Ongwen.[61] This proof that some of the witnesses wanted to testify for Mr Ongwen, including investigator reports, was available to the Prosecutor and the Single Judge.[62]

68. The prejudice was that the confusion resulted in a) the restrictions on Mr Ongwen to have

[56] Confirmation Decision, para. 102.
[57] T-8-Conf, p. 3, lns 9-25; Single Judge relied on the following confidential decisions: ICC-02/04-01/15-277, ICC-02/04-01/15-287, ICC-02/04-01/15-293.
[58] Article 21(3) and 67(1) of the Statute.
[59] T-12-Conf.
[60] T-12-Conf, p. 3.
[61] T-12-Conf.
[62] T-12-Conf, p. 3

contact with his family;[63] and b) the violations of his right to call witnesses in his Defence case.

69. In addition, the Single Judge failed to properly carry out his role in the Article 56 Proceedings. First, when assessing the basis for the proceedings, he made a collective assessment of the witnesses, and never interviewed the witnesses individually.

70. Second, where there were inconsistencies in their Article 56 testimony, he failed to request corroboration from the Prosecution. For example, there were significant inconsistencies related to their abductions, victimization and the responsibility for their victimization.[64]

5. Conclusion

71. In sum, the conduct of the Single Judge in both the Article 56 Proceedings and the Confirmation Hearings, violated Mr Ongwen's fair trial rights, under Article 67(1)(a) and (e) of the Statute.

72. In addition, the Defence was denied an expert on SGBC even though they comprised about 25% of the charges against him. The Trial Chamber denied this request; however, it had granted an SGBC expert for the victims, although ample testimony from fact witnesses had been submitted. This is a double standard which prejudiced Mr Ongwen's fair trial rights.[65]

D. Proceedings before the Trial Chamber

The Courtroom is both the place where substantive rights can be taken away and the avenue through which an individual can prevent these rights from being taken away.[66]

i. Mr Ongwen's Illegal Plea

73. On 6 December 2016, Mr Ongwen pleaded not guilty before the Trial Chamber. It is the

[63] *See* below 'Violations of Liberty and Other Violations of the Right to Family and Private Life'.
[64] For example, P-227's testimony was inconsistent on the date of her abduction. She testified that she was abducted in September 2002 and also testified that she was abducted in April 2005.
[65] Defence's Request to add Expert Witness UGA-D26-P-0158 and Fact Witness UGA-D26-P-0013, ICC-02/04-01/15-1559-Red; Decision on Defence Request to Add Two Witnesses to its List of Witnesses and Accompanying Documents to its List of Evidence, ICC-02/04-01/15-1565; Motion for Reconsideration or, In the Alternative, for Leave to Appeal Portion of the 'Decision on Defence Request to Add Two Witnesses to its List of Witnesses and Accompanying Documents to its List of Evidence', ICC-02/04-01/15-1567-Red; Decision on Defence Motion for Reconsideration of or Leave to Appeal the Decision on Defence Request to Add Two Witnesses to its List of Witnesses and Accompanying Documents to its List of Evidence, ICC-02/04-01/15-1589.
[66] Y. McDermott, Fairness in International Criminal Trials (2016), p. 27.

Defence position that the plea was illegal.[67]

74. The Defence does not contest the power of the Trial Chamber to take a plea under Article 64(8) or Article 65 of the Statute. However, the Defence submits that a plea should be voluntary, knowing or informed, and, thirdly, unequivocal. This standard was developed by courts in cases dealing with objections to guilty pleas. Logically, the standard for a guilty plea should be the same. Therefore, the standard for guilty and not guilty pleas should be the same: voluntary, informed or knowing and unequivocal.

75. Mr Ongwen's plea taken in December 2016 was hardly unequivocal. Even the Trial Chamber acknowledged that "[a]t the conclusion of the exchange, Mr Ongwen did not give an unqualified affirmation that he understood the charges".[68] Mr Ongwen was asked by Presiding Judge Schmitt at the hearing whether he read and understood the Document Containing the Charges. His response was: "I do understand -- I did understand the Document Containing the Charges, but not the charges, because the charges -- the charges I do understand as being brought against LRA, but not me, because I am not the LRA. The LRA is Joseph Kony, who is the leader of the LRA".[69]

76. The Defence interprets this statement to mean that Mr Ongwen did not understand the charges against him, which is the essential piece of understanding you need before you take a plea. It appears that he understood a translation which he was given, but he did not understand the charges as being against him. He later confirms this, stating: "In the name of God, I deny all the charges in respect to the war in northern Uganda".[70]

77. Given these circumstances, it is hard to understand how the Trial Chamber reached the conclusion that Mr Ongwen's plea was voluntary, knowing or informed, and unequivocal. This case has thus suffered from a fundamental fair trial that permeates the proceedings from the outset.

78. The first problem is that Mr Ongwen did not receive a complete translation of the 104-page

[67] Mr Ongwen's Illegal Plea, T-26, pp 16-21; Counsel Lyons' Opening Statement, T-179, pp 75-79; *see also* **ANNEX C** – Mr Ongwen's Illegal Plea and Violation of His Right to Translation.
[68] Decision on Defence Request for Findings on Fair Trial Violations Related to the Acholi Translation of the Confirmation Decision, ICC-02/04-01/15-1147 ('Decision on Fair Trial Violations'), para. 9(iii).
[69] Mr Ongwen's Illegal Plea, T-26, p. 17, lns 2-6.
[70] Mr Ongwen's Illegal Plea, T-26, p. 21, lns 1-2.

Confirmation Decision until after the plea was taken, on 6 December 2016.[71] At the time of the hearing on 6 December, only pieces of the Confirmation Decision had been translated – up to paragraph 145 which was approximately at p. 64 in a 104-page-long document. Moreover, the 'operative part' of the Confirmation Decision (*i.e.* recitation of the charges from the Document Containing the Charges) is not identical with the Document Containing the Charges filed by the Prosecution in December 2015,[72] and read by Mr Ongwen prior to the Confirmation of Charges hearing in January 2016.[73] As confirmed by the Trial Chamber, the 'operative part' of the Confirmation Decision contains certain modifications. At least one of them is a modification in terms of the dates of charged crimes, which is a specific element of the notice requirement.[74]

79. The other problem is that the Trial Chamber had been put on notice regarding Mr Ongwen's mental disability and that it could affect his understanding and ability to enter a plea.[75] The day before the 6 December hearing, the Defence filed its First Rule 135 motion and requested the Trial Chamber to order a psychiatric or a psychological examination to ensure his fitness to stand trial. The Defence position is and has been that a mentally disabled defendant cannot enter a plea because he lacks the capacity to understand the charges.[76] The Trial Chamber rejected the motion.

80. On 16 December 2016, in a written decision, the Trial Chamber appointed a psychiatrist (Mr de Jong) and ordered him to make a diagnosis as to any mental condition or disorder that Mr Ongwen may suffer at the present time.[77] Mr de Jong confirmed the medical findings of the Defence mental health experts presented to the Trial Chamber on 5 December 2016, and found that Mr Ongwen, *inter alia*, shows an oscillating range of symptoms of severe posttraumatic stress disorder, several symptoms of a dissociative disorder (*e.g.* out of body

[71] *See* below 'Violation of Mr Ongwen's Right to Acholi Translation'.
[72] Prosecution's submission of the document containing the charges, the pre-confirmation brief, and the list of evidence, ICC-02/04-01/15-375-AnxA-Red2 ('Document Containing the Charges)'.
[73] Confirmation of Charges Hearing, T-20, p. 6, lns 9-14.
[74] Confirmation Decision, para. 158; *see* Decision on Defence Request for Findings on Fair Trial Violations Related to the Acholi Translation of the Confirmation Decision, ICC-02/04-01/15-1147 ('Acholi Translation Decision'), para. 7.
[75] UGA-D26-0015-0154 and UGA-D26-0015-0004.
[76] Defence Request for a Stay of the Proceedings and Examinations Pursuant to Rule 135, ICC-02/04-01/15-620-Red ('First Rule 135');
[77] Decision on the Defence Request to Order a Medical Examination of Dominic Ongwen, ICC-02/04-01/15-637-Red, ('Decision on First Rule 135'), paras 31-33.

experience, automatic answers or time distortion), and high level of anxiety.[78]

81. However, when the Trial Chamber made this order, it had already accepted a plea illegally entered by Mr Ongwen on 6 December. In light of the information before it about Mr Ongwen's disability, a postponement of the 6 December proceedings should have been taken. Based on the sequence of the events, it appears that the Trial Chamber had already decided that a plea from a mentally disabled defendant was legal. In sum, the Trial Chamber applied its Article 64(8)(a) powers in a discriminatory manner, *i.e.* treating Mr Ongwen as if he were a mentally able defendant.[79]

82. In summary, given the translation and modification problems of the Confirmation Decision and this added issue of Mr Ongwen's mental health disability, of which the Trial Chamber was apprised, it is the Defence view that the taking of plea should have been postponed until these issues were resolved. It is clear that the mental health problems could impact on Mr Ongwen's ability to enter a plea. It is also evident that he did not understand the charges as being against him. This illegal plea is and has been a continuing fair trial violation that prejudiced the fairness of the proceedings.

ii. Violation of Mr Ongwen's Right to Notice and His Right to Prepare a Defence

83. The Appeals Chamber held "the right of the accused person to be informed of the charges is firmly grounded in the Statute and it has already highlighted the strong link between the right to be informed in detail of the nature, cause and content of the charges and the right to *prepare* one's defence".[80]

84. From the inception of this case, the Defence has litigated the breaches of the right to notice. For this purpose, the Defence incorporates the following submissions concerning the violations of Mr Ongwen's right to notice:

i) **NCTA Motion**: the objections in respect to lack of notice in defective charges and modes of liability.[81]

[78] Mr de Jong Report, UGA-D26-0015-0046-R01, at 0050, 0052 and 0055.
[79] *See* publicly available video capturing the moments of Mr Ongwen's illegal plea on 6 December 2016.
[80] *Ongwen* OA4 Judgment, para. 69.
[81] NCTA Motion, *see* particularly paras 23-26, 27, 28-32.

ii) ***Ongwen* Appeal Brief**: listing the Defence objections on notice since 18 January 2016;[82]

iii) ***Ongwen* Further Submissions**:

a. **Paragraphs 8-11**: the Defence objections to the parameters of the Prosecution disclosure obligations.

b. **Paragraphs 12-14**: the Defence objections to uncharged acts that occurred outside of the 1 July 2002 to December 2015 temporal jurisdiction.[83]

iv) **Defects Series Parts I-IV**: the Defence objections summarized in the Trial Chamber's Defects Decision;[84]

v) **SGBC Defects**: defective pleading of SGBC counts.[85]

vi) **Dismissal of the Charge of Enslavement Motion**: defective pleading of crimes of enslavement and sexual slavery.[86]

85. In sum, the Trial Chamber's violations of Mr Ongwen's right to notice have permeated the entire proceedings. He has been placed in a position of not knowing the specifics against which he must defend the alleged crimes and his alleged participation. This has prejudiced the Defence's planning and preparation of Defence's case and its use of limited resources. All this has made the fair trial impossible.

iii. Violation of Mr Ongwen's Right to Acholi Translation

86. The lack of notice is exacerbated by the lack of Acholi translation. Under Article 67(1)(a) of the Statute, Mr Ongwen has not only a right to be informed in detail of the nature cause and content of the charges against him, but also a right to be informed of the charges "in a language which [he] fully understands and speaks". For Mr Ongwen, this is Acholi.

87. Even if the Trial Chamber were to find that the charges against Mr Ongwen were not

[82] Defence's appeal against the 'Decision on Defence Motions Alleging Defects in the Confirmation Decision', ICC-02/04-01/15-1496-Corr ('*Ongwen* Appeal Brief'), para. 29 (a-k).
[83] *Ongwen* Further Submissions', paras 8-11 and 12-14.
[84] Decision on Defence Motions Alleging Defects in the Confirmation Decision, ICC-02/04-01/15-1476 ('Defects Decision'), para. 6 (i-iii), and para. 11 (i-ix).
[85] SGBC Defects.
[86] Dismissal of the Charge of Enslavement Motion.

defective, the failure to have provided a full translation of the Confirmation Decision to Mr Ongwen, is the basis for violation of Article 67(1)(a) of the Statute. On 6 December 2016, at the time Mr Ongwen entered the plea, he did not have a complete translation of the 104-page-long Confirmation Decision in Acholi. This did not occur until mid-December 2017.[87]

88. In addition to the lack of translation of the Confirmation Decision in Acholi, there have been at least two dozen objections dealing with the lack translation or interpretation into Acholi.[88]

89. The lack of notice, based on the failure to fully translate the charging document before the plea, negatively impacted on Mr Ongwen's ability to understand the charged crimes and modes of liability against him, and was prejudicial. This resulted in the Trial Chamber accepting a plea which was not unequivocal and not informed. Even the Trial Chamber acknowledged that "Mr Ongwen did not give an unqualified affirmation that he understood the charges".[89]

90. In conclusion, the lack of translation, combined with the lack of notice in the Confirmation Decision as well as the Trial Chamber's admission of evidence of acts not charged and evidence of events outside the temporal jurisdiction of the Court – individually and in aggregate – prejudiced the fair trial rights of Mr Ongwen.

iv. The Trial Chamber Violated Mr Ongwen's Fair Trial Rights by Failing to Articulate the Burden of Proof Standard for Affirmative Defences Prior to the Presentation of the Defence Evidence

91. The Trial Chamber erred by failing to articulate the burden of proof standard for affirmative defences prior to the presentation of the Defence evidence. Under Article 67(1)(e) of the Statute, an accused has the fair trial right to present defences. In this case, Mr Ongwen gave notice of two affirmative defences under Article 31(1)(a) and (d) of the Statute.

92. However, the Trial Chamber forced the Defence into a position of presenting the defence evidence without knowledge of the burden of proof standard which had to be met, or would be applied by the Trial Chamber.

[87] Similarly, a translation of the 52-page-long 'Separate opinion of Judge Marc Perrin de Brichambaut' in Acholi was not provided to Mr Ongwen until February 2018; *see also* **ANNEX C** – Mr Ongwen's Illegal Plea and Violation of His Right to Translation, illustrating the exact delay in providing the translated versions; *see also* *Ongwen* OA4 Judgment, para. 20.
[88] Defence Request to Change the Date of the Closing Statements, ICC-02/04-01/15-1668, paras 4-32.
[89] Decision on Fair Trial Violations, para. 9(iii).

93. The purpose of articulating the standard is to give notice as to what burden of proof standard the Trial Chamber will apply to the evidence in reaching its Article 74 Judgment. Regardless of the system – common-law or civil – it is a fundamental principle that there must be i) some criteria for judgment on the standard of evidence; and ii) some nexus between evidence presented, and the legal element of the crime or mode of liability which is being addressed.

94. Here, in the absence of an articulated burden of proof standard, the presentation of evidence of affirmative defences becomes a legal "free for all". This prejudices the Defence because it is not known what standard the Prosecution must refute, and what evidence the Defence must adduce. The Trial Chamber affirmed that "[…] an accused must never be required to affirmatively disprove the elements of a charged crime or a mode of liability, as it is the Prosecution's burden to establish the guilt of the accused pursuant to Article 66 of the Statute".[90]

95. In addition, the Trial Chamber's deferral of ruling on a standard for the Article 31 defences means that the Defence presents evidence with one hand tied behind its back. This is prejudicial to the Defence because it cannot fully address all issues which may be necessary for the Trial Chamber's Article 74 judgment if it does not know the standard which will be applied.

96. Hence, this lack of notice and, in the end, knowledge of the burden of proof standard resulted in a significant handicap to the Defence where the Trial Chamber violated Mr Ongwen's Article 67(1)(a) and (e) rights and its Article 64(2) obligations.

v. Trial Chamber's Prejudicial Evidentiary Regime

97. The Trial Chamber's evidentiary regime that "does not involve making any relevance, probative value or potential prejudice assessments at the point of submission – not even on a *prima facie* basis […]"[91] is prejudicial, erroneous as a matter of law and undermines the fairness of the proceedings.

98. First, it proved itself to be prejudicial because it floods the 'case file' with items of a

[90] Decision on Defence Request for the Chamber to Issue an Immediate Ruling Confirming the Burden and Standard of Proof Applicable to Articles 31(1)(a) and (d) of the Rome Statute, ICC-02/04-01/15-1494, para. 14; Initial Directions, paras 24-25.

[91] Decision on Prosecution Request to submit Interception Related Evidence, ICC-02/04-01/15-615, para. 7; *see also* Evidentiary Regime Motion; LTA Evidentiary Regime, *Ongwen* Further Submissions', para. 24.

prejudicial nature. To date, there are over 4200 items formally submitted into evidence.[92] The combination of lack of notice in charges and no evidentiary rulings put an unfair burden on the Defence. As a result, the Defence was required to work on the assumption that all the items submitted into evidence by the Prosecution may be used against Mr Ongwen.[93]

99. Second, the regime is in violation with the Trial Chamber's duty to apply the safeguards embodied in Article 69(4) of the Statute.[94] The Defence agrees in this regard with the findings of Judge Van den Wyngaert and Judge Morrison that the Chamber must "apply the admissibility criteria of article 69 (4) of the Statute sufficiently rigorously to avoid crowding the case record with evidence of inferior quality".[95]

100. Third, Judges Van den Wyngaert and Morrison ruled also that it was inappropriate to employ a similar evidentiary regime used in the *Bemba et al*. case (Article 70 case) for cases under Article 5 of the Statute.[96] It is important to note that this Trial Chamber's evidentiary regime, which is applied to the *Ongwen* Article 5 crimes case is identical to the one employed by Trial Chamber VII in the *Bemba et al.* case (Article 70 case).[97]

101. Fourth, the Trial Chamber's evidentiary regime is opaque and leaves the parties "in the dark".[98] This is supported by the prejudicial impact it had on the fairness of the proceedings:

i) **The regime allows for selective and inconsistent rulings on evidence**. In its 'Decision in Response to an Article 72(4) Intervention', the Trial Chamber held that a person's identity who was extremely close to Kony and who had a direct knowledge about the implicit threat of lethal violence which Kony held over his subordinates in the event that his subordinates disobeyed or disrespected him is "manifestly

[92] For example, of the 2507 (*see* ICC-02/04-01/15-580) and 1006 (*see* ICC-02/04-01/15-654) items requested to be submitted into evidence by the Prosecution via 'bar table motions' only 47 were rejected by the Trial Chamber; *see also* *Ongwen* Further Submissions', paras 24-25.
[93] *Ongwen* Further Submissions', paras 23-28.
[94] Article 69(4) of the Statute: The Court may rule on the relevance or admissibility of any evidence, taking into account, inter alia, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.
[95] *Bemba*, Separate Opinion of Judges Van den Wyngaert and Morrison, ICC-01/05-01/08-3636-Anx2, para. 18; *Bemba et al*., Separate Opinion of Judge George Henderson, ICC-01/05-01/13-2275-Anx, paras 40, and 43-45; *see also* Evidentiary Regime Motion, paras 8-15.
[96] *Bemba*, Separate Opinion of Judges Van den Wyngaert and Morrison, ICC-01/05-01/08-3636-Anx2, para. 18.
[97] In para. 25 (footnote 17) of its Initial Directions, to support its evidentiary regime, the Trial Chamber cites Trial Chamber VII's decisions: *Bemba et al*., Decision on Prosecution Requests for Admission of Documentary Evidence (ICC-01/05-01/13-1013-Red, ICC-01/04-01/13-1113-Red, ICC-01/05-01/13-1170-Conf.
[98] Dissenting Opinion of Judge Geoffrey Henderson, ICC-02/11-01/15-1172-Anx, para. 5.

unimportant" and irrelevant to the *Ongwen* case.[99] Another example was the Trial Chamber's ruling on the Defence objection against the admissibility of the Prosecution's P-447's rebuttal expert report. Contrary to its prior rulings, here the Trial Chamber prematurely dismissed the Defence admissibility objections, without deferring its ruling until the deliberation of the judgment.[100]

ii) **The regime allows for overcrowding the 'case file' with prejudicial items**. An example is the Trial Chamber's decision rejecting the Defence request to exclude portions of the Victims expert PCV-1's report that impermissibly provides comments on Mr Ongwen's responsibility. Although the Trial Chamber confirmed that "even if certain comments inadvertently appear to do so – those comments cannot be relied upon to establish the accused's responsibility for the crimes", it still recognised submission of this report into evidence, including the comments on Mr Ongwen's responsibility.[101]

iii) **There is nothing to safeguard the quality of the evidentiary process, *i.e.* permissible means of obtaining evidence**. A relevant example is the involvement of the Prosecution's potential witness and intermediary, P-78. This person collected several evidentiary items[102] and located over 40 Prosecution insider witnesses, particularly for the purposes of the *Ongwen* trial.[103] However, certain items disclosed by the Prosecution also show that P-78 was asked by the Prosecution to provide an explanation for the misuse of a phone and other funds provided to him/her by the Office of the Prosecutor.[104] More importantly, the Prosecution's investigation report also notes that P-78 pressured Prosecution witnesses P-37 and P-105 "by encouraging that they give evidence to OTP investigators during their recent interviews".[105] This example

[99] Decision on Defence Request for Leave to Appeal the Decision in Response to an Article 72(4) Intervention, ICC-02/04-01/15-1290, paras 12-13: the Trial Chamber concluded also that this person's identity is not relevant to the Ongwen case and to the preparation of the defence of duress without ever knowing this person's identity.
[100] Email Decision on Submitted Materials for the rebuttal evidence provided by P-0447, 6 December 2019, at 16:41; *see also* Evidentiary Regime Motion, paras 17-19.
[101] Decision on Defence Request for Leave to Appeal the Trial Chamber's Oral Decision on the Exclusion of Certain Parts of the CLRV Expert Report, ICC-02/04-01/15-1268, para. 10; *see also* Evidentiary Regime Motion, paras 20-26.
[102] Based on the information in Defence Ringtail, it appears that P-78 is linked to at least 271 evidentiary items.
[103] UGA-OTP-0263-2689-R01, at 2689: "P-0078 was heavily involved in locating key insider witnesses for the Ongwen case, locating in excess of 40 witnesses"; *see also* UGA-D26-0017-0139, at 0140.
[104] UGA-OTP-0263-2681-R01, at 2681; UGA-OTP-0263-2689-R01, at 2691; UGA-OTP-0263-2671-R01, at 2671.
[105] UGA-OTP-0263-2688; UGA-OTP-0263-2685-R01, at 2686; UGA-OTP-0263-2689-R01, at 2689; *see also* Evidentiary Regime Motion, paras 27-35.

> compromises the proceedings, because of the lack of integrity in the evidence collection process.[106]

102. Mr Ongwen has the fundamental right to know the reasons for the Trial Chamber's decision on his guilt or innocence.[107] The Trial Chamber's regime impermissibly denies this right. In particular, the regime informs that the Trial Chamber is not required to "discuss [the relevance, probative value and potential prejudice] for every item submitted in the judgment itself".[108] It further adds that "the requirement of a reasoned judgment enables the participants to verify precisely how the Chamber evaluated the evidence".[109] This reasoning is flawed for several reasons.[110]

103. On the one hand, the Trial Chamber seemingly adheres to the fundamental requirements under Article 74(5) of the Statute, which dictate that the judgment "shall be in writing and shall contain a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions'.[111] On the other hand, the Trial Chamber incorrectly and without any legal basis or authority vests itself with discretion not to provide any reasoned opinion on why certain submitted items were ruled (in)admissible and/or (ir)relevant.

104. Second, the Trial Chamber's position is in clear conflict with the Appeals Chamber's interlocutory ruling in the *Bemba* case. The Appeals Chamber held:

> It should be underlined that irrespective of the [evidentiary] approach the Trial Chamber chooses, it will have to consider the relevance, probative value and the potential prejudice of **each item of evidence** at some point in the proceedings – when evidence is submitted, during the trial, or at the end of the trial".[112]

105. The Defence raised this matter with the *Ongwen* Trial Chamber and requested that it "**CONFIRM** that the evidential rulings for all items submitted into evidence and their

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[106] UGA-OTP-0263-2689-R01, at 2689.
[107] The decision shall be in writing and shall contain a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions, see Article 74(5) of the Statute. "It fails to appreciate the elementary proposition that failure to provide a reasoned judgment is fundamentally a violation of the right of fair trial, which includes an accused person's entitlement to know the basis of the Trial Chamber's decision on the guilt of the defendant", *see* Concurring Separate Opinion of Judge Eboe-Osuji, ICC-01/05-01/08-3636-Anx3, p. 99, para. 305.
[108] Initial Directions, para. 24.
[109] Initial Directions, para. 25.
[110] Evidentiary Regime Motion, paras 36-43.
[111] Concurring Separate Opinion of Judge Eboe-Osuji, ICC-01/05-01/08-3636-Anx3, para. 305.
[112] Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber II entitled "Decision on the admission into evidence of materials contained in the prosecution's list of evidence", ICC-01/05-01/08-1386, para. 37.

assessment will be discussed in the judgment itself or in a separate annex to the judgment".[113] However, it dismissed the Defence request and, in contrast, found that "the Defence misinterprets the *Bemba* Interlocutory Appeal when asserting that a trial chamber 'is still obliged to make evidentiary rulings of every item of evidence" and that the Trial Chamber's regime "is in complete conformity with [the cited above appeal judgment]".[114]

106. To conclude, the Defence reiterates that the Trial Chamber's evidentiary regime had a prejudicial impact on the fairness of the proceedings. Moreover, it maintains its remedy sought that the Statute and applicable law unequivocally obligate the Trial Chamber to provide evidentiary rulings on **all** items submitted into evidence in the judgment, or as proposed by Judge Osuji in a separate annex to the judgment.[115]

vi. Conclusion

107. The fair trial violations during the trial period commenced with the illegal plea. In addition, the cumulative effects of the violations discussed above – breach of Mr Ongwen's right to remain silent, discrimination, lack of notice, lack of Acholi translation, no rulings on evidentiary items, failure to articulate the standard for burden of proof – individually and in the aggregate prejudiced Mr Ongwen's right to present his defence under Article 67(1)(b) and (e) of the Statute.

E. The Prosecution Disclosure Practices Violated Mr Ongwen's Fair Trial Rights

108. The disclosure practices of the Prosecution over the course of Mr Ongwen's trial have individually and in sum amounted to an unfair trial. During the Defence opening statement, Counsel Lyons raised a range of disclosure issues that arose during the events up until that point.[116] Those issues impacted upon Defence preparation pursuant to Article 67(1)(b) which in turn impacted upon Mr Ongwen's right to confront witnesses against him and call

[113] The Defence requested this, *in the alternative*, to its main request that the Trial Chamber "RULE on the admissibility and/or relevance of all items that the Prosecution, Victims and the Defence submitted into evidence through 'bar table' or other motions [or through witness], and provide a reasoned statement for these rulings now or before closing briefs, *see* Evidentiary Regime Motion, paras 36-43.

[114] Decision on Defence Request for Leave to Appeal the Decision on the Defence Request regarding the Evidentiary Regime, ICC-02/04-01/15-1563, paras 15-18.

[115] A second alternative approach will be to reserve evidential rulings until the time of judgment writing and make the rulings the. Here, evidential rulings could be made in the body of the judgment, if that can be done conveniently. Otherwise, the evidential rulings at the time of the judgment could be made in separate volume (either a second volume of the judgment or a stand-alone capacity) serving as a compendium of evidential rulings, see Concurring Separate Opinion of Judge Eboe-Osuji, ICC-01/05-01/08-3636-Anx3, p. 103, para. 319; *see also* Evidentiary Regime Motion, para. 55.

[116] T-179-Red, p. 90 to p. 92.

witnesses on an equal footing with the Prosecution pursuant to Article 67(1)(e) of the Statute.

109. The Prosecution has a problem with its storage of materials. Despite continual assertions of comprehensive reviews, and adversarial responses to Defence criticisms,[117] material continues to be identified. A lot of material has been found following claims of final and comprehensive searches. For example, the audio and transcript related to the informant litigation was found after strong assertions were made,[118] a DVD of videos was found after it was pointed out that a Prosecution evidence reference number was unlikely to be captured as part of the original video,[119] and the databases which are the subject of separate litigation appeared after claims were made that all material had been disclosed from the Amnesty Commission.[120]

110. The Prosecution has sought to excuse itself by claiming that "recordkeeping practices in place in April 2004" were "in their infancy".[121] Later comments indicated that investigators were not indicating the source of materials when they were collected.[122] The OTP was not the first international prosecutorial entity in existence at the time it came into being and it has to be presumed that the staff was familiar with the organisational strictures and record keeping requirements of a domestic criminal-law process. In any case, if an initial state of disorganisation in the Prosecution's investigations could have excused a misplaced item, multiple further instances – for fair trial purposes – certainly should not be. After a third example of the same issue, it speaks to a present decision to avoid resolving problems or an unwillingness to address it. By the present stage of proceedings it has become a *pattern*.

111. The Prosecution methodology for reviewing its disclosure obligations has failed to turn up

[117] Prosecution Response to "Defence Request for a Rule 77 Disclosure Order Concerning the Requests for Assistance and Other Related Items" ICC-02/04-01/15-1142: ("The Prosecution takes very seriously its disclosure obligations under the Statute, the Rules of Procedure and Evidence").
[118] Prosecution's Notice of Filing of an Item Received in Response to an RFA, ICC-02/04-01/15-1189-Red, para. 6. Moreover, the Defence incorporates by reference its pleadings – including remedies sought – concerning the Trial Chamber's erroneous resolution of the "Article 72(4) matter"; *see* Defence Response and Disclosure Request, in light of the "Prosecution's Notice of Filing of an Item Received in Response to an RFA, ICC-02/04-01/15-1197-Red; Defence Response to the Letter from the Ugandan Government, ICC-02/04-01/15-1255-Red; Defence Request for Leave to Appeal "Decision in Response to an Article 72(4) Intervention, ICC-02/04-01/15-1279.
[119] ICC-02/04-01/15-1718-Conf-AnxA, p. 2.
[120] Defence Request for Remedies in Light of Prosecution Disclosure Violations, ICC-02/04-01/15-1718-Conf, para. 26.
[121] ICC-02/04-01/15-1142, para. 9 ("It is unfortunately impossible for the Prosecution to state conclusively that no 9 April 2004 RFA ever existed, given the recordkeeping practices in place in April 2004, when the OTP and the Court were in their infancy (the first ICC Prosecutor having been elected less than one year earlier).").
[122] ICC-02/04-01/15-1718-Conf-AnxA, p. 5 ("I cannot confirm with absolute certainty that all items for which P-0038 is the source, or is in the chain of custody, have been disclosed. The completion of Pre-Registration Forms back at the time the investigation first began was not standardised, with the result that his name may not appear.")

disclosable material which is later identified. Even though the Defence has not been a party to the process, the problems with the methodology come through in the Prosecution's descriptions of their process. The Defence has noted that the deficiencies in the way the Prosecution searches its material [123] and fails to cross-reference material described in documents.[124] When the Prosecution states "the three most senior lawyers on the Prosecution trial team conducted a supplementary review of all undisclosed items in the Prosecution's possession"[125] and identified a further 15 items in March 2017, subsequent events appear to have demonstrated that this process which was based upon a review of "contents and not its title or its origin" was not sufficient to identify all disclosable material.

112. One reason that the Prosecution may not have been able to identify material is because it appears that its process of recording the chain of custody and other evidence related information in that period was irreparably broken. For example, 335 audios were mislabelled and corrected by the Prosecution.[126] However, on nearly every occasion the Defence has made queries about the chain of custody of an item, the response has been that the chain of custody provided to the Defence inaccurately indicates the actual chain of custody. Examples of the problems with the chain of custody include the date on which the "List of the Most Notorious LRA Commanders Recommended for Trial by the ICC" and associated documents was received[127] which led to explanations concerning how the inaccurate information resulted from "human error at the time of inputting the metadata"[128] and the updating of 1066 items chain of custody information by the Prosecution on 18 October 2018.[129] Since that point, on 4 October 2019, the Prosecution confirmed that the information about the source for material disclosed from the Amnesty Commission was not accurate.[130]

113. In cases with such huge volumes of transcripts, items, and text, it might seem like an administrative formality to be concerned by the chain of custody, but the Defence re-asserts that details matter. The chain of custody is an important way of shedding light on the

[123] Defence Request for Remedies in Light of Prosecution Disclosure Violations, ICC-02/04-01/15-1718-Conf, para. 26.
[124] Defence Request for Remedies in Light of Prosecution Disclosure Violations, ICC-02/04-01/15-1718-Conf, para. 22 and 'Defence Request for Leave to Appeal the "Decision on Defence Request for Disclosure of Certain Requests for Assistance and Related Items"', ICC-02/04-01/15-1174-Red.
[125] Prosecution Response to Defence Request for a Disclosure Order (ICC-02/04-01/15-759), para. 2.
[126] PPTB, para. 84.
[127] Defence Request for Leave to Reply to ICC-02/04-01/15-1341-Conf, ICC-02/04-01/15-1345, paras 7-11.
[128] *See* ANNEX D.
[129] Email, 18 October 2018 17h46, subject 'Metadata discrepancies between OTP Ringtail and E-court and Re-issue package'.
[130] ICC-02/04-01/15-1718-Conf-AnxC, p. 7.

reliability or not of evidence. It assists the Defence in building a picture of the investigation against which cross-examination questions are developed and strategies created. The particular issues with the early investigations noted here, but which are even further present in the *inter partes* record, relate to material which was collected in most temporal proximity to the allegations. In a way it should be the most important material and yet the Prosecution practices of that time, which are aggravated by issues in the present, undermine the probative value of the purported incriminatory evidence from that period brought against Mr Ongwen.

114. Despite claims to the contrary, the Prosecution has taken a narrow view of its obligations.[131] As has been discussed in a recent filing, the Prosecution has also simply disregarded the Trial Chamber's explicit jurisprudence in respect to the obligation to disclose the material from which excerpts are drawn.[132] It is worth noting here the Prosecution's broad approach to relevance in relation to how it has presented much of the intercept material as "indirectly relevant"[133] whereas when asked for disclosure has taken a narrower view. As discussed, the relevance criteria applied raises all manner of questions.[134]

115. A selection of the Prosecution's failures to disclose, includes:

a. A range of materials necessary to conduct investigations, argue for duress, and question witnesses;[135]

b. The CEDAR reports related to the 'enhancement' of intercept recordings;[136]

c. All material necessary for the examination of witness P-38;[137] and

d. Two databases that originate from the Amnesty Commission and one database that originates from the Ugandan Human Rights commission as well as other material currently in a request before the Trial Chamber.

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[131] *See*, for example, 16 March 2017, ICC-02/04-01/15-759-Conf-AnxB, p. 2, response to Request A.2 and Corrected version of Defence Request for Disclosure Pursuant to Rule 77 and Article 67(2) and Request for a Remedy in Light of Late and Untimely Disclosure', filed 4 September 2018, ICC-02/04-01/15-1329-Corr-Red, para. 16.
[132] Defence Request for Remedies in Light of Prosecution Disclosure Violations, ICC-02/04-01/15-1718-Conf, paras 59-61.
[133] *See* para. 232.
[134] Defence Request for Remedies in Light of Prosecution Disclosure Violations, ICC-02/04-01/15-1718-Conf, para. 27.
[135] Corrected version of 'Defence Request for Disclosure Pursuant to Rule 77 and Article 67(2) and Request for a Remedy in Light of Late and Untimely Disclosure', ICC-02/04-01/15-1329-Corr-Red, paras 60-77.
[136] *See* para. 277.
[137] Defence Request for Remedies in Light of Prosecution Disclosure Violations, ICC-02/04-01/15-1718-Conf, paras 27-29.

116. On 12 February 2020, the Defence filed a request for a series of remedies related to the late disclosure of three databases just mentioned.[138] The disposition of that request will follow the date of the filing of the present brief. As noted by the Defence when objecting to a request for a variation of the deadline, the Defence drafts the present brief without the benefit of the remedies requested therein. This leads to prejudice. As noted in the request, the material covers the charged period and is relevant to the charges against Mr Ongwen, the modes of liability, and the contextual elements of the alleged crimes. The material may also shed light on alleged abductions by Sinia brigade which would have relevance to the sexual and gender based and child-soldier charges.[139] The Defence makes submissions in the present filing on these issues without the time to analyse the material or full information necessary to make submissions in respect to these items.

117. The material collected contemporaneously to the charges is tainted by disorganisation and missing information. The Defence has had to expend considerable resources identifying missing information and requesting it. Evidence is a constituent element of a fair trial. Timely access to material is necessary to conduct investigations, and to prepare defence strategy. Without this, there is no opportunity "[t]o examine, or have examined, the witnesses against [the Accused] and to obtain the attendance and examination of witnesses on [the Accused's] behalf under the same conditions as witnesses against him or her" pursuant to Article 67(1)(e) of the Statute. After the trial is concluded, there are no remedies to resolve these violations.

F. Other Human Rights Violations and Discrimination

118. Human rights underpin every aspect of the Statute. Its provisions must be interpreted and most importantly applied in accordance with internationally recognised human rights.[140] It is thus a given that the Trial Chamber was required to exercise its powers in compliance with the human rights legal instruments applicable to Mr Ongwen's mental condition and disability.[141]

119. The discriminatory manner in which this case has been handled by the Trial Chamber in respect of Mr Ongwen's right to family life, liberty, and basic needs as a mentally disabled

[138] Defence Request for Remedies in Light of Prosecution Disclosure Violations, ICC-02/04-01/15-1718-Conf.
[139] Defence Request for Remedies in Light of Prosecution Disclosure Violations, ICC-02/04-01/15-1718-Conf, para. 1.
[140] Article 21(3) of the Statute; *see also* Articles 64, 67 of the Statute, Rule 135 of the Rules and Regulations 103(1) and (2) of the RoC; *see also* *Lubanga* OA4 Judgment, para. 37.
[141] These are the relevant international human rights instruments concerning the treatment of detained persons with disabilities subject to proceedings before criminal court: Article 12 of the ICESCR; Articles 2, 4(2), 5(3) and 13(1) of the CRPD.

defendant is unprecedented in international criminal courts. The Trial Chamber's discrimination against Mr Ongwen and breaches of his human rights alone suffice and continue to undermine the legitimacy and fairness of the proceedings, and make the exercise of his minimum fair trial guarantees under Article 67(1) of the Statute impossible.

i. The Trial Chamber Discriminated Against Mr Ongwen as a Mentally Disabled Defendant

120. According to Article 2 of the CRPD, discrimination on the basis of disability means:

> [A]ny distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.

121. In this case, the Trial Chamber treated Mr Ongwen as an accused and a detained person who does not suffer from any mental health disability. The Trial Chamber's discriminatory approach against Mr Ongwen became most apparent in its flawed decisions on i) Mr Ongwen's alleged understanding of the charges against him under Article 64(8)(a) of the Statute (*i.e.* Mr Ongwen's illegal plea); [142] ii) the Defence requests concerning the necessity of medical examination of Mr Ongwen under Rule 135 of the RPE;[143] and iii) the trial hearings schedule.[144]

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[142] Mr Ongwen's Illegal Plea, T-26, pp 16-21; Counsel Lyons' Opening Statement, T-179, pp 75-79.

[143] Defence Request for a Stay of the Proceedings and Examinations Pursuant to Rule 135, ICC-02/04-01/15-620-Red ('First Rule 135'); Decision on the Defence Request to Order a Medical Examination of Dominic Ongwen, ICC-02/04-01/15-637-Red, ('Decision on First Rule 135'); Defence Request for a Stay of the Proceedings and for Trial Chamber IX, pursuant to Rule 135, to Order a Medical Examination of Mr Ongwen, ICC-02/04-01/15-1405-Red2 ('Second Rule 135'); Decision on Defence Request to Order an Adjournment and a Medical Examination, ICC-02/04-01/15-1412-Red, ICC-02/04-01/15-1412-Red ('Decision on Second Rule 135'); Defence Request for Leave to Appeal "Decision on the Defence Request for a stay of Proceedings and for an Order of Medical Examination of Dominic Ongwen pursuant to Rule 135, ICC-02/04-01/15-1415-Red2 ('LTA Decision on Second Rule 135'); Decision on Request for Leave to Appeal the Decision on Defence Request to Order and Adjournment and a Medical Examination, ICC-02/04-01/15-1426 ('Decision on LTA Decision on Second Rule 135'); Defence Urgent Request to Order a Medical Examination of Mr. Ongwen, ICC-02/04-01/15-1595-Red ('Urgent Rule 135'); Decision on Further Defence Request for a Medical Examination, ICC-02/04-01/15-1622 ('Decision on Urgent Rule 135'); Defence Request for Leave to Appeal the Decision on Defence Request for Medical Examination of Mr. Ongwen, ICC-02/04-01/15-1626 ('LTA Decision on Urgent Rule 135'); Decision on Defence Request for Leave to Appeal the Decision on Defence Request for Medical Examination of Mr Ongwen, ICC-02/04-01/15-1640 ('Decision on LTA Decision on Urgent Rule 135').

[144] Defence Request for a Status Conference Pursuant to Rules 132(2) and 132 bis(4), ICC-02/04-01/15-1264-Red ('Status Conference Request'); Decision on Defence Request to Hold a Status Conference, ICC-02/04-01/15-1278 ('Decision on Status Conference Request'); Defence Request In Light of the Trial Chamber IX's Trial Hearings Dates Schedule for the Remainder of 2018, ICC-02/04-01/15-1326-Red ('First Scheduling Request'); Decision on Defence Request for Amendment of the Seating Schedule, ICC-02/04-01/15-1330-Red ('Decision on First Scheduling Request'); Defence Request for Leave to Appeal Decision on Defence Request, ICC-02/04-01/15-1334-Red ('LTA Decision on First Scheduling Request'); Decision on Defence Request for Leave to Appeal the Decision on Defence Request or Amendment of the Seating Schedule, ICC-02/04-01/15-1344-Red ('Decision on LTA Decision on First Scheduling

122. Near the end of the Defence case, the Trial Chamber dismissed the urgent Defence request for medical examination of Mr Ongwen under Rule 135 of the RPE, and held as follows:

> The question of whether the accused **may be** mentally disabled was never considered in the Impugned Decision.[145] (Bold added)

123. Contrary to the Trial Chamber, the Defence position is that Mr Ongwen is and has been a mentally disabled defendant. This position is supported by mental health professionals' reports on Mr Ongwen's mental health, and the following facts:

i) On **19 October 2015**, the Defence requested the Pre-Trial Chamber to schedule sufficient breaks during the 'Article 56' proceedings, because Mr Ongwen was having difficulty following the proceedings.[146]

ii) On **7 December 2016**, the Defence mental health experts, based on their interviews and psychiatric assessment, informed the Trial Chamber that Mr Ongwen, *inter alia*, "suffers from severe depressive illness, posttraumatic stress disorder (PTSD), and dissociative disorder. In addition Mr Ongwen experiences severe suicidal ideation and he is at very high risk of committing suicide if nothing is done to avert suicide".[147]

iii) On **16 December 2016**, the Trial Chamber appointed Mr de Jong, an expert in the field of psychiatry, psychotherapy and epidemiology, "to make a diagnosis as to any mental condition or disorder that Mr Ongwen may suffer at the present time".[148] Mr de Jong found in his report of **7 January 2017** that Mr Ongwen, *inter alia*, shows a full and oscillating range of symptoms of severe posttraumatic stress disorder, several symptoms of a dissociative disorder (*e.g.* out of body experience, voice echoing, automatic answers or time distortion), and high level of anxiety.[149]

Request'); Defence Request for Amendment of the Seating Schedule, ICC-02/04-01/15-1507-Red ('Second Scheduling Request'); Decision on Defence Request for Amendment of the Seating Schedule, ICC-02/04-01/15-1512 ('Decision on Second Scheduling Request'); Defence Request for Leave to Appeal 'Decision on Defence Request for Amendment of the Seating Schedule, ICC-02/04-01/15-1515-Red ('LTA Decision on Second Scheduling Request'); Decision on Defence Request for Leave to Appeal the Decision on the Request for Amendment of the Seating Schedule, ICC-02/04-01/15-1525 ('Decision on LTA Decision on Second Scheduling Request'); see also **ANNEX D** – Eight Months Late Response to Mr Ongwen's Mental Disability.

[145] Decision on LTA Decision on Urgent Rule 135, para. 11.

[146] Defence Request to Amend the Schedule of the Second Article 56 Hearing, ICC-02/04-01/15-321, paras 13-15.

[147] UGA-D26-0015-0004 (disclosed by the Defence on 7 December 2016 – Rule 78 Pack 6).

[148] Decision on First Rule 135, paras 31-33.

[149] Mr de Jong Report, UGA-D26-0015-0046-R01, at 0050, 0052 and 0055; *see also* Urgent Rule 135, paras 18-21.

iv) On **2 March 2017,** Mr Ongwen informed the Trial Chamber during the court hearing that "[redacted]".[150]

v) On **28 February 2018**, the Registry informed the Trial Chamber that the ICC-DC Medical Officer and Mr Ongwen's treating psychiatrist recommend that "Mr Ongwen's mental condition would significantly benefit from a 'time-out day' on Wednesdays during the weeks his case is scheduled in court".[151]

vi) On **21 March 2018**, the ICC-DC Medical Officer advised the Trial Chamber that "five Court days in a row is generally too much **for a detainee with serious mental or physical health issues**. [redacted]".[152] (Bold added)

vii) On **13 July 2018**, the ICC-DC Medical Officer informed the Trial Chamber that Mr Ongwen will be [redacted].[153]

viii) On **25 July 2018**, the ICC-DC Medical Officer repeated to the Trial Chamber that he regards his recommendations from 21 March and 13 July "as opportune and necessary to improve his health and wellbeing".[154]

ix) On **7 January 2019**, the ICC-DC officials informed the Trial Chamber of [redacted].[155]

x) On **25 January 2019**, the Defence mental health experts, based on their clinical examination of Mr Ongwen, informed the Trial Chamber that he is, *inter alia*, [redacted].[156]

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[150] Transcript of hearing, T-45-Red, p. 30, lns 11-12. In this regard, the Defence notes the Trial Chamber's email decision of 16 December 2019, ordering the CMS to "[p]lease proceed with the correction as proposed ([redacted].") and implement it in the English and corresponding French version of the transcript.
[151] Registrar Submission of Information Provided by the Medical Officer, ICC-02/04-01/15-1200-Conf-Exp-Anx.
[152] Registrar Transmission of a Medical Report from the Medical Officer, ICC-02/04-01/15-1315-Conf-Exp-Anx.
[153] Registrar Transmission of a Medical Report from the Medical Officer, ICC-02/04-01/15-1315-Conf-Exp-Anx.
[154] Registrar Transmission of a Medical Report from the Medical Officer, ICC-02/04-01/15-1315-Conf-Exp-Anx.
[155] Registry Report on a [redacted] within the ICC Detention Centre, ICC-02/04-01/15-1403-Conf-Exp.
[156] UGA-D26-0015-1219, at 1222.

xi) On **22 January 2019**, the ICC-DC Medical Officer informed the Trial Chamber that "Mr. Ongwen is NOT able to attend a hearing on 28 January 2019" and that [redacted]".[157]

xii) On **15 February 2019**, the ICC-DC Medical Officer informed the Trial Chamber that "Mr Ongwen is not fit to attend Court from Monday 18th February 2019 due to the fact that [redacted]".[158]

xiii) On **18 February 2019**, the ICC-DC Medical Officer informed the Trial Chamber that [redacted]".[159]

xiv) On **18 February 2019**, the Prosecution sent an email to the Trial Chamber and the Defence, noting [redacted]".[160]

xv) On **29 March 2019**, the Trial Chamber was advised by the Registry's officials to postpone the hearings due to Mr Ongwen's health issues.[161]

124. The Defence avers that the Trial Chamber discriminated against Mr Ongwen by assessing his participation and exercise of his minimum Article 67(1) guarantees as if he were not a defendant with mental disabilities. In addition, the Defence submits that the Trial Chamber, in dismissing the requests regarding his health, committed errors and/or abused its discretion. It failed to interpret and apply the Statute in compliance with relevant human rights standards that guarantee Mr Ongwen's rights as an accused and a detained person suffering from a

[157] Annex to Registry Transmission of the Detention Centre's Medical Officer's Assessment on whether Mr Ongwen is able to attend the Hearing on 28 January 2019, ICC-02/04-01/15-1416-Conf-AnxI-Corr.
[158] Registry Transmission of the Detention Centre Medical Officer's Report, ICC-02/04-01/15-1449-Conf-AnxII.
[159] Defence Urgent Request to Order a Medical Examination of Mr. Ongwen, ICC-02/04-01/15-1595-Conf-AnxA.
[160] Defence Urgent Request to Order a Medical Examination of Mr. Ongwen, ICC-02/04-01/15-1595-Conf-AnxB.
[161] Transcript of hearing, T-210-Red.

disability.[162] Also, the Trial Chamber acted unreasonably by missappreciating relevant facts.

1. The Trial Chamber violated Mr Ongwen's Right to Testify Under Article 67(1)(e) of the Statute

125. Mr Ongwen has a right to make a decision whether or not he will testify in his defence. Based on the information and circumstances related to Mr Ongwen's mental state and disability, the Defence submitted that there are sufficient indicia suggesting existence of a medical condition or disorder affecting Mr Ongwen's ability to make such decision. Therefore, the Defence requested the Trial Chamber to appoint an impartial psychiatrist to obtain more detailed information for it to make an informed ruling whether Mr Ongwen is able to meaningfully exercise his right to testify under Article 67(1)(e) of the Statute.[163]

126. Under Rule 135 of the RPE, the Chamber may order a medical examination of a defendant not only for the purposes of its determination under Article 64(8)(a) of the Statute, but also for "any other reason".[164] In this case, the "other reason" for a Rule 135 order was Mr Ongwen's inability to exercise his right to testify under Article 67(1)(e) of the Statute.

127. The Trial Chamber was correct in finding that the right of Mr Ongwen to testify "does not only include the ability of the accused to make such a statement but also the ability to make an informed decision whether he wishes to do so or not".[165] It, however, made a series of errors that materially affected its reasons for rejecting the motion. As a result, Mr Ongwen was placed in a position where he could not decide whether or not to testify.

128. The first error was that the Trial Chamber took the position that the assessment of Mr Ongwen's meaningful exercise of his rights "cannot be split up separately in individual, compartmentalised rights, which form subject of completely separated orders of a medical examination".[166] In other words, the Trial Chamber refused to address Mr Ongwen's mental

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[162] *I.e.* right to a medical treatment as a person with disabilities, or a right to highest attainable standard of physical and mental health, see Articles 2, 4(2) and 5(3) of the CRPD, and Article 12(1) of the ICESCR.

[163] Urgent Rule 135; LTA Decision on Urgent Rule 135; *see also* Defence Request for Leave to Reply to CLRV, Prosecution and LRV Responses to 'Defence Urgent Request to Order a Medical Examination of Mr. Ongwen, ICC-02/04-01/15-1612 ('Leave To Reply Urgent Rule 135').

[164] Decision on First Rule 135, para. 29; *see also* Rule 135(2) of the RPE, which mandates that the Chamber "shall place its reasons for any such order on the record". The applicable standard for Rule 135 requests is "indications suggesting the existence of medical conditions which may impact on the accused's ability to meaningfully exercise his fair trial rights which the Chamber is unable to resolve without the assistance of one or more medical experts", *see* Decision on First Rule 135, paras 12-13.

[165] Decision on Urgent Rule 135, para. 14.

[166] Decision on Urgent Rule 135, para. 15.

disability and its impact on his right to make an informed decision whether or not to testify. It argued that Mr Ongwen's mental disability had to meet a higher threshold: his mental disability had to impact on **all** Article 67(1) rights in order to show that he could not meaningfully participate.[167]

129. The law does not bar the Trial Chamber from concluding that Mr Ongwen was unfit to stand trial because of his inability to meaningfully exercise an individual, separate fair trial right.[168] In the English case of *R v Orr*, the Court of Appeal found that "the appellant had been fit to participate in his trial up to the point of cross examination and thereby implicitly determined that the appellant was no longer able to fully participate in his trial within the 'Pritchard' refined criteria".[169] The defendant's capacity to withstand a cross-examination was considered a separate issue from other capacities, including from his capacity to undergo the examination-in-chief.

130. For Mr Ongwen to make an informed decision whether to testify, he would have to, for example, understand the conditions, such as "legal implications of his decision to testify", "that the answers he uses can also be used against him", "that the other party and participants are also allowed to pose him questions and that he must answer them",[170] "that he is able to understand that he may choose to give testimony himself",[171] but also "to have the freedom to choose what to say",[172] to have a "basic capacity to understand the questions put to him and give rational and truthful answers to those questions",[173] or to be able to withstand the cross-examination.[174] Most of these conditions are so specific to the accused's ability to make an informed decision whether to testify in his defence that it would be illogical and practically

[167] The Defence focused **solely** on Mr Ongwen's capacity to make an informed decision whether to testify under Article 67(1)(e) of the Statute, and not his capacity to exercise other Article 67(1) rights.
[168] *Gbagbo*, Decision on the fitness of Laurent Gbagbo to take part in the proceedings before this Court, ICC-02/11-01/11-286-Red, para. 51: the Pre-Trial Chamber refers to the Article 67(1) rights as a whole, nothing in its findings suggests or requires the Chamber to assess all the capacities necessary for the meaningful exercise of the accused's fair trial rights as a whole, and not separately.
[169] This resulted in the Court of Appeal finding that the defendant was unfit to stand trial, *see R v Orr*, [2016] EWCA Crim 889, at para. 29; *see also* Urgent Rule 135, at para. 12, referring to *T v UK* [1999] ECtHR, at para. 87: Where the Grand Chamber considered two separate abilities and held that due to T's PTSD combined with lack of any therapeutic work since the offence, had limited T's ability to instruct his lawyers and testify in his own defence.
[170] Decision on Urgent Rule 135, paras 17-18.
[171] *Kovačević*, Decision on Accused's Fitness to Enter a Plea and Stand Trial, IT-01-42/2-I, para. 5, subpara. 4.
[172] Rothschild, Erdmann and Parzeller (2007), Fitness for Interrogation and Fitness to Stand Trial, 104 Deutsches Ärzteblatt International 3029, at p. 2: 'The freedom to choose what to say is held to be substantially impaired when the relevant party "said more" under the influence of drugs "than he would have said without them," or if he was "in state of at least reduced free will and freedom of decision"'; *see also* Urgent Rule 135, paras 14-15.
[173] *Jokić*, Judgment on the Allegations of Contempt, IT-05-88-R77.1-A, at para. 35.
[174] *R v Orr*, [2016] EWCA Crim 889.

impossible to consider such conditions with respect to the meaningful exercise of other Article 67(1) rights.

131. In sum, Mr Ongwen's capacity to make an informed decision whether to testify may theoretically interrelate or overlap with other capacities necessary for meaningful exercise of his Article 67(1) rights. That said, it was unreasonable for the Trial Chamber to conclude that the impugned capacity is inseparable from other capacities, or that it cannot be impaired by a mental condition or disorder as a stand-alone capacity.[175]

132. The second error was that the Trial Chamber's analysis of the indicia suggesting the existence of mental conditions which may impact on Mr Ongwen's impugned ability was based on the premise that Mr Ongwen is a defendant, who does not suffer from any mental health disability. The Trial Chamber explicitly confirmed this position in its ruling on the Defence request for leave to appeal the Rule 135 decision, holding that "whether [Mr Ongwen] may be mentally disabled was **never considered** in the [Rule 135] Decision".[176] (Bold added)

133. The result of this was that the Trial Chamber treated Mr Ongwen as a defendant without any mental disabilities. For example, the Trial Chamber's argument that for Mr Ongwen "to take a procedural decision it is not necessary that [he] has the same capacity as if he was a trained lawyer"[177] or that he represented by lawyers is not relevant to whether Mr Ongwen is able to exercise his right to make an informed decision whether or not to testify.[178]

134. Another example of the Trial Chamber's flawed approach was its refusal to consider that Mr Ongwen's daily medicine regimen (and its side-effects) may impair his cognitive abilities, and therefore impact on his capacity to make the informed decision.[179] To this end, the Trial Chamber held that the "potential side effects and their effects on the accused's capacity are hypothetical and amount to speculation".[180] It is the Defence position that once the information about the very significant amount and strength of medications that Mr Ongwen is taking was brought to the attention of the Trial Chamber, it was required to order an enquiry as to their impact on his mental capacities. This is especially true where an impartial mental

[175] LTA Decision on Urgent Rule 135, paras 9-18; Leave To Reply Urgent Rule 135, para. 10.
[176] Decision on LTA Decision on Urgent Rule 135, para. 11.
[177] Decision on Urgent Rule 135, para. 17.
[178] Decision on Urgent Rule 135, para. 17; *see also* LTA Decision on Urgent Rule 135, paras 19-39.
[179] Urgent Rule 135, para. 24; Leave To Reply Urgent Rule 135, paras 12-14; LTA Decision on Urgent Rule 135, paras 36-38 (for detailed information about Mr Ongwen's medicine regimen see confidential versions of these filings as well as Mr de Jong Report, UGA-D26-0015-0046-R01).
[180] Decision on Urgent Rule 135, para. 26.

health expert opinion could be available under Rule 135 of the RPE.

135. To conclude, the Trial Chamber failed to apply the relevant standards on equal and meaningful participation by defendants with mental disabilities, and take the necessary precautions under Articles 21(3) and 64(2) of the Statute.

2. The Trial Chamber Failed to Implement the ICC-DC Medical Officer's Recommendations for Eight Months

136. The ICC-DC Medical Officer has advised the Trial Chamber on at least four occasions in 2018 that Mr Ongwen, "as a detainee with serious mental or physical health issues", would significantly benefit "[redacted]". In addition, the ICC-DC Medical Officer informed the Trial Chamber that [redacted].

137. The Trial Chamber did not implement the ICC-DC Medical Officer's recommendations for the span of eight months and rejected all the Defence requests on this matter.[181] Its position was as follows:

> The Single Judge is of the view that it is not necessary to amend the Seating Schedule at this point in time.[182]
>
> At this point in time, the Single Judge considers it premature to declare that the Chamber will not sit every Wednesday in a five-day week. The flow of the Defence's evidence may necessitate designating a non-sitting day other than Wednesday.[183]

138. First, the Defence submits that considerations concerning the flow of the Defence's evidence were not part of the ICC-DC Medical Officer's justification for the proposed sitting schedule. A non-sitting day was a medical necessity in light of Mr Ongwen's medical condition. This was recommended by the ICC-DC Medical Officer irrespective of whether or not a non-sitting day was necessitated by "flow of the evidence".

139. Second, contrary to its findings, the Trial Chamber was required to apply relevant international human rights instruments that guarantee Mr Ongwen's rights as an accused and a detained person suffering from a disability, *e.g.* a right to [redacted] as a person with

[181] First Scheduling Request; LTA Decision on First Scheduling Request; Email from the Defence to TC IX Communications, 'Message about non-Sitting Day', 24 October 2018, at 9:05.
[182] Decision on First Scheduling Request, para. 5; *see also* Decision on LTA Decision on First Scheduling Request.
[183] Decision on First Scheduling Request, para. 7; *see also* Decision on LTA Decision on First Scheduling Request.

disabilities, or a right to highest attainable standard of physical and mental health.[184] This was especially necessary to ensure that he can follow the proceedings, communicate freely with his counsel and exercise his right to prepare a defence under Articles 67(1)(b) and (e) of the Statute.

140. Third, the Trial Chamber also abused its discretion by substituting its own untrained medical opinion for that of the ICC-DC Medical Officer. The Trial Chamber prioritised considerations of trial expeditiousness over Mr Ongwen's human rights and dignity. The Trial Chamber is not a medical professional and yet its decision has had the effect of overruling the considered recommendation of the ICC-DC Medical Officer.

141. In a similar scenario, in the *Mladić* case, the Appeals Chamber held that:

> With respect to Mladi[ć]'s contention that the Trial Chamber adopted its own "untrained" medical opinion rather than relying on a contrary medical opinion, the Appeals Chamber agrees that, had the Trial Chamber found the medical opinion provided insufficient "so as to be dispositive of the matter", the Trial Chamber should have ordered an independent medical examination, as requested by the Prosecution.[185]

142. And the Appeals Chamber then concluded that:

> In light of the foregoing, the Appeals Chamber considers that the Trial Chamber erred by failing to attribute sufficient weight to the information contained in the Report and the advice provided by the UNDU medical staff as well as the submissions in support of the reduced sitting schedule of the Registrar and Prosecution. Accordingly, the Appeals Chamber finds that the Trial Chamber abused its discretion in rejecting Mladi[ć]'s request for modified sitting schedule and therefore committed a discernible error.[186]

143. Therefore, in finding that it "does not find any reason why taking a day, other than Wednesday off would be incompatible with the Recommendation", the Trial Chamber incorrectly applied its own non-expert reasoning in place of that of the ICC-DC Medical Officer, which unequivocally recommended a [redacted]".[187]

144. In disregarding the recommendations, Mr Ongwen was required to attend five hearing days,

[184] Article 12 of the ICESCR; Articles 2, 4(2), 5(3) and 13(1) of the CRPD.
[185] *Mladić*, Decision on Mladić's Interlocutory Appeal Regarding Modification of Trial Sitting Schedule Due to Health Concerns, IT-09-92-AR.73.3, 20 October 2013, para. 13.
[186] *Mladić*, Decision on Mladić's Interlocutory Appeal Regarding Modification of Trial Sitting Schedule Due to Health Concerns, IT-09-92-AR.73.3, 20 October 2013, para. 16.
[187] Registrar Submission of Information Provided by the Medical Officer, ICC-02/04-01/15-1200-Conf-Exp-Anx.

including Wednesdays, which rendered some of the [redacted] impossible.[188] In doing so, the Trial Chamber unfairly interfered with Mr Ongwen's a [redacted] for his recognised mental disabilities. This also undermined Mr Ongwen's ability to participate fully in the proceedings and therefore negatively impacted upon his right to a fair trial.

145. In addition, on 15 May 2019, the Trial Chamber inappropriately attempted to cover its prior errors concerning the impugned scheduling by holding that it "ensured […] that no hearing would be scheduled on Wednesdays, **as it has done in the past**".[189] However, the case record shows something different. Contrary to the Trial Chamber, the record shows that the ICC-DC Medical Officer's recommendations from 28 February, 21 March, 13 July and 25 July 2018 and the Defence requests concerning the issue of 'Wednesdays off' were repeatedly disregarded by the Trial Chamber until after 29 October 2018 (for eight months).[190]

3. Conclusion

146. The Trial Chamber has a disability blind-spot. Contrary to four mental health experts' findings based in their direct and continuous examination of Mr Ongwen,[191] the Trial Chamber proceeded with the trial proceedings as if Mr Ongwen was not a mentally disabled defendant. This had a severe impact on the exercise of Mr Ongwen's fair trial rights.

ii. Violations of Liberty and Other Violations of the Right to Family and Private Life

147. Communication restrictions placed upon Mr Ongwen in the pre-trial and trial phases have overshadowed much of his trial. These restrictions, for different durations of time, interfered with Mr Ongwen's residual liberty in detention,[192] relationships with his children and parents of his children, and communication with family members.[193] These are human rights violations and violations of Articles 67(1)(b) and Articles 67(1)(e) of the Statute. The unnecessary litigation and violations described below impacted on Mr Ongwen and burdened

[188] *See* **ANNEX E** – Eight Months Late Response to Mr Ongwen's Mental Disability.
[189] Decision on Second Scheduling Request, para.7.
[190] LTA Decision on Second Scheduling Request, para. 2.
[191] Mr de Jong (appointed by the Trial Chamber), ICC-DC Medical Officer (appointed by the ICC Registry) and the Defence Mental Health Experts (D-41 and D-42).
[192] *E.g.* the remaining rights permitted to the general inmate population of an institution which have not been removed due to detention. For example, a detainee may not be free to travel freely as they choose due to a conviction but this does not mean that they can be put in solitary confinement without due process.
[193] Miller v The Queen (1985) 24 DLR (4th) 9, 12 October 1984, para 32, cited in Munjaz v the United Kingdom, 17 July 2012, Judgment, Application no. 2913/06 ('Munjaz v UK'), para. 40. In other words, a prisoner is not without some rights or residual liberty and there may be significant degrees of deprivation of liberty within a penal institution. A prisoner has the right not to be deprived unlawfully of the relative or residual liberty permitted to the general inmate population of an institution.

his Defence, which detracted from his right to have "examination of witnesses on his or her behalf under the same conditions as witnesses against him or her".

148. The restrictions originate from allegations concerning possible witness interference. This possibility was used to instigate the Article 56 hearings discussed elsewhere in this brief. When the witnesses appeared in the Article 56 hearings to testify, neither the Pre-Trial Judge nor the Prosecutor provided them the opportunity to explain whether they had been interfered with. When the person [redacted] whom the Prosecution alleged organized the meeting testified, the Prosecution never put any question to her concerning this.[194] Witness D-13, one of the parents of Mr Ongwen's children, testified for the Defence and the Prosecutor was unable to make a reasonable case for the interference whereas she was able to give a reasonable explanation for the contact which had nothing to do with interference.[195] Moreover, the transcript which the Prosecution argues shows interference in fact appears to show Mr Ongwen asking D-13 to tell the truth.[196] In short, the factual underpinning of the restrictions was not tested at the time of the Article 56 hearings, and even though it would have been significantly too late, they were not borne out or substantiated much later.

149. The imposition of restrictions based on allegations above which were not proven continue to violate Mr Ongwen's human rights and caused prejudice to Mr Ongwen as he was unduly punished for conduct which was not proven. The initial impact of the restrictions was that Mr Ongwen unjustifiably lost his capacity to speak with anyone outside the Detention Centre other than his Counsel, Mr Ayena-Odongo, and Mr Obhof[197] for over a month.[198] Although later partially relaxed,[199] Mr Ongwen was not able to speak with his children for the next year and a half.[200] This interfered with his ability to provide support which caused him mental distress. A little over a year after the original restrictions were placed, following litigation in the summer of 2016, Mr Ongwen was able to speak with his children and send money to his

[194] T-194-Conf and T-195-Conf.
[195] T-245-Conf, p. 10, ln. 24 to p. 28, ln. 11.
[196] ICC-02/04-01/15-342-Conf-AnxIV, p. 6, ln. 157 to p. 7 ln. 167.
[197] Order concerning a request by the Prosecutor under regulation 101(2) of the Regulations of the Court, ICC-02/04-01/15-242, para. 3.
[198] Decision on a request by the Prosecutor under article 57 of the Rome Statute and regulation 101(2) of the Regulations of the Court, ICC-02/04-01/15-254.
[199] Decision concerning the restriction of communications of Dominic Ongwen, ICC-02/04-01/15-283.
[200] Decision on Mr Ongwen's Request to Add New Persons to his Non-Privileged Telephone Contact List, ICC-02/04-01/15-553.

children through the Registry.[201]

150. An individual retains a residual liberty while in detention[202] and depending upon the type, duration, and specific manner in which deprivations are imposed,[203] further changes can constitute unjustified deprivations of liberty[204], which must be consistent with fundamental human rights protections pursuant to Article 21(3) of the Statute. Deprivations of liberty must be "in accordance with law"[205] and not be arbitrary. Arbitrary deprivations go beyond measures which lack a legal definition and "must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law".[206] A measure to restrict liberty must have a basis in law which is adequately accessible and foreseeable. Where the law confers discretionary powers on authorities the law must indicate the scope of discretion and the manner of its exercise with sufficient clarity to give protection against arbitrary interference.[207] Even justifiable deprivations of liberty must still be proportionate.

151. Detention does not void other rights such as that to family and private life. The presumption is that detained persons continue to enjoy all the fundamental rights and freedoms guaranteed by international human rights protections save for the right to liberty, where detention can otherwise be legally justified.[208] The right to private life may "embrace multiple aspects of the person's physical and social identity".[209] It protects the right to personal development, whether of personality or personal autonomy and it encompasses the right for each individual to establish and develop relationships with others and the outside world, that is, the right to a

[201] Joint Defence and Prosecution Observations Pursuant to ICC-02/04-01/15-521, ICC-02/04-01/15-606-Conf-Exp, para. 18.
[202] *See Miller v The Queen* (1985) 24 DLR (4th) 9, 12 October 1984, available at: *cited* in *Munjaz v the United Kingdom*, 17 July 2012, Judgment, Application no. 2913/06 ('Munjaz v UK'), para. 40.
[203] *Munjaz v the United Kingdom*, 17 July 2012, Judgment, Application no. 2913/06, para. 62.
[204] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, ('ICCPR') Article 9(1); Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) ('ACHPR'), Article 6; Organization of American States (OAS), *American Convention on Human Rights*, *"Pact of San Jose", Costa Rica*, 22 November 1969 ('ACHR'), Article 7; Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5 ('ECHR'), Article 5(1).
[205] ICCPR, Article 9(1).
[206] *Communication No. 458/1991, A. W. Mukong v. Cameroon* (Views adopted on 21 July 1994), in UN doc. GAOR, A/49/40(vol. II), p. 171, para. 9.8.
[207] *Tereshchenko v. Russia*, Judgment, 5 June 2014, Application no. 33761/05 *citing* Munjaz v UK, para. 88.
[208] *Hirst v the United Kingdom (no. 2)*, Judgment, 6 October 2005, Application no. 74025/01, para. 69.
[209] *S. and Marper v. the United Kingdom*, Judgment, 4 December 2008, Applications nos. 30562/04 and 30566/04, para. 66.

"private social life".[210] Interferences with family and private life must be in accordance with law, have a legitimate purpose, and be necessary and proportionate. Any restriction on those rights must be justified in each individual case.[211] Where a person's autonomy is restricted, greater scrutiny should be given to measures which remove the little personal autonomy that is left.[212] In particular fair procedural safeguards may be needed.[213]

152. The ability to communicate with extended family, children, friends, and anyone else is an aspect of personal freedom. Restrictions on such communication are a restriction on liberty and interference with this also implicates the right to family and private life. The Trial Chamber has recognised that the right to family life and the rights of the child were, and are, involved. This has both occurred implicitly through the granting of Defence requests,[214] but also through discussion and application of the jurisprudence related to these rights.[215]

153. As addressed by the Defence in a prior request, the legal basis of the restrictions in respect to various individuals was convoluted, kept shifting, or missing.[216] Taken as a whole, the Defence submits that they cannot fulfil the criteria of being in accordance with law for either restrictions on liberty or interferences with the right to family and private life. It was arbitrary in the manner described by the Human Rights Committee as it was unpredictable and lacked due process since no clear safeguards were put in place for reviewing the restrictions. The interference was also arbitrary because it vested too much discretion in the Pre-Trial and Trial Chambers. There was not a clear basis against which the restrictions could be assessed, and no way to obtain oversight without receiving leave to appeal. Finally, as discussed above, the factual basis for imposing the restrictions was not investigated, it was subject to dispute, and when actually examined in testimony it was not substantiated. The restrictions were on their own terms neither necessary nor proportionate[217] and it can neither be in accordance with law to impose restrictions upon a flawed factual basis nor can it be proportionate.

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[210] *Bărbulescu v Romania*, Judgment, 5 September 2017, Application no. 61496/08, para. 71; *Botta v. Italy*, Judgment, 24 February 1998, 153/1996/772/973, para. 32
[211] *Dickson v. the United Kingdom*, Judgment, 4 December 2007, Application no. 44362/04, para. 68.
[212] Munjaz v UK, para. 80.
[213] *T.P. and K.M. v. the United Kingdom*, Judgment, 10 May 2001, Application no. 28945/95, paras 71-72.
[214] *See* Defence Response to the Prosecution Filing ICC-02/04-01/15-482-Conf", ICC-02/04-01/15-490-Red, para. 23 et seq and Decision on Prosecution 'Request for an order that Mr Ongwen cease and disclose payments to witnesses and that the Registry disclose certain calls made by Mr Ongwen', ICC-02/04-01/15-521.
[215] Decision on Request for Disclosure and Related Orders Concerning Mr Ongwen's Family, 12 February 2019, ICC-02/04-01/15-1444, para. 23.
[216] Defence Request to Lift Communication Restrictions Placed Upon Mr Ongwen, ICC-02/04-01/15-1616-Red, paras 21, 23, 32, 31, 36, 47, 55, and 56.
[217] Defence Request to Lift Communication Restrictions Placed Upon Mr Ongwen, ICC-02/04-01/15-1616-Red, paras 50-54.

154. This additional burden being placed upon Mr Ongwen detracted from his capacity to focus on his trial. For the Defence, with its limited resources, this meant continuous litigation to ensure that Mr Ongwen's rights in detention were respected. The ordinary transmission of mail to a detained person required preparation of legal filings[218] and seeking to obtain information to enable Mr Ongwen to provide for his children resulted in extended litigation[219] as did litigation to ensure that the women were not being denied contact with Mr Ongwen when in fact they wanted contact.[220] The Defence therefore requests a remedy for this violation and submits that it is part of the cumulative violation which leads to its requesting a declaration of a permanent stay of the proceedings.

155. Even if the Trial Chamber considers that there was a sufficient factual basis to impose some kind of restrictions, the procedure, legal basis, and excessive discretion taken by the Trial Chamber were counter to international human rights and the Statute. As touched upon by the Defence,[221] neither the procedure nor the scope and manner of exercise of the discretion assumed by the Pre-Trial Chamber and Trial Chamber were sufficiently clear to ensure Mr Ongwen the minimum degree of protection. Moreover, as previously noted, in relying upon the criteria of the nature of the crimes alleged by the Prosecution, given that he benefited from the presumption of innocence, the Single Judge reversed a burden of proof upon Mr Ongwen in violation of his Article 67(1)(i) right.

G. Conclusion and Remedy

156. A fair trial is the only means to do justice. Where violations of the rights of the defendant are such as to make it impossible for him to present a defence, a fair trial cannot be held. If no fair trial can take place, then "the object of the judicial process is frustrated and the process must be stopped".[222]

157. Justice was not served in this case. Here, the cumulative effect of irreparable violations starting with the rights to counsel and to remain silent at UPDF Operational HQ in January 2015, through the pre-trial and trial proceedings' violations, including Mr Ongwen's

[218] Corrected version of 'Defence Request for Production of Correspondence Addressed to Mr Ongwen, ICC-02/04-01/15-1411-Corr-Red.
[219] Defence Request for Orders to the Prosecution in Relation to Information Concerning Mr Ongwen's Family, ICC-02/04-01/15-1414-Red.
[220] Defence Request to Lift Communication Restrictions Placed Upon Mr Ongwen, ICC-02/04-01/15-1616-Red, para. 32.
[221] Defence Request to Lift Communication Restrictions Placed Upon Mr Ongwen, ICC-02/04-01/15-1616-Red, para. 32.
[222] *Lubanga* OA4 Judgment, para. 37; *Gbagbo* Ruling on Applicability of Articles 55 and 59, paras 89-92.

discrimination as a mentally disabled defendant, make a fair trial impossible. The Trial Chamber, with the power and responsibility ensuring fairness of the proceedings, failed. As a result, the legitimacy of a judgment in this case is already compromised.

158. For all the reasons above, the Defence requests that the Trial Chamber, pursuant to its inherent jurisdiction, immediately declare a permanent stay of the proceedings.

III. MODES OF LIABILITY

159. All modes of liability are discussed factually in the crime sections.

A. Command Responsibility

160. The Defence incorporates its submissions made in the Defects Series with regards to command responsibility.[223] The Defence position is that all allegations of criminal liability through command responsibility pursuant to Article 28(a) are defectively pleaded and should be dismissed for facial deficiency. In any event, the Prosecution failed to meet the required elements for command responsibility liability for the crimes committed at Pajule, Odek, Lukodi, Abok (Counts 1 to 49), SGBC and child soldier crimes (Counts 61 to 70). The Defence reiterates that the Confirmation Decision confirmed command responsibility as an alternative mode of liability for all counts except 50-60.[224]

161. The Appeals Chamber in *Bemba* held that "Article 28 of the Statute is not a form of strict liability."[225] The Defence reiterates its view that the *mens rea* standard is not based on strict liability,[226] and avers that none of the elements of command responsibility can be presumed; to hold otherwise would result in supporting an incorrect legal standard for command responsibility as well as holding the Prosecution to an incorrect burden of proof.[227]

162. In order to successfully establish command responsibility, the Prosecution needs to prove

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[223] *Ongwen*, Defence Motion on Defects in the Confirmation of Charges Decision: Defects in Notice in Pleading of Command Responsibility under Article 28(a) and Defects in Pleading of Common Purpose Liability under Article 25(3)(d)(i) or (i) (Part III of the Defects Series) 'Defects Series III', ICC-02/04-01/15-1432, paras 7-30 and paras 64-65 and *see Ongwen*, Defence Motion on Defects in the Confirmation of Charges Decision: Defects in the Modes of Liability (Part II of the Defects Series), 'Defects Series II', ICC-02/04-01/15-1431, paras 6-8 and 12-16.

[224] Defect Series III, ICC-02/04-01/15-1432, para. 7.

[225] *Bemba* Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute" ('Bemba Appeal Judgment'), ICC-01/05-01/08-3636-Red, 8 June 2018, para. 170.

[226] *Delalić at al.*, Appeals Judgment, IT-96-21-A, para. 239 and *see* Defects Series III, ICC-02/04-01/15-1432, paras 26-28.

[227] *See* Defects Series III, ICC-02/04-01/15-1432, paras 26-29.

beyond reasonable doubt that (i) the accused was a military commander or person effectively acting as such; (ii) the accused had effective command and control or effective authority and control; (iii) the accused knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; (iv) the accused failed to take all necessary and reasonable measures within his power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution and (v) the alleged crimes were committed as a result of the accused's failure in that, but for the accused's claimed failure, the alleged crimes would not have been committed.

i. Effective command and control and effective authority and control

163. There is a high threshold for effective control; intermediate levels of authority are not pertinent to command responsibility.[228] Not every position of influence or authority amounts to effective control,[229] even if the accused has substantial influence over the perpetrators.[230] Additionally, when a conflict includes the participation of irregular armies or rebels, the "traditional indicia of effective control […] may not be appropriate or useful" and the less developed the military structure the more it reinforces the need to evaluate the nature of the authority of the commander instead of his formal rank.[231]

164. In this case, the LRA operated in a highly irregular structure in which only Kony exercised effective control.

ii. Knew or should have known element

165. Both statutory mental states require knowledge. The Defence submits that the mental element is stated in two forms, 'knew' and 'should have known'[232], and that they trigger different obligations.[233]

166. The Appeals Chamber in *Bemba* was unable to agree on the interpretation of this element and

[228] *Bagilishema* Appeals Judgment, ICTR-95-1A-A, para. 56.
[229] *Kvočka,* Appeals Judgment, IT-98-30/1-A, para. 144.
[230] *Čelebići* Appeals Judgment, IT-96-21-A, para. 266.
[231] *Brima et al ('AFRC')* Trial Judgment, SCSL-04-16-T, para. 787.
[232] *Bemba* Appeal Judgment, Separate Opinion of Judge Van den Wyngaert and Judge Morrison, ICC-01/05-01/08-3636-Anx2, paras 38 and 40 c.f. *Bemba* Appeal Judgment, Dissenting Opinion of Judge Monageng and Judge Hofmánski, ICC-01/05-01/08-3636-Anx1-Red, para. 265.
[233] *Bemba* Appeal Judgment, Separate Opinion of Judge Van den Wyngaert and Judge Morrison, ICC-01/05-01/08-3636-Anx2 para. 40.

to date, there has been no holding from the Appeals Chamber on this.[234] The Defence notes that the "should have known" alternative has no basis in customary international law and has been rejected by the ICTY on several occasions.[235]

167. Regarding the "should have known" criterion, the Defence submits that the Prosecution needs to firstly demonstrate what information Mr Ongwen had and at which point in time.[236] Without determining what facts were available to Mr Ongwen at the relevant time, it is impossible to establish what steps he should have taken.[237] After the Prosecution demonstrates what information Mr Ongwen had, it needs to establish what, if anything, Mr Ongwen did with that information.[238] If the Prosecution relies on a "should have known" standard, the Prosecution must establish that Mr Ongwen failed to adequately follow up on the information.[239]

168. The Defence maintains that there are two types of knowledge; knowledge *ex ante* and *post facto*.[240] For knowledge *ex ante*, the Prosecution needs to demonstrate that Mr Ongwen had sufficiently specific knowledge that his troops were about to commit the crimes; awareness of a general risk that his troops may commit unspecified crimes is insufficient.[241]

169. Regarding knowledge *post facto*, the Prosecution needs to demonstrate that Mr Ongwen knew that a crime within the jurisdiction of the Court was committed and that the perpetrators were his subordinates.[242] General criminal conduct is not enough; the Prosecution needs to demonstrate that Mr Ongwen had knowledge of the actual crimes that were allegedly

[234] *Bemba* Appeal Judgment, Separate Opinion of Judge Van den Wyngaert and Judge Morrison, ICC-01/05-01/08-3636-Anx2, 8 June 2018, para. 38.
[235] *Čelebići* Appeal Judgment, IT-96-21-A, para. 241; *Hadžihasanovic* Trial Judgment, IT-01-47-T, para. 96; *Blaškić* Appeal Judgment, IT-95-14-A, paras 62 and 406; *Orić* Trial Judgment, IT-03-68-T, para. 324; *Halilović* Trial Judgment, IT-01-48-T, para. 69.
[236] *Bemba* Appeal Judgment, Separate Opinion of Judge Van den Wyngaert and Judge Morrison, ICC-01/05-01/08-3636-Anx2, para. 39.
[237] *Bemba* Appeal Judgment, Separate Opinion of Judge Van den Wyngaert and Judge Morrison, ICC-01/05-01/08-3636-Anx2, para. 38.
[238] *Bemba* Appeal Judgment, Separate Opinion of Judge Van den Wyngaert and Judge Morrison, ICC-01/05-01/08-3636-Anx2, para. 39.
[239] *Bemba* Appeal Judgment, Separate Opinion of Judge Van den Wyngaert and Judge Morrison, ICC-01/05-01/08-3636-Anx2, para. 39.
[240] *Bemba* Appeal Judgment, Separate Opinion of Judge Van den Wyngaert and Judge Morrison, ICC-01/05-01/08-3636-Anx2, para. 44.
[241] *Bemba* Appeal Judgment, Separate Opinion of Judge Van den Wyngaert and Judge Morrison, ICC-01/05-01/08-3636-Anx2, para. 44.
[242] *Bemba* Appeal Judgment, Separate Opinion of Judge Van den Wyngaert and Judge Morrison, ICC-01/05-01/08-3636-Anx2, para. 46.

committed.[243]

170. Both the PPCB and the operative part of the Confirmation Decision state that Mr Ongwen "knew or […] should have known" for Pajule, Odek, Lukodi, Abok and counts 61 to 70.[244] However, in the PPTB, for Pajule, Odek, Lukodi and Abok, the Prosecution alleges that Mr Ongwen "knew that the LRA fighters were committing or were about to commit the crimes".[245] The Prosecution's change in its theory[246] is prejudicial because the Defence was not clearly informed about the type of alleged knowledge it must defend.

iii. Necessary and reasonable measures

171. As raised in the Defects Series, the Defence maintains that the notice for Article 28 in the Confirmation Decision is defective.[247] If the Court considers command responsibility, the Defence submits that the Prosecution has failed to prove beyond reasonable doubt either that Mr Ongwen failed to take necessary and reasonable measures either to prevent or repress, or to submit the matter to competent authorities.

172. The Appeals Chamber found that "Article 28 only requires commanders to do what is necessary and *reasonable* under the circumstances."[248] The Defence submits that what is reasonable to do in the circumstances needs to be considered from the perspective of Mr Ongwen.[249]

173. To satisfy this element, it is not enough to identify the measures that Mr Ongwen could have hypothetically taken. Rather, the Prosecution needs to demonstrate beyond reasonable doubt that Mr Ongwen did not take concrete and specific measures which were available to him that a reasonably diligent commander in similar circumstances would have done.[250]

174. The Appeals Chamber in *Bemba* held that the duty to take ""all necessary and reasonable measures" is intrinsically connected to the extent of a commander's material ability to prevent

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[243] *Bemba* Appeal Judgment, Separate Opinion of Judge Van den Wyngaert and Judge Morrison, ICC-01/05-01/08-3636-Anx2, para. 47.
[244] *Ongwen*, Public redacted version of "Pre-confirmation brief", 21 December 2015, ICC-02/04-01/15-375-Conf-AnxC ('PPCB'), ICC-02/04-01/15-375-AnxC-Red2, 8 June 2016, paras 225, 309, 372, 424, 615 and 665; *Ongwen*, Confirmation Decision, ICC-02/04-01/15-422-Red, paras 17 (p. 74), 29 (p. 78), 43 (p. 82), 56 (p. 86), para. 123 (p. 101) and para. 129 (p. 103).
[245] Prosecution's Pre-Trial Brief ('PPTB'), ICC-02/04-01/15-533, 6 September 2016, paras 284, 367, 425, 496.
[246] *Ntagerura*, Appeal Judgment, ICTR-99-46-A, 7 July 2006, para. 27.
[247] Defects Series III, ICC-02/04-01/15-1432, 1 February 2019, paras 7-30 and para. 64-65.
[248] *Bemba* Appeal Judgment, ICC-01/05-01/08-3636-Red, para. 169.
[249] *Bemba* Appeal Judgment, ICC-01/05-01/08-3636-Red, para. 170. *See also* Annex G, pages 3 to 4.
[250] *Bemba* Appeal Judgment, ICC-01/05-01/08-3636-Red, para. 170.

or repress the commission of crimes or to submit the matter to the competent authorities".[251] Mr Ongwen cannot be blamed for not having done something that he had no power to do.[252] Rather when assessing if Mr Ongwen took all "necessary and reasonable measures", it requires consideration of what type of measures were at Mr Ongwen's disposal given the circumstances at the time.[253] It is not for the accused to demonstrate that the measures he took were adequate.[254] Mr Ongwen did not have authority or means to take any measures; all authority was vested in Kony.

iv. Causation

175. Article 28 includes an element that crimes occur "as a result of" a commander's failure to exercise control properly. As with all statutory elements, the requirement that a crime occur "as a result of" the commander's failure must be proved beyond reasonable doubt. The Defence position is that the language "as a result of" is a causation element and means that the Prosecution must prove that, but for an accused's omissions, the crimes would not have occurred.

176. In the PPTB, the Prosecution claims causation is not an element of command responsibility, but states that, in any event, the facts and evidence meet the requirement of causation.[255] The Prosecution specifically contends that Mr Ongwen's "failure to exercise his duty to prevent crimes increased the risk that the forces would commit" the crimes at Pajule, Odek, Lukodi and Abok[256] and thus appears to be arguing for a low threshold test for causation being the "increase the risk" test.

177. There is no decision by the Appeals Chamber on the causation issue.[257] The Defence avers that causation, as an element of command responsibility ensures that liability is incurred only for culpable omissions of a commander.[258] More specifically, the Defence maintains that the applicable test to assess causation is through a "but-for" test and not the "increase the risk"

[251] *Bemba* Appeal Judgment, ICC-01/05-01/08-3636-Red, para. 167.
[252] *Bemba* Appeal Judgment, ICC-01/05-01/08-3636-Red, para. 167.
[253] *Bemba* Appeal Judgment, ICC-01/05-01/08-3636-Red, paras 167-168.
[254] *Bemba* Appeal Judgment, ICC-01/05-01/08-3636-Red, para. 170.
[255] *Ongwen*, PPTB, ICC-02/04-01/15-533, p. 74, footnote 456.
[256] *Ongwen*, PPTB, ICC-02/04-01/15-533, paras 287, 370, 429 and 499. With regards to SGBC and the conscription and the use of child soldiers (charges 61 to 70) the Prosecution simply argue that the crimes are as a result of Mr. Ongwen's failure to exercise control properly without specifying a standard of causation, *see* paras 699 and 757.
[257] *See Bemba* Appeal Judgment, J. Van den Wyngart and J. Morrison, ICC-01/05-01/08-3636-Anx2, para. 51.
[258] *See Bemba* Appeal Judgment, J. Osuji, ICC-01/05-01/08-3636-Anx3, paras 200, 202 and 212.

test.[259] In other words, the Prosecution is required to demonstrate that the alleged crimes are a direct consequence of or are directly linked to Mr Ongwen's alleged failures as a commander.

178. Alternatively, if the Trial Chamber rejects the "but-for" test of causation, the Defence maintains that, while the "but-for" definition is the correct one, in any event, the Prosecution is applying an incorrect standard by arguing an "increase the risk". Three of the five Appeals Judges in *Bemba* viewed "as a result of" as meaning causation.[260] The Trial Chamber should at least apply the "high probability" test that was advanced by two of the Appeals Chamber judges.[261] In other words, the Prosecution needs to demonstrate that there is a high probability that, if Mr Ongwen had discharged the duties they claim he omitted, it would have either prevented the crimes or the crimes would have been committed in a different manner.[262] The Defence avers that the Prosecution failed to establish causation beyond a reasonable doubt under any of the tests for causation put forth, even the "increased the risk" test. Consequently, the Prosecution failed to prove beyond a reasonable doubt the statutory element that the crimes were committed as a result of Mr Ongwen's alleged failure.

179. The Confirmation Decision neither analyses nor mentions causation.[263] The Prosecution failed to give proper notice regarding the specific alleged failure of Mr Ongwen that resulted in the crimes committed by his subordinates. The Prosecution argues that Mr Ongwen's "failure to exercise his duty to prevent crimes increased the risk that the forces would commit" the crimes at Pajule, Odek, Lukodi and Abok.[264] While it appears that the failure refers to failing to prevent, the Prosecution does not cite any supporting evidence. Whereas for counts 61 to 70, the Prosecution argues that Mr Ongwen failed "to prevent these crimes being committed by his subordinates […] [n]or did he submit them for prosecution by [the]

[259] *See* United Kingdom, Court of Appeals, R. v Pagett [1983] EWCA Crim 1 (03 February 1983). *See also Ford v. Garcia* Ex. Rel. Estate of *Ford v Garcia*, 289 F.3d 1283 at 1287; *Schonfeld et al.*, Law Reports of Trials of War Criminals ('LRTWC'), Volume, XI, pp 71; Judge Advocate summing up in Trial of Lieutenant-General Baba Masao, Case No. 60, Australian Military Court, Rabaul, 28th May-2nd June 1947, p. 60; Judge Bernard's opinion in the *Tokyo* Judgment see page 4 of Annex H; Summation in the *Medina* case, Military Law Review Vol. 175, March 2003, pp 356 to 357.

[260] *Bemba* Appeal Judgment J. Hofmánski and J. Monageng, ICC-01/05-01/08-3636-Anx1-Red, para. 331 and *Bemba* Appeal Judgment, J. Osuji, ICC-01/05-01/08-3636-Anx3, paras 213 and 216.

[261] *Bemba* Appeal Judgment, J. Hofmánski and J. Monageng, ICC-01/05-01/08-3636-Anx1-Red, para. 339.

[262] *Bemba* Appeal Judgment, J. Hofmánski and J. Monageng, ICC-01/05-01/08-3636-Anx1-Red, para. 339.

[263] The nearest mention appears to be: "[Mr Ongwen]'s conduct cannot be seen as a mere failure to prevent or repress crimes committed by other persons. […] the Chamber finds that it is precisely the deliberate conduct of [Mr Ongwen] that resulted in the realisation of the objective elements of the crimes." *Ongwen*, Confirmation Decision, ICC-02/04-01/15-422-Red, para. 147 (p. 65).

[264] *Ongwen*, PPTB, ICC-02/04-01/15-533, paras 287, 370, 429 and 499.

competent authorities",[265] without citing to any supportive evidence. Thus it remains unclear which failure allegedly resulted in the crimes that form the basis of counts 61 to 70. The Prosecution's failure to provide proper notice is prejudicial to the Defence because it does not know which alleged failure it must defend.

B. Indirect co-perpetration and indirect perpetration

180. Indirect *co-perpetration* is charged in respect to Pajule (Counts 1-9), Odek (Counts 11-23), the systemic SGBC charges (Counts 61-68), and the child soldier charges (Counts 69-70). For the Lukodi (Counts 24-36) and Abok (Counts 37-49) charges, the mode of liability is indirect *perpetration*.

i. Indirect co-perpetration

181. Examining the Court's jurisprudence,[266] there are five to six objective elements for indirect co-perpetration, depending upon how a Trial Chamber combines and separates the criteria. These are:

a. The Accused must be part of a common plan or an agreement with one or more persons to commit the crimes or to engage in a conduct which, in the ordinary course of events, would result in the commission of the crimes.

b. The Accused must have control over an organisation.

c. The organisation must consist of an organised and hierarchical apparatus of power.

d. The execution of the crimes must be secured by almost automatic compliance with the orders issued by the Accused. That is there must be control of the members of the common plan over a person or persons who execute the material elements of the crimes by subjugating the will of the direct perpetrators.[267]

e. The Accused and the other co-perpetrators must carry out *essential contributions* in a

[265] *Ongwen*, PPTB, ICC-02/04-01/15-533, paras 700 and 758.
[266] *See inter alia Ntaganda*, Judgment, 8 July 2019, ICC-01/04-02/06-2359, para. 774; *Kenyatta*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012 ICC-01/09-02/11-382-Red, para. 297; *Bemba*, Decision Pursuant to Arficle 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, ICC-01/05-01/08-424, paras 350-351; *Katanga and Ngudjolo*, Decision on the confirmation of charges against Germain Katanga and Mathieu Ngudjolo Chui, 13 October 2008, ICC-01/04-01/07-717 ('*Katanga* CoC'), paras 500-518, 527-539; *Bashir*, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, ICC-02/05-01/09-3, paras 209-213.
[267] *Ntaganda*, Judgment, 8 July 2019, ICC-01/04-02/06-2359 ('Ntaganda Judgment'), para. 774.

coordinated manner which results in the fulfilment of the material elements of the crime. This is shown where the Accused has the capacity to *frustrate* the commission of the crime. [268]

f. The Trial Chamber must make a normative assessment of the role of the accused person in the specific circumstances of the case to decide whether the Accused had *control over the crime*. This should be done by assessing whether the accused had control over the crime, by virtue of his or her essential contribution to it and the resulting power to frustrate its commission.[269]

182. In respect to the subjective elements, the Accused must satisfy the *mens rea* elements of the crimes themselves.[270]

a. Be aware and accept that implementing the common plan will result in the fulfilment of the material elements of the crimes – that is to say it was virtually certain that the implementation of the common plan would lead to the commission of the crimes at issue;[271] and

b. Have knowledge of the factual circumstances enabling him to exercise joint control over the commission of the crime through another person(s). This requires that the Accused was aware: (i) of his essential role in the implementation of the common plan – i.e. awareness of his capacity to make an essential contribution; and (ii) of his ability – by reason of the essential nature of his task – to frustrate the implementation of the common plan, and hence the commission of the crime.[272]

1. Indirect co-perpetration is not found in the Statute

183. The Defence incorporates by reference its pre-trial arguments that indirect co-perpetration is not a valid mode of liability under the Statute.[273] [274] On 1 February 2019, the Defence re-

[268] Ntaganda Judgment, para. 774.
[269] Ntaganda Judgment, para. 779.
[270] Ntaganda Judgment, para. 774.
[271] Public redacted Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, 1 December 2014, ICC-01/04-01/06-3121-Red ('Lubanga AJ'), paras 446, 452. The Appeals Chamber also confirmed that it is, in this context, "as such correct to consider article 30 of the Statute because that provision describes the relevant mental element and may therefore also serve as a yardstick for determining whether two or more individuals agreed to commit a crime", para. 446.
[272] *Lubanga*, Decision on the confirmation of charges, 29 January 2007, ICC-01/04-01/06-803-tEN, para. 367; see also, Katanga CoC, paras 538-539.
[273] Defence Brief for the Confirmation of Charges, 20 January 2016, ICC-02/04-01/15-404-Red, paras 82-89.

asserted this position while raising other legal issues in relation to indirect co-perpetration.[275] The Defence notes that the mode of liability has not been raised before the Appeals Chamber and therefore no appellate level authority on this mode of liability exists. Given the lack of an unambiguous textual basis in the Statute, the Defence therefore again submits that the Trial Chamber must dismiss the charges under this mode of liability given that the mode cannot be found in the Statute and Article 22 prohibits convictions based upon (1) conduct not covered by the Statute and (2) because the statute must be strictly construed and not be extended by analogy.

2. The defective Confirmation of Charges Decision violates the right to notice

184. The Defence has previously argued that the charges in respect to indirect co-perpetration should be dismissed because neither the (a) objective element of "power to frustrate the commission of the crime" nor the (b) subjective element of "awareness of the power to frustrate the crime" were pleaded, and hence, there is no notice of the mode of liability to the Accused.[276] The Defence incorporates all submissions from that filing here by reference.

185. Mr Ongwen's right to notice was violated because, in respect to the forms of liability confirmed, the elements under Article 25(3)(a) of the Statute were incomplete, and unsubstantiated in respect to subjective elements and the Pre-Trial Chamber only confirmed part of the legal elements of subjective elements for most of the modes of liability under Article 25(3)(a) of the Statute, and then failed to connect factual support to these elements. Consequently, Mr Ongwen's right to be informed in detail of the charges under Article 67 of the Statute, which includes the modes of liability, was violated.

3. It is impossible for Mr Ongwen's essential contribution to be assessed and therefore he should be acquitted on all indirect co-perpetration counts

186. An issue which is closely related to the defective notice in the Confirmation of Charges decision is the issue of the absence of sufficient specificity in the pleading in respect to the roles of senior LRA members who are referred to only in general terms in the alleged plans or purposes which comprise the indirect co-perpetration charges. The Defence has raised this in

[274] Defence Brief for the Confirmation of Charges Hearing, 20 January 2016, ICC-02/04-01/15-404-Red, para. 85.
[275] Defence Motion on Defects in the Confirmation of Charges Decision: Defects in the Modes of Liability (Part II of the Defects Series), 1 February 2019, ICC-02/04-01/15-1431, paras 26 and 28-31.
[276] Defence Motion on Defects in the Confirmation of Charges Decision: Defects in the Modes of Liability (Part II of the Defects Series), 1 February 2019, ICC-02/04-01/15-1431, paras 32-49.

three separate filings.[277] Counsel Taku also raised one aspect of the issue at the status conference prior to the start of the trial in respect to the identities of those on the intercepts[278] and the issue has been raised in a request for remedies that is pending before the Trial Chamber at the time of this filing.[279]

187. As just outlined, whether Mr Ongwen can be convicted for his alleged contribution depends in part upon an assessment of whether his alleged contribution was essential. Where multiple individuals are alleged to have been involved in a crime and where contributions are premised upon the allegation that, for example, as argued by the Prosecution, "Dominic Ongwen's conduct and presence expressly encouraged LRA fighters to commit crimes",[280] then evidence regarding how influential Mr Ongwen's presence was is necessary for a determination of the issue. There is insufficient evidence to prove beyond reasonable doubt what, if any, influence Mr Ongwen had in the perpetration of alleged crimes.

188. There are two ways to construe the issue but either, it is submitted, should lead to an acquittal of Mr Ongwen. Firstly, the Defence submits that the lack of specificity and information lead by the Prosecution in respect to the other alleged commanders and senior LRA individuals means that the Prosecution has simply not met its burden of proof in respect to whether Mr Ongwen made an essential contribution – it is simply impossible to know without the context. Secondly, the Defence submits that the pleading failure, and related disclosure issues, mean that the lack of notice renders the indirect co-perpetration charges defective in such a way that they must be dismissed for inadequate notice.

4. The Prosecution theory seeks to dilute the notion of individual responsibility in a departure from the Court's jurisprudence on indirect co-perpetration

189. Notwithstanding prior Defence objections to the existence of the indirect co-perpetration in the Court's legal frame-work, the Statute – pursuant to Article 22(2) – requires the Trial Chamber to strictly construe the definition of the mode of liability and resolve ambiguities in favour of the Accused. There are four preliminary reasons that this submission is pertinent.

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[277] Public redacted version of "Corrected version of 'Defence Request for Disclosure Pursuant to Rule 77 and Article 67(2) and Request for a Remedy in Light of Late and Untimely Disclosure', filed 4 September 2018", filed 17 September 2018 (ICC-02/04-01/15-1329-Conf-Corr), 8 October 2018, ICC-02/04-01/15-1329-Corr-Red; Defence Request for Leave to Appeal 'Decision on Defence Request for Disclosure and Remedy for Late Disclosure' (ICC-02/04-01/15-1351), 5 October 2018, ICC-02/04-01/15-1360; and Defence's Further Submissions, 31 May 2019, ICC-02/04-01/15-1536 OA4.

[278] 23 May 2016, T-25, p. 9, lns 2-23.

[279] Defence Request for Remedies in Light of Prosecution Disclosure Violations, ICC-02/04-01/15-1718-Conf.

[280] Prosecution's Pre-Trial Brief, 6 Sept. 2016, ICC-02/04-01/15-533 ('PPTB'), para. 267.

190. *Firstly*, in referring to the element of 'organised and hierarchical apparatus of power' the Prosecution attempts to expand liability by suggesting that mere compliance with an order "may be sufficient to demonstrate that the organisation is composed of fungible individuals, but it is not the only way to making that showing."[281]This is an attempt to expand liability under indirect co-perpetration without a legal basis.

191. *Secondly*, in describing the legal criteria concerning the organisation, the Prosecution has stated that the Accused must have the "ability to cause the organisation to **contribute** to the crimes".[282] Despite the further stated requirement of essential contribution, the Prosecution submission appears to suggest that the Accused's control over the organisation does not have to be so great or absolute as to be able to control it.

192. *Thirdly*, the Prosecution synthesis speaks of "*the ability* to cause the organisation to contribute to the crimes"[283] and then applies it. The jurisprudence states that the Accused "has control" of the organisation. This is something quite different from a possibility and impermissibly departs from the standard so as to lower it.

193. *Fourthly*, the Prosecution subtly argues that not all crimes that are attributed to the Accused through the doctrine of indirect co-perpetration must have been the result of the Accused's essential contribution.[284] The implication is that if the crimes occur from the result of the common plan which would have occurred anyway or would have occurred in an identical or different way – albeit not significantly different – then the Accused can also be held responsible for these. Following the Prosecution on this submission would bring the doctrine of indirect co-perpetration towards guilt by association which has no place in a court premised upon individual responsibility.

194. In conclusion, if the Trial Chamber accepts that indirect co-perpetration is part of the Statute, it is critical that the mode is strictly construed to avoid infringing Articles 67 and 22.

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[281] PPTB, para. 140(b).
[282] PPTB, para. 140(c).
[283] PPTB, para. 140(c).
[284] PPTB, para. 140(d) (bold added). "This means that the [essential] contribution must be such that some or all of the crimes resulting from the implementation of the common plan "would not have been committed or would have been committed in a significantly different way."

5. The Trial Chamber should acquit Mr Ongwen on the indirect co-perpetration charges because the unreliability of the intercept evidence raises serious doubts concerning multiple elements of the Prosecution's theory of this mode

195. The Prosecution relies heavily upon the intercept evidence to establish several elements of indirect co-perpetration which cut across the charges. Primarily in this regard, it seeks to establish (1) the organised and hierarchical nature of the LRA and (2) Mr Ongwen's position of authority and control over troops within this military structure.

196. To prove the structure, the Prosecution notes that the intercepts show the nature of the organisation,[285] its disciplinary system,[286] and that it facilitated executing attacks.[287] In respect to Mr Ongwen's position, it seeks to use the intercepts to show that Mr Ongwen was operational as a commander during the charged period,[288] that he organised attacks,[289] that he had the capacity to make an essential contribution,[290] that he was promoted – thereby increasing his authority,[291] that he was able to administer discipline,[292] and that he had a reputation as an unusually effective commander.[293]

197. In the intercepts section, the Defence has discussed extensively an array of issues which individually and cumulatively lead to the conclusion that the intercept evidence as a whole is not reliable and therefore should not be relied upon to make factual findings in support of legal criteria. The Defence submits that the unreliability of the intercept evidence raises serious doubts about key aspects of the Prosecution's over-arching allegations concerning indirect co-perpetration and raises a reasonable doubt about this mode of liability.

198. Even if the Trial Chamber does not agree that the body of evidence as a whole is too unreliable, the Defence submits that each individual intercept, upon which the Prosecution relies as evidence to prove elements of indirect co-perpetration, also exhibit many of the specific issues with reliability, attribution, and interpretation.

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[285] PPTB, para. 65 and 92.
[286] PPTB, para. 95.
[287] PPTB, para. 96.
[288] PPTB, para. 109.
[289] PPTB, para. 110.
[290] PPTB, para. 113.
[291] PPTB, para. 114.
[292] PPTB, para. 122.
[293] PPTB, para. 135.

ii. Indirect perpetration

199. Indirect perpetration is related to, but different from indirect co-perpetration. With indirect perpetration, the primary perpetrator controls the will of those who carry out the objective elements of the offence.[294] The perpetrator: (1) exerts control over the crime whose material elements were brought about by one or more persons; (2) meets the mental elements prescribed by Article 30 and the mental elements specific to the crime at issue; and (3) is aware of the factual circumstances which allow the person to exert control over the crime.[295]

200. In describing the objective element of the mode of liability, the *Katanga* Trial Chamber set out two forms by which the Accused exerts control over the crime. On form is control over the will of the physical perpetrators. Such situations:

> involve an indirect perpetrator who exerts control over the will of physical perpetrators who, for example, act under duress or by mistake, or who are afflicted by mental deficiency or impairment. In most cases, therefore, the physical perpetrator or the executor will not bear full responsibility for his or her actions and the existence of grounds for excluding criminal responsibility must be considered.[296]

201. The other form comprises the existence of an organised apparatus of power whose leadership will be assured that its members will affect the material elements of the crime.[297] The Accused must be "the highest authority"[298] in the organisation because his control over the organisation, essentially decides whether and how the crime would be committed.[299] In assessing this form, the Trial Chamber must consider the nature of the organisation and control exerted over it.

202. The Defence submits that only Kony had the requisite level of authority; Mr Ongwen acted at the will of Kony under duress and while impaired with mental illnesses.

C. Ordering

203. The Confirmation Decision confirmed ordering through Article 25(3)(b) of the Statute as an

[294] *Lubanga*, Decision on the confirmation of charges, 7 February 2007, ICC-01/04-01/06-803-tEN, para. 322(ii).
[295] *Katanga*, Judgment pursuant to article 74 of the Statute, 7 March 2014, ICC-01/04-01/07-3436-tENG ('Katanga Judgment'), para. 1399.
[296] Katanga Judgment, para. 1402.
[297] Katanga Judgment, para. 1403.
[298] Katanga Judgment, para. 1405.
[299] Katanga Judgment, para. 1405.

alternative mode of liability for Counts 8 to 49 and Counts 61 to 70.[300] The Defence notes that Article 25(3)(b) encompasses three different forms of liability,[301] and the only one that the Pre-Trial Chamber confirmed is ordering for counts 8 to 49 and 61 to 70.

204. The Defence avers that an individual "who orders a crime is not a mere accomplice but rather an indirect perpetrator, using a subordinate to commit the crime."[302] Ordering requires the perpetrator to be in a position of authority[303] which necessitates a superior-subordinate relationship[304] and requires the superior to instruct the subordinates to commit a crime or do an act or omission which leads to a crime.[305] Under Article 25(3)(b) ordering, an individual can only be liable if the crimes were actually committed or attempted and that "the order had a direct effect on the commission or attempted commission of the crime",[306] meaning that it "needs to have a causal effect on the offence."[307] Regarding the subjective element of ordering, Article 25(3)(b) requires that the superior meant to order the offence[308] or the superior needs to "at least [be] aware that the crime will be committed in the ordinary course of events as a consequence of the execution or implementation of the order."[309]

205. The Trial Chamber in *Bemba et al.*, found that in relation to the other two types of liability in Article 25(3)(b) "the 'ordering' liability reflects the strongest form of influence over another person."[310]

206. The Defence submits that ordering "complements the command responsibility provision (article 28): in the latter case the superior is liable for an omission" whereas for ordering the commission of a crime under Article 25(3)(b), the superior incurs liability for the affirmative act of commanding another to commit the crime.[311] For this reason, the Defence avers that the level of control required for the superior who orders must be comparable to effective control

[300] Decision on the confirmation of charges against Dominic Ongwen, ICC-02/04-01/15-422-Red, *see* pp 71 to 104.
[301] *Bemba et al.*, Judgment pursuant to Article 74 of the Statute ('Trial Judgment'), ICC-01/05-01/13-1989-Red, paras 74 to 77.
[302] Annex F, p. 3, para. 18 (emphasis removed).
[303] *Ntaganda*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute of the Charges of the Prosecutor Against Bosco Ntaganda ('*Ntaganda* Confirmation Decision'), ICC-01/04-02/06-309, para. 145.
[304] *Bemba et al.*, Trial Judgment, ICC-01/05-01/13-1989-Red, para. 77.
[305] *Ntaganda* Confirmation Decision, ICC-01/04-02/06-309, para. 145.
[306] *Ntaganda*, Confimation Decision, ICC-01/04-02/06-309, para. 145; *Bemba et al.*, Trial Judgment, ICC-01/05-01/13-1989-Red, para. 79.
[307] *Bemba et al.*, Trial Judgment, ICC-01/05-01/13-1989-Red, para. 81.
[308] *Bemba et al.*, Trial Judgment, ICC-01/05-01/13-1989-Red, para. 82.
[309] *Mudacumura*, Decision on the Prosecutor's Application under Article 58, ICC-01/04-01/12-1-Red, para. 63.
[310] *Bemba et al.*, Trial Judgment, ICC-01/05-01/13-1989-Red, para. 77.
[311] Annex F, p. 4.

(as required by Article 28).[312] Given that liability under Article 25(3)(b) ordering is contingent on the perpetrators having committed or attempting to commit a crime as a direct result of the superior's orders, it logically appears to encapsulate a level of control between the superior and the subordinates akin to effective control.[313]

207. Alternatively, even if the Trial Chamber rejects that a level of control akin to effective control is applicable, the Defence maintains that it is necessary to establish a strong level of control between the superior and the subordinates. The Pre-Trial Chamber found in *Muducumura* that the following demonstrated that Mr Mudacumura acted in a position of authority under Article 25(3)(b): he was "top military commander" of the FDLR which was a "large, well organised organisation which has a clear hierarchical structure", he had "control over his forces" and authority to recruit, discipline, promote and remove them, his level of dominance and control over the FDLR troops extended to the degree that he would "take efforts to prevent soldiers from demobilising, to authorise their marriage and to control the information they received from the outside world or even from within the FDLR" and his orders had to be complied with.[314]

208. The Prosecution failed to demonstrate that Mr Ongwen was in a position of authority over the subordinates that committed the crimes in counts, that the order had a direct effect on the crime committed or the attempted commission, or that Mr Ongwen meant to order the offence or was aware that the crime(s) would be committed as a result of the execution of his order(s).

D. Aiding and Abetting

209. Charges 1 to 9 contain the alternative of Article 25(3)(c) of the Statute. Pursuant to Article 25(3)(c) of the Statute, 'a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person […] [f]or the purpose of facilitating the commission of such crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission'. According to Trial Chamber VII in *Bemba*, liability under Article 25(3)(c) is dependent on the commission or at least attempted commission of an offence by the principal perpetrator.[315] The assistance must

[312] *See* *Blaškič* Appeal Judgment, IT-95-14-A, para. 69.
[313] *See* *Blaškič* Appeal Judgment, IT-95-14-A, para. 69 and *c.f.* *Hadžihasanović* Appeal Judgment, IT-01-47-A, paras 225 to 232 – when subordinates disregard orders, do not comply or act independently, the accused does not have effective control.
[314] *Mudacumura*, Decision on the Prosecutor's Application under Article 58, ICC-01/04-01/12-1-Red, para. 64.
[315] Judgment pursuant to Article 74 of the Statute, ICC-01/05-01/13-1989-Red ('Bemba et al TJ'), para. 84

have furthered, advanced or facilitated the commission of such offence.[316]

210. According to the Appeals Chamber, the objective elements under Article 25 (3)(c) of the Statute are fulfilled when the person's assistance in the commission of the crime facilitates or furthers the commission of the crime.[317]

211. In respect to the subjective elements of Article 25(3)(c), 'purpose' found in the opening clause '[f]or the purpose of facilitating the commission of such a crime' in Article 25(3)(c) of the Statute goes beyond the ordinary *mens rea* standard encapsulated in Article 30 of the Statute and penalises such assistance only if a higher subjective element is satisfied on the part of the accessory.[318] This means that the accessory must have lent his or her assistance with the aim of facilitating the offence.[319] Liability for aiding and abetting an offence requires proof that the accessory also had intent with regard to the principal offence pursuant to Article 30 of the Statute, which applies by default. This means that the aider or abettor must at least be aware that the principal perpetrator's offence will occur in the ordinary course of events.[320]

212. The Defence submits that the Prosecution has failed to prove beyond a reasonable doubt that Mr Ongwen was present at Pajule, the subject of Counts 1-9. If the Court finds that Mr Ongwen was present, which the Defence does not concede, there is insufficient evidence to prove beyond a reasonable doubt that Mr Ongwen either made a substantial contribution or intended that the crimes occur.

E. Common Purpose under Article 25(3)(d)(i) and (ii)

213. The Confirmation Decision confirmed Article 25(3)(d)(i) and (ii) as an alternative mode of liability for all counts except counts 50-60. The Defence incorporates its submissions made in the Defects Series with regards to Article 25(3)(d)(i) and (ii).[321] The Defence submits that all allegations of criminal liability through Article 25(3)(d)(i) and (ii) should be dismissed for facial deficiency. In any event, the Prosecution failed to meet the required elements for

[316] Bemba et al TJ, para. 94.
[317] 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, 8 March 2018, ICC-01/05-01/13-2275-Red ('Bemba et al AJ'), para. 1327.
[318] Bemba et al TJ, para. 95.
[319] Bemba et al TJ, para. 97. Knowledge is insufficient.
[320] Bemba et al TJ, para. 98.
[321] *Ongwen*, Defence Motion on Defects in the Confirmation of Charges Decision: Defects in Notice in Pleading of Command Responsibility under Article 28(a) and Defects in Pleading of Common Purpose Liability under Article 25(3)(d)(i) or (i) (Part III of the Defects Series) 'Defect Series Part III', ICC-02/04-01/15-1432, paras 31 to 65.

Article 25(3)(d)(i) and (ii) liability for the crimes committed at Pajule, Odek, Lukodi, Abok (counts 1 to 49), SGBC and child soldier crimes (counts 61 to 70).

214. The Defence reiterates its position that the vagueness of the CoC Decision regarding the level of contribution required for common purpose liability, which means that there is no definition for the requisite level of contribution, violates the fair trial rights of Mr Ongwen.[322] It also reiterates that the Prosecution's change in legal theory, initially stating in the PPCB that Mr Ongwen's contribution to the common plan was substantial and later alleged in the PPTB that there is no threshold requirement regarding the contribution.[323] This results in a lack of notice to the Defence and a violation of fair trial rights.[324]

215. Article 25(3)(d) is not well-defined in the Statute. The delegations had "divergent views" regarding its inclusion[325] as well as on the details of a definition of a common purpose type of liability.[326] Given this, Article 22(2) of the Statute should be applied, and Article 25(3)(d) should be interpreted in favour of Mr Ongwen.

216. The Defence submits that for Article 25(3)(d), the Prosecution needs to prove beyond a reasonable doubt that (1) a crime within the jurisdiction of the court was attempted or committed; (2) a group of people acting with a common purpose attempted to or committed the crime; (3) Mr Ongwen contributed in any other way; (4) his contribution was significant; (5) the contribution was intentional and made (i) with the aim to further the criminal activity or criminal purpose of the group and (ii) with the knowledge of the intention of the group to commit the crime. The Defence notes that the operative part of the CoC Decision charged Mr Ongwen for counts 1 to 49 and 61 to 70 for "[article 25(3)] (d) (i) **and** (ii)"[327] rather than (d)(i) **or** (ii) as in the Statute. The Defence contends that the Confirmation Decision is the charging document in this case and, consequently, the Prosecution must establish both (i) *and* (ii).

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[322] Defects Series Part III, ICC-02/04-01/15-1432, paras 31 to 40.
[323] Defects Series Part III, ICC-02/04-01/15-1432, paras 37 to 40. *See also Ongwen*, Public redacted version of "Pre-confirmation brief", ICC-02/04-01/15-375-Conf-AnxC ('PPCB'), ICC-02/04-01/15-375-AnxC-Red2, para. 613 and *Ongwen*, Prosecution's Pre-Trial Brief ('PPTB'), ICC-02/04-01/15-533, para. 152.
[324] Defects Series Part III, ICC-02/04-01/15-1432, para. 37 to 40.
[325] UNGA Preparatory Committee on the Establishment of the International Criminal Court, Decisions Taken by the Preparatory Committee at its session held from 11 to 21 February 1997, U.N. Doc. A/AC.249/1997/L.5, 12 March 1997, pp 21-22.
[326] Report of the Preparatory Committee on the Establishment of the International Criminal Court Vol. I, Proceedings of the Preparatory Committee during March-April and August 1996, G.A. Official Records, 51st Sess. Supp. No. 22 (A/51/22), 13 September 1996, para. 191.
[327] *Ongwen*, Decision on the confirmation of charges against Dominic Ongwen, ICC-02/04-01/15-422-Red *see* p. 73 to 104, emphasis added.

i. Threshold for the contribution

217. The Appeals Chamber has yet to decide on the level of contribution required under Article 25(3)(d).[328] The Defence maintains that the level of contribution required is a "significant contribution". The *Katanga* Trial Chamber found that the contribution of the accused needs to be "connected to the commission of the crime and not solely to the activities of the group in a general sense" and that the requisite level of contribution is "a significant contribution, analysed in relation to each crime, [that] must be proven beyond a reasonable doubt."[329]

ii. Common purpose

218. The Defence reiterates its position that neither the Confirmation Decision nor the auxiliary documents provide proper notice to Mr Ongwen regarding any common purposes and the PPCB confuses common purpose and common plan, and the elements of a common plan are not pleaded.[330] The Defence avers that Article 25(3)(a) requires a contribution to a common plan whereas Article 25(3)(d) requires a contribution to a specific crime, and an essential contribution towards a common plan does not automatically amount to a significant contribution to a specific crime for a common purpose.[331]

219. Specifically, the Defence refers to its submission, while noting that it does not waive its objection to the PPTB as a source of notice, that neither the PPCB nor the PPTB, aside from Kony, names the other members of the group of persons acting with a common purpose.[332] The Defence avers that a "common purpose groups must fulfil the material elements of the crimes and include all those who made direct contributions to bringing about those material

[328] *See Mbarushimana* 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" ('Appeal Judgment'), ICC-01/04-01/10-514 OA4, Judgment *c.f.* with the Dissenting opinion of Judge Fernandez in *Mbarushimana* Appeal Judgment.
[329] *Katanga*, Judgment pursuant to article 74 of the Statute ('Trial Judgment'), ICC-01/04-01/07-3436-tENG, para. 1632. The Defence notes the differing holdings of Pre-Trial Chambers regarding the threshold of contribution required for example, *Mbarushimana* Decision on the confirmation of charges, ICC-01/04-01/10-465-Red, paras 276-285 *c.f. Ruto and Sang*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-01/11-373, para. 354 and *Al Hassan*, Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, ICC-01/12-01/18-461-Corr-Red, which nonetheless recognizes in footnote 2354 at para. 948 that a different approach was taken by the Trial Chamber in *Katanga* and the Pre-Trial Chamber in *Mbarushimana*.
[330] Defects Series III, ICC-02/04-01/15-1432, paras 41 to 63. *See* PPCB paras 363-365 and 663 ICC-02/04-01/15-375-AnxC-Red2, and PPTB paras 755 and 749-751, ICC-02/04-01/15-533.
[331] *Katanga* Trial Judgment, Minority Opinion of Judge Christine Van den Wyngaert, ICC-01/04-01/07-3436-Anx1, para. 38.
[332] Defects Series III, ICC-02/04-01/15-1432, paras 46 to 50.

elements, either personally or through others."[333]

220. The Defence also submits that the common purpose of the group needs to be a criminal purpose.[334] In the event that the Trial Chamber finds that the purpose of the group may be non-criminal, the Defence avers that the crime needs to be "an inherent part of the common plan".[335] The Defence maintains that all the members of the group need to share the same intent, which is the intent to cause the consequences that establish the crime or awareness that the crime "will occur in the ordinary course of events."[336]

iii. Requisite intent

221. The *Katanga* Trial Chamber found, regarding the requirement of intent under Article 25(3)(d), that the "actions [of the accused] must have been deliberate and made with awareness"[337] and "that the accused intended to engage in the conduct which constitutes a contribution" and was aware that the actions contributed to the actions of the group acting with a common purpose.[338]

iv. Article 25(3)(d)(i) and (ii)

222. The Defence avers that in relation to Article 25(3)(d)(i), the Prosecution needs to prove that Mr Ongwen had the aim to further the criminal activity or criminal purpose, and that Mr Ongwen had the specific intent to further the criminal activity or the criminal purpose of the group.[339]

223. Alternatively, should the Trial Chamber find that Article 25(3)(d)(i) only requires the accused to have "a more general understanding of the group's criminal purpose",[340] the Defence nonetheless maintains that the Prosecution needs to demonstrate that Mr Ongwen understood, even if generally, the group's criminal purpose or activity and that he had the intent to further

[333] *Katanga* Trial Judgment, Minority Opinion of Judge Christine Van den Wyngaert, ICC-01/04-01/07-3436-Anx1, para. 285.
[334] *See Katanga* Trial Judgment, Minority Opinion of Judge Christine Van den Wyngaert, ICC-01/04-01/07-3436-Anx1, para. 286.
[335] *Katanga* Trial Judgment, Minority Opinion of Judge Christine Van den Wyngaert, ICC-01/04-01/07-3436-Anx1, para. 286 and *see also Katanga* Trial Judgment ICC-01/04-01/07-3436-tENG, para. 1627.
[336] *Katanga* Trial Judgment, ICC-01/04-01/07-3436-tENG, para. 1627.
[337] *Katanga* Trial Judgment, ICC-01/04-01/07-3436-tENG, para. 1638.
[338] *Katanga* Trial Judgment, ICC-01/04-01/07-3436-tENG, para. 1639.
[339] *See* Annex F, p. 5, para. 33.
[340] *See* for example *Katanga* Trial Judgment, Minority Opinion of Judge Christine Van den Wyngaert, ICC-01/04-01/07-3436-Anx1, para. 288 and *see Mbarushimana*, Decision on the Confirmation of Charges, Dissenting Opinion of Judge Monageng, ICC-01/04-01/10-465-Red, para. 128.

this purpose or activity.

224. Regarding Article 25(3)(d)(ii), the Defence submits that the Prosecution needs to prove beyond a reasonable doubt that Mr Ongwen knew of the intention of the group to commit each of the crimes committed as part of the common purpose at the time he allegedly participated in the conduct that amounted to his contribution.[341] It is insufficient to prove that Mr Ongwen had knowledge of a general criminal intention.[342]

IV. THE INTERCEPTED RADIO COMMUNICATIONS IS UNRELIABLE EVIDENCE

225. The Prosecution has tethered the purported radio intercepts of Mr Ongwen's claims of responsibility and other recordings to proving most of its case. Despite this, it has failed to invest sufficient focus and care in presenting the Trial Chamber a body of material upon which the Trial Chamber can find facts. In sum, the Defence submits that:

a. most of the material is irrelevant and the failure to translate, transcribe it, or attempt to attribute other speakers has deprived the Trial Chamber of context;

b. the Prosecution did not authenticate the recordings which should bar their admission;

c. in any case, the original intercept recordings are unreliable evidence;

d. particularly due to the failure to conduct an authentication procedure, the body of recordings was plausibly tampered with prior to being provided to the Prosecution by one party to the LRA conflict, and therefore the prejudice of admission outweighs their probative value;

e. the 'enhancement' may have further contributed to the unreliability of the evidence;

f. the testimonial and Rule 68 process of attribution processes were flawed as a result; and

g. the in-court attribution witnesses themselves are not credible or reliable.

226. The Defence submits that the factors discussed above mean that the Prosecution has failed to prove beyond a reasonable doubt that the person speaking whom the Prosecution alleges is Mr Ongwen is in fact Mr Ongwen. Therefore, it is submitted, only conclusions and inferences

[341] *Katanga* Trial Judgment, ICC-01/04-01/07-3436-tENG, paras 1641-42.
[342] *Katanga* Trial Judgment, ICC-01/04-01/07-3436-tENG, para. 1642.

which are favorable or doubts about his guilt can be drawn from the body of recordings.

227. Prior to the trial, Lead Counsel for the Prosecution has stated that the intercepted radio material "plays a very considerable role in the way the Prosecution puts its case".[343] The reasoning of the Confirmation Decision relies upon the intercept evidence as a super-structure to confirm the charges. The material was discussed more specifically in respect to contextual elements of the charges,[344] discussed in respect to the crime-sites,[345] and the material was discussed in respect to the abductions of women[346] and children.[347]

228. The Pre-Trial Chamber noted that the Defence did not challenge the reliability of the intercept material;[348] however, the Pre-Trial Chamber indicated that the trial is the correct venue for a fuller evaluation.[349] At trial, the Defence contested the reliability of the intercepts in cross-examination as discussed below and indicated both in its opening statement[350] and in an objection[351] that it contests the attribution of Mr Ongwen in the recordings.

229. In addition to relevance, Article 69(4) of the Statute requires taking account of the prejudice that evidence admission may cause to a fair trial. The Trial Chamber must consider the inherent reliability of an item of evidence when determining probative value. If an item of evidence does not display sufficient indicia of reliability, it may be excluded.[352]

230. Secondly, even if the evidence itself is reliable, the Trial Chamber has to evaluate whether the purported attributions made by Prosecution witnesses are accurate or reliable themselves. This involves considering whether the witnesses themselves are credible and reliable and also whether, their attribution is reliable given other issues with the evidence and elapse of time.

231. Finally, the Trial Chamber will have to construe the communications in context. The inferences that can be drawn from the purported admissions advanced by the Prosecution are

[343] T-25, p. 10, lns 17 and 18.
[344] Confirmation Decision, para. 60.
[345] Confirmation Decision – Pajule: para. 65; Odek, para. 71; Lukodi: paras 76 and 78; and Abok: paras 81 and 83.
[346] Confirmation Decision, para. 136.
[347] Confirmation Decision, para. 141.
[348] Confirmation Decision, para. 51.
[349] The Pre-Trial Chamber indicated that it had reached "the identical conclusion" as Confirmation Decision, para. 49 to the intercept evidence in para. 50. This is also consistent with the comment by Pre-Trial I in Lubanga that "the Chamber notes that Pre-Trial Chamber rulings on the admissibility and probative value of evidence are not binding on a Trial Chamber", 24 May 2007, ICC-01/04-01/06-915, para. 75.
[350] T-179-Conf, p. 33-38.
[351] T-251-Conf (cross-examination of D-42), p. 45, lns 18-25.
[352] Decision on the Prosecutor's Bar Table Motions, 19 December 2010, ICC-01/04-01/07-2635 ('Katanga Bar-Table Decision'), para. 21 *citing* ICC-01/04-01/06-1399, para. 30.

several and certainly not all inferences lead to the claimed admissions of guilt. Construing the meaning of the intercepts in respect to other evidence and testimony appears in the sections on the themes to which the Prosecution attributes them.

A. Most of the documentary material lacks relevance

232. In submitting the intercept materials, the Prosecution did not even try[353] to explain why most of the intercept materials, including the recordings, are relevant or probative.

233. The Prosecution has simply not translated and interpreted through its witnesses the overwhelming vast majority of the recordings. Therefore, none of that material, including the related log-books and rough notes, should be admitted into evidence and used in an incriminatory fashion. Cherry picking excerpts when, according to the Prosecution, an entire context exists should not be permitted and is not fair to the Accused. This material should only be used is if it raises doubts about guilt or is relevant to Article 31(1) defences.

B. Lack of authenticity

234. For an item to be found reliable and relied upon, it must be authenticated. In the absence of authentication, there can be no guarantee that a document is what the party tendering it purports it to be.[354] Unless an item of evidence is self-authenticating, or the parties agree that it is authentic, it is for the party tendering the item to provide admissible evidence demonstrating its authenticity.[355] A mere general reference to the record of the trial is unsatisfactory since it is not for the Chamber to start its own investigations into material which may prove a document's authenticity and reliability.[356]

235. Those private documents that can readily be authenticated by the party against whom they are tendered will be presumed authentic, unless such party challenges the authenticity and provides evidence to that effect. Private documents whose authenticity is dependent upon a connection with a third person or organisation *must* be authenticated by independent evidence. Such evidence must provide proof of authorship or adoption and integrity. If the date of the document cannot be inferred from the document itself, evidence of it should also

[353] Prosecution's formal submission of intercept evidence via the 'bar table', 28 October 2016, ICC-02/04-01/15-580, para. 17 (emphasis added).
[354] Katanga Bar-Table Decision, para. 22.
[355] Katanga Bar-Table Decision, para. 23.
[356] Katanga Bar-Table Decision, para. 23.

be provided. Any form of authentication by the alleged author of the document is preferable.[357]

236. The Defence submits that the recordings and associated documents are private documents or materials, or share more in common with private materials than public ones because of the circumstances they were created and limited extent of distribution. It is not possible for the Defence to authenticate such materials that come from the military and the security services. At the time of the bar-table motion, the Defence did not have the benefit of witness testimony[358] and it did not concede the authenticity of the material.[359]

237. The Prosecution wants the Trial Chamber to find the intercept material authentic because "[t]his body of intercepted communications is too voluminous and its sources too diverse to be anything other than genuine and highly probative".[360] This is precisely the kind of general reference the *Katanga* Trial Chamber stated was unsatisfactory.[361]

238. The witnesses who testified to creating the materials are unreliable, biased, or not credible to confirm the authenticity of the materials let along the reliability of it. Witness P-38, who might also be pointed to authenticate the material, appears to have only handled the material. Additionally, the chain of custody on the material prior to its arrival with the Prosecution trial team is murky. Having asserted the authenticity in its opening statement, the Prosecution led evidence that many of the tapes actually showed indicia of being copies.[362]

239. When the Defence has inquired about the chain of custody for the early investigations, which is when many of the recordings were collected, the result has revealed systemic failures in the Prosecution's chain of custody system.[363] As such, the authenticity of much of the material has not been proven and therefore they should only be relied upon to the benefit of Mr Ongwen.

240. To the extent that the Trial Chamber considers the intercept operation material of the Ugandan Internal Security Organisation ('ISO') and UPDF as comprising official documents,

[357] Katanga Bar-Table Decision, para. 24(c).
[358] Defence Response to "Prosecution's formal submission of intercept evidence via the 'bar table'" (ICC-02/04-01/15-580), 21 November 2016, ICC-02/04-01/15-599 ('Defence Intercept Bar-Table Response'), para. 16.
[359] Defence Intercept Bar-Table Response, para. 17.
[360] PPTB, para. 62.
[361] *See* para. 234.
[362] T-128, p. 8, ln. 10 to p. 10, ln. 14.
[363] *See* para. 112.

official documents that are not publicly available from official sources are not self-authenticating and must be certified by the relevant authority. Documents which do not bear extrinsic indications as to their origin and author must be authenticated by way of attestation of the originating organisation.[364]

C. The original intercept recordings are unreliable

241. Once the authenticity of an item has been established, the Trial Chamber must ascertain whether the evidence displays such qualities that, when considered alone, it could reasonably be believed.[365] If an item does not display sufficient indicia of reliability, it may be excluded.[366] Evidence of originality and integrity is necessary before audio material can be admitted.[367]

242. The original recordings are unreliable because (1) their source renders them unreliable, (2) the purpose for which they were created makes a conviction based upon them unsafe, (3) the conditions of their creation – a conflict with "rudimentary" equipment and many environmental problems, and (4) the failure of the Prosecution to adequately examine and scrutinize the tapes.

i. The recordings are unreliable

243. The recordings were provided by one party of a conflict, created in the context of a conflict, and there are indications that the recordings have been tampered with, all of which make the materials unreliable.

244. There is no finite list of criteria that are to be applied in determining reliability. Factors the Trial Chamber may consider include whether the *source* of the information has an allegiance towards one of the parties in the case or has a personal interest in the outcome of the case. The *purpose* for creating the item is also relevant to reliability.[368]

245. The Prosecution has repeated[369] that the "intercept evidence is *unaffected by human memory's fallibility*, and *free of the bias or suspect motivations* that have the potential to taint witness testimony".[370] Reliability is also asserted because they were created not-for-trial purposes and

[364] Katanga Bar-Table Decision, para. 24(b).
[365] Katanga Bar-Table Decision, para. 26.
[366] Katanga Bar-Table Decision, para. 21 *citing Lubanga*, 13 June 2008, ICC-01/04-01/06-1399, para. 30.
[367] Katanga Bar-Table Decision, para. 24(d).
[368] Katanga Bar-Table Decision, para. 27 (a) and (d).
[369] PPTB, para. 88; T-26, p. 43, lns 3-6.
[370] Emphasis added.

were collected for intelligence-gathering purposes and used to prevent LRA attacks.[371] The latter Prosecution claim actually undermines the former. It is precisely because the recordings and other materials come from one party to a conflict that they are unreliable.

246. The Government of Uganda appears to have targeted Mr Ongwen for prosecution as part of its relationship with the ICC. The Defence made disclosure requests[372] in relation to list from the Government of Uganda. Mr Ongwen's name appears at the bottom of a list entitled "Most Notorious LRA Commanders Recommended for Trial by the ICC".[373]

247. The zealotry in the testimony of P-3 should underscore the mentality that those in UPDF had for the LRA. In response to a question about the Odek attribution, P-3 stated "You started fighting me before the ICC. You're fighting with me, against me with Dominic Ongwen".[374] P-3 understood himself to be investigating the LRA.[375]

248. The Prosecution provided ISO and the UPDF with tapes.[376] The witnesses knew that they were in a position to contribute to the punishment of their enemies. Does it make sense that the interceptors would provide exculpatory material[377] which implicated their own soldiers? The motivation would be to record and provide those conversations which cast their opponents in the worst possible light. Moreover, the material passed through a committee which answers to the President of Uganda and P-38 indicated that he made a selection.[378]

249. The tapes can provide something of a record if they were not tampered with. Yet, the Prosecution lead evidence through its own witnesses that at least some of the tapes were not originals.[379] In fact, in the opinion of their expert "It is likely [...] some or all of the supplied cassette tapes were copies and not first generation recordings".[380]

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[371] PPTB, para. 86.
[372] Public redacted version of "Corrected version of 'Defence Request for Disclosure Pursuant to Rule 77 and Article 67(2) and Request for a Remedy in Light of Late and Untimely Disclosure', filed 4 September 2018", filed 17 September 2018 (ICC-02/04-01/15-1329-Conf-Corr), 8 October 2018, ICC-02/04-01/15-1329-Corr-Red.
[373] UGA-OTP-0032-0036.
[374] T-45-Conf, p. 42, lns 21-24.
[375] T-42-Conf, p. 38, lns 1-7.
[376] PPTB, para.84.
[377] Defence Request for a Disclosure Order Regarding Material Related to the Circumstances of Hostilities between the LRA and Ugandan Government Pursuant to Article 67(2) and Rule 77, 16 March 2017, ICC-02/04-01/15-759.
[378] T-128, p. 10, lns 4-20; T-128, p. 9, lns 16-24.
[379] T-128, p. 8, ln. 2 to p. 10, ln. 14.
[380] T-128, p. 8, lns 6-7.

250. On cross-examination, Prosecution witness Mr French was asked to identify discontinuities in a visual depiction of recordings from allegedly close in time to several of the intercepts which the Prosecution considers core to its case. He confirmed three out of three potential discontinuities identified by the Defence[381] describing one as more "pronounced".[382]

251. Discontinuities in the tapes represent gaps in the evidence. Discontinuities in temporal proximity, whether hours or even weeks, to alleged crimes should be of great concern to any fact-finder since the inferences that could be drawn are wide and should raise doubts, from the omission of information which could shed light on duress being placed upon Mr Ongwen, to orders that other individuals attack the charged sites, and so on.

252. Lead Counsel Ayena Odongo raised the possibility that entire conversations could have been fabricated like a collage which Mr French agreed was possible. [383] Even putting aside actual drastic alteration of the underlying material, intentional or unintentional selection can significantly bias the probative value of material. For these reasons, the original intercept recordings are too unreliable to be used to find the incriminatory facts.

ii. The Prosecution failed to critically examine or investigate the tapes and missed significant problems impacting upon their reliability

253. The failure to identify the problems with the tapes may have resulted from an organisational confirmation bias. Witness P-3, for example, seems to suggest that the Prosecution only asked him for specific tapes.[384] It seems the Prosecution formed a hypothesis that the tapes were the proverbial 'smoking gun' and then proceeded to un-critically investigate the tapes themselves. The overconfidence in the objective strength of this evidence seems to have meant that contrary explanations or weaknesses with the evidence were not considered.

254. Audio tape evidence requires an expert to critically examine the evidence. This involves "First and foremost, if you are authenticating analogue tapes, checking for signs that you have the original and not a copy is, is an obvious one"[385] and "[c]hecking for things like edits, listening out for if something changes specifically in the background which shouldn't

[381] T-128, p. 41, ln. 12 to p. 45, ln. 9; T-128, p. 46, ln. 5 to, p. 47 ln. 4; and T-128, p. 48, lns 5 to 15.
[382] T-128, p. 46, ln. 5 to, p. 47 ln. 4.
[383] T-128, p. 80, ln. 19, p. 77, ln. 2.
[384] T-46, p. 9, lns 1-4 ("there were several LRA attacks, so at the time that ICC came to me, they selected the places or the incidents that they were interested in. They picked only those tapes that they were interested in, and that is what I gave them").
[385] T-128, p. 34, lns 20-22.

occur".[386] The Prosecution's witness Mr French had done this as part of his career.[387] Yet, the Prosecution did not ask him to conduct such an exercise.[388] The Trial Chamber should draw inferences from this failure – whatever the reasons for it.

255. Without being asked to conduct an examination, Mr French spontaneously raised the problem that the tapes may be copies.[389] In a short period of cross-examination, the Defence was able to establish with him many discontinuities.[390] These indicated breaks in the recordings which are important to interpreting the tape content. One can only wonder how many more problems could be identified had the Prosecution applied the full resources of its office.

256. Additionally, certain specialist software might have been able to provide a greater insight into who was speaking on the recordings in the Prosecution possession, but the Prosecution chose not to use the software[391] or perhaps the results undermine its case.

iii. The conditions, technical problems, and environment in which the recordings were created cumulatively make the recordings unreliable

257. The nature and characteristics of the item is a factor for evaluating the items' reliability.[392] The Prosecution has argued that the recordings are reliable because they were relied upon to conduct military operations;[393] however, this actually cuts in the opposite direction. The intercepts were created for the purpose of war operations, this means that by their very nature, the evidence was not created with fair-trial protections. The creation of the recordings lacked a professional forensic process and had no accompanying fair-trial safeguards. P-3 demonstrates the systematic bias in the tapes and log-books when he describes what was forwarded to the chain of command as "we select the main important pieces of information, mainly operational information."[394] Moreover, they would tape over un-important information.[395] Being used for military operations thus makes the recordings and associated material less reliable for a criminal process and not more.

[386] T-128, p. 35, lns 12-13.
[387] T-128, p. 20, ln. 1-2.
[388] T-128, p. 36, ln. 18 to p. 37, ln. 25; T-128, p. 11, lns 10 to 23.
[389] T-128, p. 8, ln. 2 to p. 10, ln. 14.
[390] T-128, p. 36, ln. 18 to p. 37, ln. 25; T-128, p. 11, lns 10 to 23.
[391] *See, inter alia*, T-119-Conf, p. 27, ln. 15; p. 28, lns 1-4 and lns 10-14.
[392] Katanga Bar-Table Decision, para. 27(b).
[393] PPTB, para. 86.
[394] T-42-Conf, p. 23, lns 6-7.
[395] T-42-Conf, p. 40, lns 11-14.

258. The recording conditions and environment make the recordings unreliable. The Prosecution itself concedes that there "were some shortcomings".[396] These include atmospheric conditions,[397] which distorted the character of voices and/or messages and made it "sometimes hard for the interceptors to hear and understand what was being said".[398] Mr French, someone familiar with audio evidence, described the quality of the recordings as "quite poor"[399] and "low quality".[400]

259. The Prosecution concedes the "material was intercepted and recorded with rudimentary equipment"[401] and Mr French suggests that there are indications of power failures in the recordings.[402] He also confirmed that the different equipment used may change the voices that are heard. It is possible to conclude that what the radio operators were listening to in the room sounded differently from what they heard on the tapes because the quality of the voices was likely altered by the recording equipment[403] and P-3 describes this phenomenon during his direct examination.[404] This raises questions about the reliability of the recordings and later attributions and is probative of the fact that some of the original attributions of Labongo taking responsibility for Odek,[405] rather than Mr Ongwen, are more accurate.[406]

260. The Prosecution concedes messages were being relayed due to environmental conditions,[407] and P-205 confirmed that messages were often relayed for a variety of reasons,[408] so even if an individual can be attributed, what basis is there to conclude that they are speaking about their own actions and not in fact simply relaying messages of others. This uncertainty of actual sender should lead the Trial Chamber to conclude that the recordings are not reliable.

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396 T-26, p. 50, ln. 7.
397 T-26, p. 50, lns 8-9.
398 T-26, p. 50, lns 9-10.
399 T-128, p. 36, lns 23-24.
400 T-128, p. 72, ln. 5.
401 PPTB, para. 83.
402 T-128, p. 32, lns 5-8.
403 T-128, p. 53, ln. 1 to p. 55, ln. 3.
404 T-42-Conf, p. 39, lns 21, p. 40, ln. 2 ("Q. And what was the quality of the sound that you could hear on the tape compared to the quality of the sound that came from the radio? A. Yes, there are some differences because the one that you listen direct from radio is very clear because it is a direct sound, but *the one which is recorded some time is not very clear*. But even then, even then these tapes still record very well and very clearly but, of course, the quality, when you compare with the ones that you listen to directly from radio, *there is some, a bit of difference*." – emphasis added).
405 T-45-Conf, p. 37.
406 T-128, p. 53, ln. 1 to p. 55, ln. 3.
407 T-26, p. 50, lns 10-14.
408 T-47, p. 65, lns 1-8.

261. The Prosecution concedes the "radio operators [could not] intercept and record all the LRA's communications"; [409] however, what was not mentioned was that tapes were recorded over when they were deemed to be "not very important".[410] It is therefore impossible to know whether any of the recordings provided actually occurred on the days indicated.

262. The Prosecution also concedes the record-keeping was not always meticulous. [411] The labels on tapes fell off[412] and the records were damaged by damp.[413] In testimony this was described as a full-scale leakage in the roof.[414] The forensic record is also left in disarray due to seeming intentional damage. The Prosecution referred to tension[415] between staff from the ISO and the UPDF who worked in close proximity at Gulu barracks but it was not mentioned that one of the staff member in question appears to have been tearing pages out of the records.

iv. Conclusion: the cumulative problems with the tapes mean that they are unreliable and the Trial Chamber cannot rely upon them to convict

263. From above, taken in isolation and cumulatively, the political influence which may have acted upon the record and the poor conditions under which the materials were created and stored make the originals unreliable. The Defence submits that the only use to which the recordings can fairly be employed is for exculpatory purposes. If the Trial Chamber concludes that the material is sufficiently reliable to not exclude entirely, then relying upon material which is de-contextualised, plausibly tampered with, and forensically degraded would be highly prejudicial to Mr Ongwen and therefore this should lead to it not being relied upon.

D. The Prosecution 'enhancement' contributed to the unreliability of the recordings

i. The Prosecution staff who 'enhanced' many of the recordings lacked the knowledge or skills to avoid altering the recordings

264. Mr Laroche received an insufficient training and did not have enough experience for enhancing the recordings.[416] Almost from the beginning of his cross-examination, he said "I'm not expert in the field of audio enhancement".[417] He later said that he was "not an expert

[409] PPTB, para. 83.
[410] T-42-Conf, p. 40, lns 11-16.
[411] PPTB, para. 83.
[412] PPTB, para. 83.
[413] PPTB, para. 83.
[414] T-39-Conf, p. 43, lns 6-11.
[415] PPTB, para. 84.
[416] T-128, p. 57, lns 1 to 25.
[417] T-119-Conf, p. 16, ln. 2.

in audio digital, [or] audio forensic[s]"[418] and "I'm not expert in audio."[419] He was not only not an expert, he only had a few days of training in audio enhancement.[420] The training and certification were not an official or comprehensive training.[421] The certificate[422] was "not […][a] recognised qualification as such"[423] there was not a formal curriculum.[424]

265. Mr Laroche effectively admitted that enhancement is partly an art[425] – arts rely upon talent or practice. Mr French commented that the CEDAR system is not a 'turn-key' device and requires expertise and experience[426] and attentiveness to differences in individual audios.[427] Though Mr Laroche suggested that he did not follow a recipe,[428] it became clear that he was applying Mr French's strategy with minor differences.[429]

266. What has been said about Mr Laroche can be said about Ms Zanetta who was the other Prosecution person 'enhancing' the recordings. It appears that Ms Zanetta did not have expertise in audio processing.[430] Her work was not supervised by anyone,[431] and there is not a clear record of which tapes were worked on by whom.[432] If either person were found to have made major errors, it would be impossible to identify all recordings they worked on to check.

267. He was not familiar with a basic principle of digital audio quality and sought to hide his ignorance of a term[433] which was described as a "rule of thumb"[434] easily explainable by Mr French.[435] Mr French's statement talks about a feature of CEDAR[436] for which knowledge of the principle would be required. Mr Laroche also did not know what a frequency response

[418] T-119-Conf, p. 24, lns 1 to 22.
[419] T-119-Conf, p. 42, ln. 24 to p. 44, ln. 16.
[420] T-119-Conf, p. 14, ln. 23 to p. 26, ln. 8.
[421] T-128, p. 20, ln. 16 to p. 21, ln. 11.
[422] T-128, p. 21, ln. 21 to p. 22 ln. 11.
[423] T-128, p. 22, ln. 9.
[424] T-128, p. 22, ln. 19 to p. 23, ln. 15.
[425] T-119-Conf, p. 45, ln. 13 to p. 46, ln. 4.
[426] T-128, p. 57, lns 1 to 25.
[427] T-128, p. 56.
[428] T-119-Conf, p. 19, lns 2-21.
[429] T-119-Conf, p. 44, ln. 17 to p. 45, ln. 5.
[430] T-119-Conf, p. 20, ln. 23 to p. 19, ln. 11.
[431] T-119-Conf, p. 22, lns 2 to 8.
[432] T-119-Conf, p. 23, lns 17 to 24.
[433] T-119-Conf, p. 17, ln. 22 to p. 19, ln. 11.
[434] T-128, p. 23, ln. 16 to p. 24, ln. 17.
[435] T-128, p. 24, ln. 18 to p. 25, ln. 5.
[436] UGA-OTP-0269-0015 at 0019, para. 18.

is.[437] A frequency response is an important concept in the area of signal processing and helps to explain why the radio in the room in Gulu sounded different to a tape-recording.[438]

268. The training of these individuals was clearly inadequate to the task they were given. Reliance on their work outside exonerating conclusions would be prejudicial to Mr Ongwen. Given the above, that the Prosecution entrusted evidence to those who were clearly not sufficiently prepared or trained for the task suggests that other inadvertent errors in handling this material may have been made throughout the investigation.

ii. Prosecution 'enhancement' could have altered the content or impacted upon the integrity of the recordings

269. Although Mr Laroche tried to suggest that he was completely certain that he and Ms Zanetta had not altered the recordings at all, it is both doubtful and also contradicted by his other testimony. Mr French effectively acknowledged that some of the equalisation he applied during his enhancement did remove parts of the signal.[439] This degree to which he agreed that he altered the content was even clearer in response to a question from the Single Judge.[440] Mr Laroche also admitted that the processes he applied could alter the character of the voice in the enhanced audios.[441]

270. Neither Mr Laroche nor Ms Zanetta speak any of the languages that could be on the tapes and thus would not know if their work impacted upon the content.[442] Mr Laroche was not aware of sibilance as a feature of human speech.[443] He therefore would not have been alive to whether his treatment of the audio would have impacted it. Similarly, Mr Laroche and Mr French did not know that Acholi has tonal elements. Mr Laroche did not have a familiarity with any language that could be comparable and admitted that if he changed the content then he would not know.[444]

271. Between the concessions and the gaps in knowledge, it should be clear that significant doubts arise in respect to whether the 'enhanced' recordings which were produced by Mr Laroche and Ms Zanetta have had content removed or altered by their treatment.

[437] T-119-Conf, p. 29, ln. 21 to p. 30, ln. 1.
[438] T-128, p. 53, ln. 7 to p. 55, ln. 23.
[439] T-119-Conf, p. 37, ln. 22 to p. 39, ln. 12.
[440] T-119-Conf, p. 39, ln. 13 to p. 40, ln. 18.
[441] T-119-Conf, p. 41, ln. 8 to p. 42, ln. 16.
[442] T-119-Conf, p. 20, lns 6 to 22.
[443] T-119-Conf, p. 40, ln. 22 to p. 41, ln. 7.
[444] T-128, p. 25, ln. 6 to p. 26, ln. 6.

iii. The enhancement procedure could have impacted upon the character of the voices in the recordings and therefore the attributions

272. If the enhancement process impacted upon quality of the voices in the recordings, then this could have impacted upon the accuracy and reliability of the attributions. The audio recordings which were played for Prosecution witnesses when they purportedly attributed Mr Ongwen and others were mainly the enhanced ones.

273. Mr French agreed that there several key are frequency ranges in voices and that modifying these could impact upon the character of the voice.[445] The Defence queried Mr Laroche about the extreme level of filtering that he applied to several recordings. These frequency bands corresponded to those identified by Mr French. Even lacking a background, Mr Laroche admitted that his applied processes could alter the character of the voices.[446]

274. Mr Laroche had no idea if there was a scientific way to know if he altered the character of the voices. This is relevant because if there was a way, Mr Laroche was not alive to it and therefore did not verify whether the process he was doing harmed the character of the voice. Since Mr Laroche was not familiar with the voices purported to be on the tapes, he would not know if he really altered the voices.[447]

iv. The enhancement methodology did not reflect the context of the recordings which dilutes their probative value

275. Both Mr Laroche and Mr French were asked about information which was provided to them as part of their enhancement assignment. Neither received information[448] and therefore the methodology of the enhancement process did not include any contextual considerations.

276. Probative content, such as the sound of gun-shots, may have been inadvertently removed from the recordings played to witnesses because information which might have assisted the enhancers to produce better recordings was not provided. As Mr French confirmed,[449] the way in which the audio was processed would have removed different volume levels which provide contextual clues. Such clues might include the distance of the speaker from the interceptor or maybe whether their transmission power was low.

[445] T-128, p. 70, ln. 25 to p. 72, ln. 10.
[446] T-119-Conf, p. 41, ln. 8 to p. 42, ln. 16.
[447] T-119-Conf, p. 47, lns 7 to 23.
[448] Mr French: T-119-Conf, p. 33, ln. 5 to p. 34 ln. 16; Mr French: T-128, p. 30, lns 13-15.
[449] T-128, p. 64, ln. 7 to p. 67, ln. 1.

E. The Prosecution failed to disclose information necessary to properly test the evidence violating fair trial rights

277. Until a Defence request before Mr French's testimony, the Prosecution did not provide 85 reports documenting his enhancement process. These reports *are* the documentation of the process and without them it is impossible to scrutinize the methodology. The Defence was able to identify several issues impacting upon the integrity of the process and point to problems with the evidence with them,[450] but was prejudiced by the limited time available to do so. With more time, more issues may have been identified. The late provision of such material, which was core to the testimony, was a disclosure violation impacting upon Article 67(1)(b) and (e). The Defence requests the Trial Chamber to make a finding confirming this. As a remedy the Defence requests the Trial Chamber to draw the inference that further issues may have been identified had the Defence had greater time to scrutinise the reports.

F. The security service intercept witnesses called by the Prosecution to attribute voices in the intercepts are not credible or reliable

i. Introduction and the law

The Trial Chamber is being asked by the Prosecution to conclude that *inter alia* witnesses P-3 and P-59 can: (1) Identify Mr Onwen and others's voices; (2) provide the words on the audios; (3) understand LRA jargons, slang, and proverbs; (4) and decode TONFAs. The Prosecution's wants the Trial Chamber to draw these conclusions to *inter alia* prove *mens rea* in respect to several of the attacks and confirm the reliability of the log-books.

278. Credibility involves assessing whether testimony is worthy of belief, based on the competence of the witness and likelihood that it is true and includes whether testimony is contrary to other known facts or is unlikely based on human experience. The Appeals Chamber found relevant "individual circumstances of the witness, including his or her relationship to the accused, age, […], bias against the accused, and/or motives for telling the truth."[451] The "fact that a witness is known to have previously given false testimony before a court is one of such relevant circumstances […] when assessing the reliability of […] witness's testimony […]".[452] The

[450] *See*, for example, T-128, p.62, ln. 7 to p. 63, ln. 8.
[451] *Bemba et* al, Judgment pursuant to Article 74 of the Statute, 19 October 2016, ICC-01/05-01/13-1989-Red ('Bemba Trial Judgment'), para. 202.
[452] Public Redacted 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, 8 March 2018,ICC-01/05-01/13-2275-Red, para. 1019.

"extent to which inconsistencies or discrepancies in their testimonies were explained" is also relevant to credibility.[453]

ii. Witness P-59's testimony is not credible or reliable

279. P-59 was a member of the security services of a government that was using military force against the LRA and began listening to the LRA in 2000.[454] He did not display the same degree of animosity as P-3, but as a member of a security service previously seeking to combat the LRA, he does not have a disinterested role in this case.

280. Witness P-403 noted in his report that "both the logbooks and witnesses suggest that ONGWEN communicated over the radio less frequently than many other commanders."[455] P-3 confirmed something similar in testimony.[456] Perhaps this was because Mr Ongwen was injured in 2003.[457] Mr Ongwen's limited radio presence suggested by an ISO 21 September 2003 document discussed with P-59 in which Mr Ongwen's name does not appear in the LRA command structure. Therefore, testimony and evidence suggest that Mr Ongwen was not on the radio much and provides evidence that Mr Ongwen was in sickbay.[458] If Mr Ongwen was not on the radio for parts of 2003, then there was not a lot of time by which P-59 would have had to learn to identify Mr Ongwen's voice. This raises questions about the reliability of the attributions in 2004 and even raises doubts over attributions made over a decade later.

281. If a witness is known to have given false testimony before a court it is relevant to assessing the credibility and reliability of the rest of their testimony. P-59 spent almost 20 minutes of testimony lying about a map which was presented to him.[459] He claimed that he had created the map and that witness numbers which had been placed on the map by Prosecution investigators were actually room numbers and "positions" or "trees". He sought to explain that the numbers had meaning, even though there was otherwise no rhyme or reason to the numbers which followed no sequence and which mysteriously had the prefix "P-". The Trial

[453] Bemba Trial Judgment, para. 308. *See also* para. 315.
[454] T-36-Conf, p. 8, ln. 7.
[455] UGA-OTP-0272-0446 at 0449, para. 9 *citing* Statement of P-339, UGA-OTP-0258-0732 at 0743, para. 77; UPDF logbook. UGA-OTP-0254-3833 at 3922; and ISO logbook, UGA-OTP-0062-0145 at 0240-0241.
[456] T-42-Conf, p. 72, lns 19-25.
[457] *See* Section VI.A 'Pajule' below.
[458] T-38-Conf, p. 50, ln. 4 to p. 51, ln. 4.
[459] T-38-Conf, p. 33, ln. 13 (12h06) to p. 38, ln. 13 (12h25).

Chamber knows this was lies or delusions, because the Prosecution produced two short statements from the investigators explaining the circumstances of the creation of the map.[460]

282. If P-59 actually believed what he was saying, then this raises serious doubts on the reliability of his other testimony. He annotated the map created in 2016.[461] His memory of this did not last. If inadvertent, how he filled-in gaps raises the question what else he may have fabricated.

283. In conclusion, when the other problems with the recordings are combined with the remarkable display of fantasy in the court-room, the Defence submits that P-59's testimony should not be given consideration for lacking credibility or being too unreliable.

iii. Witness P-3's testimony is not credible or reliable

284. No one in the court during the three days of P-3's cross-examination[462] is likely to soon forget the degree of animosity displayed towards Lead Counsel Ayena-Odongo and Mr Ongwen.

285. Witness P-3 perceived Counsel Ayena-Odongo to be his political opponent in the present and his military opponent in respect to events in the past. His bias makes his testimony unreliable. His attempts to avoid cross-examination, torturous answers, continuous attacks on Counsel, and provoking Mr Ongwen demonstrate his motivation to harm Counsel and Mr Ongwen. If his bias does not rise to the level of rendering him not credible, it is difficult to see what could.

286. His bias was displayed when confronted with evidence in a log-book which contradicted his attribution of Mr Ongwen at Odek. Rather than accept that the evidence suggested that 'Labongo' had claimed responsibility for the attack, he sought to find any way that he could to direct responsibility towards Mr Ongwen. [463]

287. Witness P-3 described inducing impersonation of the Red Cross to pursue intelligence and military operations.[464] This may well be a war-crime itself and anyway shows ruthless expediency. In short, P-3 demonstrated he is willing to deceive when it suited his mission.

[460] Email, sent 31 January 2017 at 17h52, subject 'Re-examination of P-0059 and possible additional evidence'.
[461] UGA-OTP-0258-0721 annexed to UGA-OTP-0258-0699-R01.
[462] T-44-Conf, T-45, and T-46.
[463] T-45-Conf, p. 37.
[464] T-44-Conf, p. 83, lns 1-3.

288. P-3 denied the allegations described in a letter shown to him,[465] but the Trial Chamber should ask whether the witness's character in court is consistent with the behaviour described in the letter. If that account is accurate, then P-3 was potentially involved in tearing pages from the record now before the Trial Chamber. P-3 sought to present his work as professional and disciplined.[466] Such background information casts doubts on such an account.

289. P-3 was trained between 2000 and 2001[467] and also began listening to the LRA in 2001.[468] Like P-59, he would not have had much exposure to Mr Ongwen's voice at the point where he was ostensibly attributing him.

290. A matter further impacting upon his reliability is the contradiction between other evidence and his attribution of Mr Ongwen at Odek. His superior, P-337, was in charge of the UPDF direction finding unit.[469] An intelligence report[470] and other sources which reflected multiple sources,[471] including direction finding material, concluded that Labongo was the individual who attacked Odek.[472] P-3 did not explain why his in-court attribution would be more correct than the conclusions based on multiple sources including, those seemingly from his superior.

291. Finally, it cannot be ignored that both individuals come from the clandestine sections of the security services. That professional area is by definition one that specialises in pursuing political and military goals through deception and secrecy. Such testimony, including the submitted Rule 68(2)(b) statements, must be treated with skepticism and care.

G. The probative value of the intercepts is attenuated by the lack of context and admission is prejudicial

292. Unreliable and irrelevant material is not probative of anything; however, other issues show the lack of probative value of the intercepts.

Firstly, the Prosecution appears to have virtually no idea who is speaking or what they are speaking about in regards to the vast majority of the material. When Counsel Taku raised[473] the problem of identification of the individuals on the tapes in a status conference, the

[465] Letter: UGA-OTP-0242-0219 discussed at: T-44-Conf, p. 59, ln. 14 to p. 78, ln. 23.
[466] T-44-Conf, p. 22, lns 1-7.
[467] T-42-Conf, 10, lns 1-8.
[468] T-42-Conf, p. 11, lns 1-20.
[469] T-46-Conf, p. 11, lns 15-25.
[470] *See* para. 374.
[471] T-46-Conf, p. 49, lns 15-24.
[472] *See* para. 374.
[473] T-25, p. 8, lns 12-23.

Prosecution side-stepped the issue.[474] If the Prosecution knows, it has not provided any indication of whom it believes is speaking. As discussed elsewhere in this brief,[475] this context is potentially indispensable to understand Mr Ongwen's role in the LRA and therefore to prove his contribution in the context of *inter alia* indirect co-perpetration.

293. Secondly, the Prosecution has not provided translations into the court's working languages or transcriptions for most of the recordings. Notwithstanding the lack of probative value of the specific translated excerpts, selecting a small part of the corpus of recordings while a huge body of unintelligible and indecipherable material exists de-contextualises the material and is cherry picking. Perhaps threats were made on the radio prior to the attack or perhaps messages were being relayed – the court cannot know without the rest of the context filled in. When the Prosecution conceded that "[c]orroboration between the sources of intercept evidence is not always consistent"[476] it is almost hard to know how it can conclude this given that the primary material is, for the most, not available.

294. Thirdly, despite having laid out the use of TONFAs[477] when the Prosecution interviewed and examined P-440 – [redacted] – and did not ask him to decode any TONFAs.[478] [redacted].

295. Fourthly, the Prosecution has suggested the intercept evidence is probative of exculpatory facts. The Prosecution's original arrest warrant arguments from 2005 argued that the radio system existed for Kony to enforce discipline and oversee operations[479] which is also in the Pre-Trial Brief.[480] A disclosed PRF form[481] contains the description of a tape as "Basic instructions (orders) issued to field commanders […] (highlights roles of 5 wanted in h.r. abuses in n ug" and "audio cassette tape recordings of LRA transmissions of attacks on IDPs camps of Odek (highlights results of attack)". This indicates a Prosecution investigator focus at the time. The Defence has not found the tape instructing field commanders. By its description, involving an order from Kony and the involvement of other commanders, it

[474] T-25, p. 11, lns 5-10.
[475] *See* Section III.B 'Indirect co-perpetration and indirect perperation'.
[476] PPTB, para. 70.
[477] PTB, paras 67, and 71-73.
[478] T-41-Conf, p. 33, ln. 23 to p. 32, ln. 14.
[479] Prosecutor's Amended Application for Warrants of Arrest Under Article 58, 18 May 2015, ICC-02/04-01/15-3-Conf-Red3, compare paras 68 and 109.
[480] PPTB, para. 65.
[481] UGA-OTP-0244-0920 at 0939.

appears probative of quite a different narrative of the Odek attack than has been presented during the case against Mr Ongwen. The fact that such a tape may exist, and arguments made in the arrest warrant which show the radio was used as a form of duress, underscores the limited probative value of the evidence the Prosecution has presented.

i. The attribution process lacks reliability and probative value

296. The Trial Chamber must ask whether it is believable that individuals could remember the voice of individuals whom they had never met and not heard in potentially upwards of 10 years. Could the Trial Chamber say to themselves with the degree of confidence expressed by P-59 and P-3 that they would recognise a voice of someone they had not heard in 10 years? It strains credulity and, in fact, P-3 stated in testimony that he could not remember voices.[482] The Trial Chamber must be intimately familiar from experience: eye-witnesses often show confidence in their identification despite the fact that evidence indicates otherwise. Finally, the process in Uganda, where tapes were played repeatedly by investigators[483] and awareness of the arrest warrant was circulated,[484] and at the Court, where witnesses reviewed their prior statements, may have become suggestive, which raises doubts about the reliability of the attributions.

297. Unreliable attribution ran through the Prosecution case presentation. For example, witness P-16, whom the Prosecution claimed could attribute Mr Ongwen, could not identify his voice. Perhaps this is explained by his testimony that he spent just a very short time with Mr Ongwen during a military operation as a signaller but has never been his signaller.

298. Finally, the voices heard in the room the day of the original radio transmissions may have sounded different than the recordings played for the witnesses and the court. Both Prosecution audio witnesses confirmed that recording the radio from "rudimentary equipment"[485] could have changed the quality of the audio from what was heard in the room by the witnesses. This may explain inconsistencies between attributions and what is written in the log-books but it then raises doubts about any given attribution in the intercept or log-book.

[482] T-42-Conf, p. 47, lns 8-12.
[483] *See*, for example, UGA-OTP-0223-0003-R01.
[484] UGA-OTP-0228-5251 at 5257, lns 179-197: in 20 July 2006: (Investigator: "Q: So you still remember the names of those five commanders who were in the arrest warrants?" P-16 through interpreter: "I remember"). The ISO Director-General was present at the Ri-Kwamba peace talks in 2006: UGA-D26-0011-0508, p. 5, lns 137 to 142.
[485] PPTB, para. 70.

H. The Prosecution has not met its burden of proof in respect to attributing Mr Ongwen on the tapes

299. With very limited exceptions, witnesses involved in the Prosecution interpretation and attribution exercise listened to enhanced recordings. The various issues identified above, as well as other technical issues discussed in cross-examination, meant that the recordings which were listened to may have had altered content and/or quality of the voices which in turn may have been different from the underlying recordings. This undermines the reliability of the attributions and explanations of the excerpts. This raises doubts about the evidence and testimony which the Prosecution presents to show Mr Ongwen's guilt.

300. Key attributions were not made in the best of circumstances; they were made by witnesses who are neither credible nor reliable. Whatever attenuated probative value the material might have, the prejudice of convicting on the basis of this body of material, which may have been interfered with by a party to conflict, and for which the Prosecution has not presented the context, is prejudicial. Too many doubts and questions lie within this body of evidence. Because the evidence lacks probative value, and in any case should also be ignored for the prejudice which relying upon would bring, the Defence submits that the Prosecution has not met its burden of proof in respect to attributing Mr Ongwen on the radio intercepts.

V. THE PROSECUTION FAILED TO ALLEGE AND PROVE THE CONTEXTUAL ELEMENTS FOR CRIMES AGAINST HUMANITY AND FOR WAR CRIMES

A. The contextual elements of the crime against humanity

301. The Pre-Trial Chamber in the operative section of the CoC Decision found that the LRA carried out a widespread or systematic attack directed against the civilian population of northern Uganda from 1 July 2002 to 31 December 2005.[486] However, it failed to define the contextual elements of the crimes against humanity, and contains extremely vague references to evidence and facts in paragraphs 60 to 64.[487] In those respective paragraphs, the Pre-Trial Chamber does not cite to the specific item of evidence on which it relied; for instance, in paragraph 60, the Pre-Trial Chamber found that the evidence given by insider witnesses is

[486] *Ongwen*, Decision on the confirmation of charges against Dominic Ongwen ('CoC Decision'), ICC-02/04-01/15-422-Red, 23 March 2016, *see* operative part.
[487] *Ongwen*, CoC Decision, Separate opinion of Judge Marc Perrin de Brichambaut, ICC-02/04-01/15-422-Anx-tENG, 6 June 2016, paras 20 to 21 and *c.f.* CoC Decision ICC-02/04-01/15-422-Red. *See also* operative part paras 2 to 8.

relevant to establish the contextual elements, yet it does not cite to these insider witnesses.[488]

302. The Defence also submits that the radio intercept evidence submitted by the Prosecution used to demonstrate contextual elements are unreliable; it has largely not been translated or transcribed and thus it remains unclear precisely what it contains.[489]

303. The Defence has raised the issue to confine the scope of the case to the charges confirmed against Mr Ongwen; however, the Trial Chamber decided that testimonial evidence can "go beyond the confirmed charges and the facts and circumstances described in the charges for contextual elements".[490] The Defence reiterates its objections to this practice, as it amounts to fair trial violations since it has not received notice concerning the contextual elements nor their scope and suffered extensive prejudice to investigate and mount a defence; this prejudice is exacerbated given the inadequacy of the CoC Decision as it failed to define the contextual elements of the crimes against humanity.[491]

B. The contextual elements for war crimes

304. The Defence reiterates its position, articulated in the Defects Series, that the contextual elements for war crimes were not supported in the Confirmation Decision and, as a result, the Defence was deprived of notice of the charges in violation of fair trial rights.

305. The Prosecution has not discharged its burden to prove beyond reasonable doubt that the alleged war crimes were committed within the context of an armed conflict not of an international character. Instead, the Prosecution evidence established it was an international armed conflict because the operational command decisions on the war were made by Kony from Sudan, the weaponry for the Prosecution of the war came from Sudan, and the multinational forces conducted war operations against the LRA and Kony in Sudan.

306. As a result, the contextual elements for war crimes were neither properly plead nor proved beyond reasonable doubt.

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[488] *Ongwen* CoC Decision, ICC-02/04-01/15-422-Red.
[489] See Sections above on 'Intercepted Radio Communications'.
[490] T-148-Conf, p. 5, lns 13 to 19.
[491] *Ongwen*, Corrected Version of 'Defence's Further Submissions'(ICC-02/04-01/15-1536), ICC-02/04-01/15-1536-Corr, 4 June 2019, paras 12 to 13.

VI. THE PROSECUTION FAILED TO PROVE BEYOND REASONABLE DOUBT THAT MR ONGWEN IS RESPONSIBLE FOR COUNTS 1-49

A. PAJULE

307. The Prosecution failed to present evidence which demonstrates beyond a reasonable doubt that Mr Ongwen participated in the planning of the attack on Pajule IDP Camp or participated in the attack by leading LRA personnel in the attack on the Pajule Trading Centre on 10 October 2003. As the Prosecution has failed to meet its burden of proof, the Defence requests that Counts 1-10 be dismissed.

308. The Defence recalls its notice on 9 August 2016 whereby it advanced that Mr Ongwen was in LRA jail at the time of the attack on Pajule.[492] Furthermore, the Defence also demonstrated during the presentation of evidence that: 1) Mr Ongwen did not attend the attack at Pajule, 2) Mr Ongwen was not physically able to participate in the attack because he was still recovering from an injury sustained in late 2002 and 3) Mr Ongwen did not have command over LRA fighters because of his injury and/or arrest.

i. Witness P-9 is not credible and his testimony should be disregarded

309. The Chamber should disregard P-9's testimony in its entirety. Witness P-9 fabricated his story about what happened to him after being taken at the trading centre, lied about how he was treated while walking to the RV, and lied about how he was treated at the RV. This witness drastically changed his account of the Pajule attack since his first statement was recorded for the Prosecution on 13 July 2005.

310. The Defence has shown through its examinations of witnesses that during and after the Pajule attack, P-9 received preferential treatment *vis-à-vis* other persons abducted from Pajule. He was not required to carry anything from the trading centre to the RV, he wore clothes during his walk from the trading centre to the RV, he was treated with respect at the RV, and witnesses who could see and hear him stated that he did not appear to show stress or fear.[493]

311. The Defence argues that these differences cannot be resolved merely by the passage of time. In fact, if he was to be believed, it would call into question every other witness who testified about what he or she witnessed happening to Rwot Oywak. Rwot Oywak's testimony has

[492] ICC-02/04-01/15-519-Conf.
[493] *E.g.* T-118-Conf, p. 40, ln. 14 to p. 41, ln. 16 (*stating* P-9 was laughing, smiling and hugging Vincent Otti).

consistently been rebuked by every subsequent witness. The Defence recalls the testimony of D-79, a person who attempted to escape from the LRA, but only to be brought back to his captors by a man who is charged to lead and protect his people, Rwot Oywak.[494] Finally, the Defence notes P-81 testified about learning [redacted].[495]

312. Respectfully, the Chamber should disregard all testimony and evidence from P-9.

ii. Mr Ongwen still suffered from his injury during the time of the attack at Pajule and could not participate in the attack or planning

313. Mr Ongwen sustained a serious debilitating injury to his right leg in late 2002.[496] Mr Ongwen spent the next one to one and a half years in sickbay.[497] While an LRA commander is in sickbay for a serious injury, he no longer retains command of his respective unit.[498]

314. At the time of the Pajule attack, many witnesses testified that Mr Ongwen did not go to the Pajule Trading Centre because of his injury.[499] Notes from intercept logbooks preceding the Pajule attack support that Mr Ongwen was still recovering from this injury.[500]

315. The Defence notes the GoU failed to give the Prosecution ISO tape 694/G, which allegedly contains the intercept audio file from 10 October 2003.[501] This audio would confirm that Mr Ongwen did not command the group which attacked Pajule Trading Centre, thus providing further corroborating evidence that Mr Ongwen was injured and still under arrest by orders of

[494] T-189-Conf, p. 21, ln. 1 to p. 23, ln. 18 (*noting* that D-79 received 170 strokes because he was able to convince Tabuley that he was lost and not trying to escape).
[495] T-118-Conf, p. 42, lns 5-10. *See also* UGA-OTP-0070-0029-R01, pp 0037-38, paras 44-45.
[496] *E.g.* UGA-D26-0015-0080; T-15-Conf, p. 38, lns 4-16 (P-214); T-17-Conf, p. 57, ln. 6 to 59, ln. 16 (P-235); T-49-Conf, p. 57, ln. 6 to p. 59, ln. 7 (P-205); T-244-Conf, p. 45, ln. 25 to p. 48, ln. 12 (D-13); T-123-Conf, p. 48, ln. 14 to p. 49, ln. 10; T-222-Conf, p. 48, lns 5-17 (D-68); T-224-Conf, p. 57, lns 12-18 (D-75); T-161-Conf, p. 40, lns 7-13 (P-209).
[497] T-17-Conf, p. 58, lns 2-15 (P-235); T-123-Conf, p. 48, ln. 14 to p. 49, ln. 10 (P-231); T-224-Conf, p. 58, ln. 24 to p. 59, ln. 6 (D-75); T-161-Conf, p. 40, lns 7-13 (P-209). *See also* UGA-D26-0015-0080.
[498] T-72-Conf, p. 32, lns 7-17 (P-142); T-107-Conf, p. 7, ln. 23 to p. 8, ln. 4 (P-70); T-121-Conf, p. 49, lns 3-16 (P-138); T-159-Conf, p. 28, lns 11-15 (P-85); T-199-Conf, p. 68, lns 4-9 (D-32); T-222-Conf, p. 49, ln. 10 to p. 50, ln. 11 (D-68, *specifically referring to Mr Ongwen*); T-224-Conf, p. 59, ln. 16 to p. 60, ln. 15 (D-75, *specifically referring to Mr Ongwen*); T-226-Conf, p. 32, lns 9-15 (D-25); T-228-Conf, p. 40, lns 14-20 (D-56).
[499] *E.g.* T-158-Conf, p. 41, lns 1-5 (P-85) ;T-208-Conf, p.63, ln. 16 to p. 64, ln. 7 (D-92); T-222-Conf, p. 52, lns 17-23 (D-68); T-226-Conf, p. 63, lns 8-16 (D-25); T-228-Conf, p. 66, ln. 18 to p. 67, ln. 5, (D-56).
[500] UGA-OTP-0232-0234, p. 0298 (2/8/03), 0315 (25/8/03), 0411 (16/9/03), 0414 (17/9/03); UGA-OTP-0060-0149, p. 0257 (25/8/03); UGA-OTP-0197-1078, p. 1100 (22/9/03); UGA-OTP-0133-0289, p. 0318 (17/9/03), 0340 (22/9/03); UGA-OTP-0242-0830, p. 0836 (22/9/03); UGA-OTP-0242-0865, p. 0866 (17/9/03); and UGA-OTP-0242-0963, p. 0964-65 (25/8/03).
[501] UGA-D26-0017-0008, p. 0008. *See also* UGA-D26-0017-0007, p. 0007; UGA-OTP-0232-0935, p. 0935; UGA-OTP-0232-0930, p. 0930; UGA-OTP-0232-0922, p. 0922; and UGA-OTP-0246-0096, p. 0096.

Kony. Prosecution analyst P-403 notes the extreme inconsistencies in the various logbooks produced by different GoU institutions for 10 October 2003.[502] None of the logbooks list Mr Ongwen as going to Pajule Trading Centre,[503] and more than half of the logbooks from that day do not mention Mr Ongwen.[504] Witness D-134 corroborates that Onyee went to the Catholic mission, Bogi attacked at the barracks and that Raska went to the trading centre.[505]

316. Moreover, a mere 17 days before the Pajule attack, Mr Ongwen was still being announced as injured over the LRA military radios.[506]

317. Testimony about Mr Ongwen's injury started during the Article 56 hearings. Witnesses P-214 and P-235 testified that Mr Ongwen spent one to one and a half years recuperating from the injury to his leg.[507] Many other witnesses for both Parties testified to specific knowledge about this injury.[508] Witness P-205 testified about [redacted] November 2002.[509] Mr Ongwen's femur was broken, his muscles exposed, and bleeding profusely.[510] During his interview with the Prosecution, P-205 stated that Mr Ongwen was still in sickbay from this injury after Tabuley's death.[511]

318. Mr Ongwen's injury was extensive. The hole in his right leg can fit an entire racquetball.[512] Mr Ongwen walks with a serious limp because of a 1996 injury and this injury from November 2002.[513] Witness D-118 recounted her time in sickbay with Mr Ongwen to the Court.[514]

319. Mr Ongwen was still injured on 10 October 2003. Witness D-92 saw Mr Ongwen at the RV after the Pajule attack limping and using a walking stick because of this injury.[515] He stated that because Mr Ongwen was still injured, he was still being carried from time-to-time in

[502] UGA-OTP-0272-0446, p. 0482, para. 117.
[503] UGA-OTP-0254-1991, pp 2116-17 and UGA-OTP-0242-6018, p. 6159.
[504] UGA-OTP-0133-0289, p. 0395; UGA-OTP-0232-0234, p. 0547; UGA-OTP-0242-0775, p. 0775; and UGA-OTP-0254-0725, p. 1070-71.
[505] T-240-Conf, p. 59, ln. 7 to p. 60, ln. 12.
[506] UGA-OTP-0242-0830, p. 0836 and UGA-OTP-0197-1078, p. 1100 (noting Mr Ongwen was "without office" and an "extra CO").
[507] T-15-Conf, p. 38, lns 4-16 (P-214) and T-17-Conf, p. 58, lns 2-15 (P-235).
[508] T-49-Conf, p. 57, ln. 6 to p. 59, ln. 7 (P-205); T-244-Conf, p. 45, ln. 25 to p. 48, ln. 12 (D-13); T-123-Conf, p. 48, ln. 14 to p. 49, ln. 10 (P-231); T-222-Conf, p. 48, lns 5-17 (D-68); T-224-Conf, p. 57, lns 12-18 (D-75) and T-161-Conf, p. 40, lns 7-13 (P-209).
[509] T-49-Conf, p. 57, ln. 6 to p. 59, ln. 7.
[510] T-49-Conf, p. 57, ln. 23 to p. 58, ln. 21.
[511] T-49-Conf, p. 59, ln. 21 to p. 60, ln. 5. *See also* UGA-OTP-0247-0228-R01, p. 0249-50, lns 705-715.
[512] *See* UGA-D26-0015-0080, p. 0080.
[513] *E.g.* T-91-Conf, p. 28, lns 2-5 (P-144).
[514] T-216-Conf, pp 33.39.
[515] T-208-Conf, p. 63, ln. 16 to p. 64, ln. 7.

October 2003.[516] Knowledge of Mr Ongwen's injury at that time is corroborated by Defence and Prosecution witnesses.[517]

320. At the time of the Pajule attack, Mr Ongwen had not yet recovered from his injury. He may not have physically been in sickbay, but Mr Ongwen remained inactive in the LRA. Furthermore, at this time Mr Ongwen, even though allegedly being given the position of 2iC of Sinia Brigade, was still present at Control Altar. As stated by P-144, "Dominic was in Control Altar at the headquarters. But, well, I didn't understand that well, but I was told that it was kind of detention or an imprisonment because, well, I didn't understand why he was taken there."[518]

321. Noted in the second paragraph of this section, Mr Ongwen's physical health appears with regular frequency during the two months preceding the Pajule attack. Mr Ongwen was in Control Altar because he had left sickbay, was unable to re-join his group because he was still recovering from his injury and without an office at that time.[519] Mr Ongwen's injury to his right thigh prevented him from having command or control over any fighting unit of the LRA. In turn, as Mr Ongwen did not have command or control over any fighting unit and it was impossible for Mr Ongwen to significantly contribute to the attack at Pajule as his injury prevented him from acting in a command position. As such, the Trial Chamber should find Mr Ongwen not guilty of counts 1-10 at Pajule.

iii. Mr Ongwen did not participate or have effective command and control over LRA fighters for the Pajule Attack

322. The Prosecution has failed to present evidence which proves beyond a reasonable doubt that Mr Ongwen attended the attack at the Pajule Trading Centre. The Prosecution bears the burden to prove that Mr Ongwen led a group of LRA fighters to attack the Pajule Trading Centre.[520] At the time of the attack on Pajule, Mr Ongwen was in LRA prison[521] and still

[516] T-208-Conf, p. 63, ln. 16 to p. 64, ln. 7.
[517] *E.g.* T-15-Conf, p. 38, lns 4-16 (P-214); T-17-Conf, p. 58, lns 2-15 (P-235); T-158-Conf, p. 40, ln. 24 to p. 41, ln. 5 (P-85); T-226-Conf, p. 63, lns 8-16 (D-25); T-228-Conf, p. 66, ln. 18 to p. 67, ln. 1 (D-56); T-222-Conf, p. 52, ln. 18 to p. 53, ln. 6 (D-68); T-49-Conf, p. 57, ln. 6 to p. 59, ln. 7 (P-205); T-244-Conf, p. 45, ln. 25 to p. 48, ln. 12 (D-13); T-123-Conf, p. 48, ln. 14 to p. 49, ln. 10 (P-231); T-224-Conf, p. 57, lns 12-18 (D-75); T-161-Conf, p. 40, lns 7-13 (P-209).
[518] T-91-Conf, p. 26, lns 14-16.
[519] UGA-OTP-0242-0830, p. 0836 and UGA-OTP-0197-1078, p. 1100.
[520] CoC Decision, p. 74, para. 17.
[521] T-91-Conf, p. 26, ln. 10 to p. 27, ln. 21 (P-144, *noting* that P-144 was unsure, but his testimony leads one to believe that Mr Ongwen was in LRA jail); T-104-Conf, p. 67, lns 5-12 (P-45 *noting* while she did not know if he was in prison, the manner in which Mr Ongwen travelled with Control Altar was indicative of someone imprisoned); and T-105-Conf, pp 25-26 (P-45 *confirming* that Mr Ongwen was under arrest).

recovering from the injury to his right leg.[522]

323. The Defence incorporates by reference arguments made about P-9's credibility above.

324. The Defence notes the GoU failed to give the Prosecution ISO tape 694/G, which allegedly contains the intercept audio file from 10 October 2003.[523] The Defence incorporates by reference arguments outlined about the audio intercepts above.

325. Witness P-231, a person who knows Mr Ongwen well, stated that Mr Ongwen was not involved in the Pajule Attack.[524] When asked if Mr Ongwen was involved in the Independence Day 2003 attack on Pajule, P-231 stated, "[t]o respond to this question, I can say that both our attacks in Pajule, Dominic was not involved."[525] As noted in the section directly above, many additional witnesses agree with that assessment based on Mr Ongwen's injury[526] or that the person did not see him at all.[527]

326. Witness D-134 stated that he did not see Mr Ongwen in the group which went to the Pajule Attack.[528] or at the RV.[529] Witness D-134 is, by all accounts, one person who was undeniably at the Pajule Attack and his testimony is consistent with his recollection from his first interview with the Prosecution in 2004.

327. Witness P-45 was unsure whether Mr Ongwen went to the Pajule Trading Centre with Raska Lukwiya.[530] Her group, [redacted].[531] When her memory was refreshed, she only noted that Mr Ongwen was replaced by Raska to lead the group to the trading centre.[532] [redacted] she cannot positively state that Mr Ongwen went to the trading centre. Similarly, while P-144 states that Mr Ongwen left the RV, the

[522] T-15-Conf, p. 38, lns 4-16 (P-214); T-17-Conf, p. 58, lns 2-15 (P-235); T-158-Conf, p. 41, lns 1-5 (P-85);T-208-Conf, p.63, ln. 16 to p. 64, ln. 7 (D-92); T-222-Conf, p. 52, lns 17-23 (D-68); T-226-Conf, p. 63, lns 8-16 (D-25); T-228-Conf, p. 66, ln. 18 to p. 67, ln. 5, (D-56) and T-224-Conf, p. 57, lns 12-18 (D-75).
[523] UGA-D26-0017-0008, p. 0008. *See also* UGA-D26-0017-0007, p. 0007; UGA-OTP-0232-0935, p. 0935; UGA-OTP-0232-0930, p. 0930; UGA-OTP-0232-0922, p. 0922; and UGA-OTP-0246-0096, p. 0096.
[524] T-123-Conf, p. 65, lns 6-13.
[525] T-213-Conf, p. 65, lns 10-13.
[526] T-158-Conf, p. 40, ln. 24 to p. 41, ln. 5 (P-85); T-208-Conf, p. 63, ln. 16 to p. 64, ln. 7 (D-92); T-226-Conf, p. 63, lns 8-16 (D-25); T-228-Conf, p. 66, ln. 18 to p. 67, ln. 1 (D-56); T-222-Conf, p. 52, ln. 18 to p. 53, ln. 6 (D-68).
[527] T-239-Conf, p. 18, lns 20-22 (D-85) (*noting* though that the witness has never met Mr Ongwen before); T-220-Conf, p. 30, ln. 25 to p. 31, ln. 5 (D-81).
[528] T-240-Conf, p. 65, lns 10-21.
[529] T-240-Conf, p. 65, lns 10-21.
[530] T-103-Conf, p. 92, lns 16-25.
[531] T-103-Conf, p. 92, lns 16-25.
[532] T-103-Conf, p. 94, lns 8-15.

group split into three smaller groups.[533] Witness P-144 categorically stated that he did not recall seeing Mr Ongwen at the trading centre when his group moved to that location.[534] Finally, P-138, a person who did not leave the RV for Pajule, states that he saw Mr Ongwen leave the RV,[535] but does not know what he did after.[536]

328. The Defence notes inconsistencies in the testimonies of Prosecution witnesses. Witness P-249 stated that he saw Mr Ongwen ordering soldiers by pointing a normal sized stick in the trading centre.[537] Witness P-249 admitted to drinking the night before,[538] the witness went to bed drunk,[539] and was still inebriated when he woke up during the attack.[540] Witness P-6 identified the person in the trading centre who was ordering LRA with a stick as Raska Lukwiya.[541] Witness P-6 was able to identify Raska Lukwiya because Raska was identified by [redacted].[542] Considering the conflicting testimonies, the Defence argues that P-6's version is accurate as she was not intoxicated on the morning of 10 October 2003.

329. The Prosecution failed to present evidence which demonstrates beyond a reasonable doubt that Mr Ongwen either participated or had command over LRA fighters for the Pajule Attack, or that he in any way significantly contributed to the commission of the alleged crime. As such, the Trial Chamber should find Mr Ongwen not guilty of counts 1-10 at Pajule.

iv. Mr Ongwen did not help plan the Pajule Attack

330. The Prosecution has failed to present evidence which proves beyond a reasonable doubt that Mr Ongwen participated in the planning of the Pajule Attack. The Prosecution bears the burden to prove that Mr Ongwen aided in the planning of the attack on Pajule.[543] At the time of the attack on Pajule, Mr Ongwen was in LRA prison,[544] still recovering from the injury to

[533] T-91-Conf, p. 29, ln. 15 to p. 30, ln. 8.
[534] T-91-Conf, p. 38, ln. 8 to p. 40, ln. 4.
[535] T-120-Conf, p. 43, lns 13-19.
[536] T-120-Conf, p. 38, lns 1-8.
[537] T-79-Conf, p. 15, ln. 9 to p. 17, ln. 11.
[538] T-79-Conf, p. 9, lns 18-22.
[539] T-80-Conf, p. 15, ln. 23 to p. 16, ln. 7.
[540] T-80-Conf, p. 15, ln. 23 to p. 16, ln. 7. The Defence disputes the witness's claim to have sobered-up when things got hot. It is a well-known scientific fact that the only natural way to sober-up is by the human body breaking down the alcohol, which takes time. With respect, the witness's claim is impossible and outlandish.
[541] T-140-Conf, p. 57, ln. 19 to p. 58, ln. 1. *See also* UGA-OTP-0144-0072-R01, p. 0078, para. 31.
[542] T-140-Conf, p. 57, lns 3-18. *See also* UGA-OTP-0144-0072-R01, p. 0078, paras 30-31.
[543] CoC Decision, p. 74, para. 17.
[544] T-91-Conf, p. 26, ln. 10 to p. 27, ln. 21 (P-144, *noting* that P-144 was unsure, but his testimony leads one to believe that Mr Ongwen was in LRA jail); T-104-Conf, p. 67, lns 5-12 (P-45 *noting* while she did not know if he

his right leg[545] and was not a senior commander of the LRA.[546]

331. The Defence incorporates by reference arguments made above in relation to Mr Ongwen's physical state at the time of the Pajule Attack. The Defence asserts that Mr Ongwen was still recovering from the injury to his right leg and did not have the authority to plan an attack like the one at Pajule as he did not have command over any LRA unit due to this injury.

332. Witness P-138 testified that at the time of the Pajule Attack, [redacted].[547] [redacted].[548] Witness P-138 stated that the planning meeting for the Pajule Attack started around 13h00.[549] Those present at the meeting selected fighters at 17h00 to go to Pajule.[550]

333. When questioned by the Presiding Judge, P-138 stated unequivocally that Mr Ongwen was not present for the planning meeting at 13h00.[551] He stated, "[Mr Ongwen] was under a brigade commander and he would only receive instructions from his brigade commander. He was not part of the team."[552] Of the commanders listed by P-138 as being present during that meeting,[553] all but Sam Kolo are dead.[554] Not a single Prosecution witness places Mr Ongwen at a meeting with any of the persons mentioned by P-138 at the time of the planning meeting starting at 13h00.

334. Witness P-138 also stated that there was another meeting at 17h00 where commanders chose the persons who would attend the Pajule Attack.[555] The witness testified that the commanders giving orders during this meeting included General Vincent Otti, Brigadier Raska Lukwiya,

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was in prison, the manner in which Mr Ongwen travelled with Control Altar was indicative of someone imprisoned); and T-105-Conf, pp 25-26 (P-45 *confirming* that Mr Ongwen was under arrest).

[545] T-15-Conf, p. 38, lns 4-16 (P-214); T-17-Conf, p. 58, lns 2-15 (P-235); T-158-Conf, p. 41, lns 1-5 (P-85); T-208-Conf, p.63, ln. 16 to p. 64, ln. 7 (D-92); T-222-Conf, p. 52, lns 17-23 (D-68); T-226-Conf, p. 63, lns 8-16 (D-25); T-228-Conf, p. 66, ln. 18 to p. 67, ln. 5, (D-56) and T-224-Conf, p. 57, lns 12-18 (D-75).

[546] *E.g.* T-120-Conf, p. 36, lns 18-23 (P-138) (*noting* Mr Ongwen's rank as a Major and not a brigade commander).

[547] T-120-Conf, p. 32, lns 6-7.

[548] T-120-Conf, p. 34, ln. 19 to p. 36, ln. 23.

[549] T-120-Conf, p. 37, lns 1-11.

[550] T-120-Conf, p. 37, lns 1-11.

[551] T-120-Conf, p. 36, lns 15-23.

[552] T-120-Conf, p. 35, lns 22-23.

[553] T-120-Conf, p. 35, ln. 13 to p. 36, ln. 1.

[554] UGA-OTP-0196-0006, UGA-OTP-0196-0007, UGA-OTP-0196-0021 (Raska Lukwiya); UGA-OTP-0018-0047, p. 0048, T-72-Conf, p. 64, lns 1-3 (Nyeko Tolbert Yadin); Charles Tabuley died on or around 30 October 2003; Okot Odhiambo died on 27 October 2013; Ocitti Jimmy was killed in early 2004 in Sudan.

[555] T-120-Conf, p. 37, lns 1-11.

Brigadier Sam Kolo, Brigadier Nyeko Tolbert Yadin and Colonel Ocitti Jimmy.[556] Mr Ongwen was not part of the group giving the instructions. He was not a senior officer at Pajule. Furthermore, P-138 stated that he "did not personally hear such instructions" being given to Mr Ongwen.[557] Finally, it is noteworthy that P-138 only saw Mr Ongwen leave the RV and did not know what he did after. He only assumes that he went to the Pajule Attack.[558]

335. No other person discusses about the planning meetings like P-138. He is the sole witness who discusses the early meeting at 13h00. He is firm and unequivocal that Mr Ongwen did not plan the attack at Pajule that happened on 10 October 2003.

336. Finally, the Defence notes that Mr Ongwen lacked command responsibility at this time. Because of his injury described above, he would not have controlled a fighting unit. Furthermore, as with P-144, P-45 also noted that Mr Ongwen was in jail at that time, and would have been stripped of his rank and command.[559] This would make it impossible for Mr Ongwen to have planned the Pajule Attack.

337. The Prosecution has failed to present evidence which proves that beyond a reasonable doubt Mr Ongwen helped plan or that he in any way significantly contributed to the commission of the alleged crime at Pajule. As such, none of the alleged modes of liability are proved and the Trial Chamber should find Mr Ongwen not guilty of counts 1-10 at Pajule.

B. ODEK

338. The Prosecution failed to present evidence which demonstrates beyond a reasonable doubt that Mr Ongwen participated in the planning of the attack on Odek IDP Camp, participated in the attack by leading LRA personnel in the attack on the Odek IDP Camp, significantly contributed to the attack on Odek IDP Camp or ordered an attack on Odek IDP Camp on 29 April 2004. As the Prosecution has failed to meet its burden of proof, the Defence requests that counts 11-23 be dismissed.

339. The Defence recalls its notices on 9 August 2016 whereby it advanced that Mr Ongwen was under a constant state of duress in the LRA and that Mr Ongwen suffered from a mental

[556] T-120-Conf, p. 38, lns 15-24.
[557] T-120-Conf, p. 40, lns 9-11.
[558] *See* T-120-Conf, p. 38, lns 1-8 and T-120-Conf, p. 43, lns 13-19.
[559] *See* T-104-Conf, p. 67, lns 4-18 and T-105-Conf, pp 25-26.

disease or defect during the charged period.[560] The Defence submits the arguments below without prejudice to the arguments advanced related to Articles 31(1)(a) and (d).

i. Testimony of witness P-245 about Odek is not credible and should be disregarded

340. Witness P-245 escaped the LRA and reported to the UPDF on [redacted] 2003.[561] From this time [redacted], P-245 did not operate in the LRA.[562] Witness P-245 lied to the Court about all experiences in the LRA he alleged to have participated in during this time period. The Trial Chamber should completely disregard his testimony regarding this time period.

341. Witness P-245 admitted [redacted].[563] [redacted].[564] [redacted].[565]

342. After returning from the LRA, P-245 was arrested [redacted].[566] Witness P-245 then was charged with [redacted].[567] In fact, [redacted].[568] He demanded money to the Court just before his testimony or he would not testify.[569] The witness is a career criminal whose testimony cannot be trusted.

343. The testimony of P-245 conflicts with Prosecution evidence. The witness stated that Mr Ongwen was the commander of Oka Battalion at the time of the attack on Odek, that

[560] ICC-02/04-01/15-517 and ICC-02/04-01/15-518.
[561] UGA-OTP-0273-2838-R01, at 2838, para. 3 and T-99-Conf, p. 22, lns 1-9.
[562] *See* UGA-OTP-0208-0486, pp 0491-92.
[563] T-101-Conf, p. 12, ln. 23 to p. 13, ln. 14.
[564] *E.g.* UGA-OTP-0250-0043, UGA-OTP-0250-0044, UGA-OTP-0250-0045, UGA-OTP-0250-0046 and UGA-OTP-0250-0047.
[565] UGA-D26-0016-0014, UGA-D26-0016-0019, UGA-D26-0016-0021, UGA-D26-0016-0023, UGA-D26-0016-0025, UGA-D26-0016-0027, UGA-D26-0016-0028, UGA-D26-0016-0030, UGA-D26-0016-0032, UGA-D26-0016-0033, UGA-D26-0016-0034 and UGA-D26-0016-0035.
[566] UGA-OTP-0273-2838-R01, p. 2839, paras 4-5.
[567] UGA-OTP-0273-2838-R01, p. 2839, paras 6-8; *see also* UGA-OTP-0208-0485, UGA-OTP-0208-0486 and UGA-OTP-0208-0501.
[568] T-100-Conf, p. 58, ln. 15.
[569] UGA-D26-0016-0050.

Okwango Alero was in 2nd Battalion of Trinkle and Buk Abudema was the brigade commander of Sinia Brigade.[570] None of this coincides with testimony from any witness; it coincides with someone who escaped the LRA on [redacted] 2003. Finally, when the witness was asked to explain his alleged [redacted].

344. The Defence also notes that P-245 is the only person who gives the fact and circumstance that Okwango Alero was involved in the Odek Attack. As noted above, P-245 did not even know which brigade Okwango Alero belonged. Witnesses also testified that he did not attend the Odek Attack.[571]

345. For the abovementioned reasons, the Defence asserts that the Trial Chamber should completely disregard the testimony of P-245 in relation to all alleged actions within the LRA [redacted].

ii. UPDF Directional Finding evidence and weather reports demonstrate that Mr Ongwen was not near Odek around the time of the attack

346. In and around the time of the Odek Attack, Mr Ongwen was approximately 20-25 km north of Odek. The directional finding material, provided by the GoU, demonstrates that Mr Ongwen did not attend the Odek Attack. Furthermore, considering the notations on UPDF intelligence reports related to weather, it would have been hard, if not impossible, for Mr Ongwen to have attended the Odek Attack.

347. As noted above, the GoU deployed mechanisms to triangulate the location of persons speaking on military grade communication devices. These locations were reported in daily intelligence reports. Examples of these reports are found in level UGA-OTP-0017.

348. On 27 April 2004, a GoU intelligence report places Mr Ongwen approximately 20 km north

[570] T-101-Conf, p. 24, lns 8-17.
[571] *E.g.* [redacted].

of Odek across the River Aswa.[572] The map coordinates are 2°50'52.0"N, 32°39'38.0"E.[573] These coordinates place the radio call between the Aswa and Agogo Rivers during the rainy season. It is noteworthy that the 18h00 communication of the LRA that day stopped because of heavy rains interfering with the radio signals.[574] It is also important to know that the same interference happened during the 21h00 communication.[575]

349. During his testimony, D-75 corroborated this location when he testified that when he heard of the Odek Attack over the FM radio, he was with Mr Ongwen near Lapak.[576] For the Trial Chamber's reference, Lapak is approximately 10 km east of the map location directly above.

350. The Defence rebukes the Prosecution's meagre attempt to impeach D-75.[577] The Defence notes how D-75 informed the Prosecution during his interview that it appeared to him that the investigator and D-75 were talking about different attacks.[578] Witness D-75, during his interview, clarified this to the Prosecution as is his legal right under Rule 112(1)(d) of the RPE. As a matter of fact, he did it before the end of the interview; he informed the Prosecution as soon as he realised they were discussing the different attacks. Nothing which D-75 stated during his testimony in Court conflicts with what he told the Prosecution on 20 and 21 June 2015, a full two years before he met with the Defence.[579]

351. On 1 May 2004, a GoU intelligence report places Mr Ongwen approximately 25 km northwest of Odek and approximately 8 km west of the River Aswa.[580] The map coordinates are 2°50'42.0"N, 32°34'07.0"E.[581] In these four days, Mr Ongwen's position changed by around 10 km.

352. Witness D-75 also testified that Mr Ongwen was with him near Lapak when they heard of the attack on the FM radio, which corroborates the directional finding evidence. The location of the RVs varies significantly from witness to witness and the locations do not coincide with the contemporaneous data collected by the GoU, as outlined above. The Defence avers that

[572] UGA-OTP-0017-0130, p. 0130.
[573] UGA-OTP-0017-0130, p. 0130.
[574] UGA-OTP-0017-0130, p. 0132.
[575] UGA-OTP-0017-0130, p. 0132.
[576] T-224-Conf, p. 76, lns 2-23.
[577] T-225-Conf, pp 52-61.
[578] UGA-OTP-0271-0661, p. 0689, lns 959-967.
[579] Compare UGA-OTP-0271-0661, 0661 and UGA-OTP-0271-0695, 0695 with UGA-D26-0022-0301, p. 0302.
[580] UGA-OTP-0017-0157, p. 0157.
[581] UGA-OTP-0017-0157, p. 0157.

given this, it sheds serious doubt as to whether Mr Ongwen could be held liable for counts 11-23 under Article 25(3)(a), Article 25(3)(b) and Article 25(3)(d)(i) and (ii).

iii. The Prosecution evidence is inconsistent as to the location of the RV before the Odek Attack

353. Prosecution witnesses testified to having an RV before the Odek Attack where Mr Ongwen allegedly gave them instructions for the attack. Below is a chart which gives specific information as to the alleged location of the RV related to Mr Ongwen's location as specified in the directional finding material provided by the GoU.

Chart of Locations of Alleged RVs before the Odek Attack

Witness	RV Location of witness	Date	RV Distance from Odek	RV Distance from D.O. on 27/4/04[582]	RV Distance from D.O. on 1/5/04[583]	Citation
P-205	1-2 km N of Lalogi	Morning of 28/04/04[584]	22 km W	25 km SE	21 km S	UGA-OTP-0233-1386[585]
P-142[586]	Omel Kuru	29/04/04	20 km N	8 km E	5 km S	T-70-Conf, p. 29, lns 1-22
P-54	Orapwoyo	Midday of 29/04/04	10 km NW	16 km NNW	18 km NNE	T-93-Conf, p. 15, lns 10-12
P-264	East of Odek		East	South	Southeast	T-66-Conf, pp 58-59
P-245	Bolo	Appears 29/04/04	10 km NE	17 km SE	25 km SE	T-99-Conf, p.50,ln 9-11
P-410	Aswa River riverbank	Appears 29/09/04	East	South	Southeast	T-151-Conf, p. 30, lns 16-19
P-406	Gulu District		Gulu District	Gulu District	Gulu District	T-155-Conf, pp 42-45
P-309	Loyo Ajonga	Midday of 29/04/04[587]	22 km NW	15 km SE	9 km SSE	T-60-Conf, p. 75, lns 15-24

354. The significance of the chart above is three-fold. Firstly, it shows the vast area covered by the witnesses in terms of the alleged RV point before the Odek Attack. Secondly, it demonstrates

[582] Mr Ongwen's location on 27 April 2004 according to directional finding evidence.
[583] Mr Ongwen's location on 1 May 2004 according to directional finding evidence.
[584] T-50-Conf, p. 28, ln. 17 to p. 29, ln. 10.
[585] T-47-Conf, p. 46, lns 5-12 (*noting* that the witness confirmed the location of the RV to the Court).
[586] Witness stated that the RV before and after the attack was at the same location.
[587] This is inferred because the witness stated it took about three to four hours to get from the RV to Odek.

that there is no consensus as to the alleged RV point before the Odek Attack. Thirdly, the testimony about the meetings and what was said is too diverse to resolve the differences in the accounts.

1. The area covered by the alleged RVs are too large

355. Firstly, when all of the possible RVs are plotted on a map, it gives locations creating an almost semi-circle from the west, to the north, then to the east of Odek. This area encompasses approximately 500-600 square km.[588] Putting it in local terms, the cities of Delft, Rotterdam, Zoetermeer and Leiden would be possible RV points if Den Haag Centraal Station was Odek. Gouda misses the cut by three kilometres, which is still closer that what the directional finding evidence would place Mr Ongwen on 1 May 2004. This is a massive area that cannot be reconciled through any logic.

2. The difference in the distances between the alleged RVs cannot be reconciled

356. Secondly, there is no consensus as to the alleged location of the planning/instructional meeting before the attack. Noting that some of the locations were vague, *i.e.* Gulu District (P-406), riverbank of Aswa River (P-410) and east of Odek (P-264), the locations vary considerably. It is understandable to have some slight differences, but these locations differ not by a few kilometres, but double digits. The locations are not even neighbouring villages.

357. Witness P-205 confirmed that the standby group left for Odek on 28 April 2004 and that the meeting with the fighters was held that morning about 1-2 km north of Lalogi.[589] This location and time is impossible for Mr Ongwen to have attended as he was located approximately 25 km away, across a river which is over 50 metres wide, and a rainstorm happening the evening and night of 27 April 2004.[590] As referenced in the chart above, the rest of the persons alleging to have attended the Odek Attack stated that the meeting was on 29 April 2004.

358. Having the standby selection at the RV on the day of an attack is not generally a problem, but it is when the distances to Odek from the alleged RV are vast and it is raining.

359. Witness P-54 stated that the standby left the RV at Orapwoyo around 14h00 or 15h00 that

[588] The area of a circle is A = π x r x r. To get the area of a semi-circle, merely divide the answer by two. A radius of 20 km was used for this calculation.
[589] *See* T-47-Conf, p. 46, lns 5-12 ; T-50-Conf, p. 28, ln. 17 to p. 29, ln. 10 and UGA-OTP-0233-1386.
[590] UGA-OTP-0017-0130, p. 0130-32.

day.[591] It took the group, allegedly with Mr Ongwen who walks slower because of his injury, around four hours to reach Odek.[592] According to P-54, the attack started at 19h00.[593] In Odek, at this time, the sun has already set and it is completely dark. This does not coincide with any other witness from Odek. Witness P-54 is either lying about his participation or does not remember the events of that day, and his testimony cannot be believed.

360. Witness P-309 located the RV in Loyo Ajonga, about 22 km from Odek.[594] He testified to the Court that it took about three or four hours to reach Odek.[595] Just like P-54, P-309 stated that Mr Ongwen, walked with the group to Odek,[596] a person who walks slower because of his injury. To reach Odek in 4 hours from Loyo Ajonga, one would have to walk at a constant rate of 5.5 km/hr. Considering that the LRA walked through the bush, not on roads, that it was raining the day Odek was attacked,[597] that it is alleged that there were children in this group, the Defence asserts that pace is impossible, and that P-309's testimony must be disregarded because he is either lying about his participation or does not remember the events of that day.[598]

361. The Defence outlined reasons above about why P-245 is not credible. To add to this list, no other witness discussed crossing the Aswa River the day of the Odek Attack. The LRA did not use bridges to cross rivers; they crossed in the water. This witness's account of the RV at Bolo should be disregarded.

362. Witness P-142 stated that Mr Ongwen remained behind at the RV, located in Omel Kuru around Kanu, which is 20 km north of Odek.[599] He stated that the standby left the day of the attack and returned the next day.[600] His story departs drastically in relation to others about Mr Ongwen's location during the Odek Attack. It also conflicts with P-205 in relation to the time in which the standby group was gone. This cannot be reconciled and should be disregarded.

[591] T-93-Conf, p. 15, lns 10-12.
[592] T-94-Conf, p. 21, lns 6-13.
[593] T-94-Conf, p. 21, lns 6-13.
[594] T-60-Conf, p. 75, lns 15-24.
[595] T-60-Conf, p. 75, lns 15-24.
[596] T-60-Conf, p. 77, lns 1-7.
[597] T-63-Conf, p. 22, lns 22-25.
[598] The Defence implores the Trial Chamber to investigate the sheer number of times the witness could not remember something when asked by the Defence versus when asked by the Prosecution. The witness's demeanour and answer patterns are indicative of someone lying.
[599] T-70-Conf, p. 29, lns 16-22.
[600] T-70-Conf, p. 29, lns 16-22.

363. Finally, P-406's entire testimony is dubious. Witness P-406 testified about being in Sudan and seeing Mr Ongwen and Kony together.[601] The witness was abducted on or around 3 September 2002[602] and returned from the bush in December 2004.[603] Mr Ongwen did not travel to Sudan during this period and no credible witness places Mr Ongwen there. It is doubtful that P-406 ever met Mr Ongwen, let alone being in his group.

364. While the exact, pinpoint location of the RV before the Odek Attack should not be at issue, it comes into play here. As shown above in the chart, the distances from Odek, the time the standby group was gone, what obstacles the standby group encountered on its way vary too much to reach any decision beyond a reasonable doubt as to the memories of the witnesses. As such, the testimony of these witnesses should be disregarded by the Trial Chamber.

3. The testimonies about the meeting at the RV are inconsistent

365. Firstly, as written above, P-245's testimony about what he allegedly did while in the LRA from 7 March 2003 to 25 August 2006 should be disregarded. As a matter of record though, P-245 is the only person to have alleged the involvement of Okwonga Alero in the Odek Attack.[604] The Defence highlights this fact as it shows the level of scrutiny and professionalism in the investigation of this case.

366. Witness P-205 stated that Mr Ongwen's order was to destroy everything in Odek.[605] But, when interviewed by the Prosecution in 2015, P-205 stated that Mr Ongwen instructed the standby to attack the military houses and destroy everything that belongs to the military.[606] Witness P-205's testimony significantly differs from his interview to his testimony, which is also outlined below in relation to the orders for Lukodi.

367. Witness P-142 stated that the standby was to go collect food and fight the government forces.[607] This is corroborated by P-372.[608] Witness P-54 stated that the orders were to collect food, and once his memory was refreshed, he said the orders were also to attacks the barracks

[601] T-154-Conf, p. 80, lns 14-20.
[602] T-154-Conf, p. 8, lns 3-22.
[603] T-154-Conf, p. 82, lns 12-14.
[604] T-99-Conf, p. 49, lns 17-19.
[605] T-47-Conf, p. 43, lns 12-21.
[606] UGA-OTP-0247-0447, p. 0470, lns 745-753. *See also* T-50-Conf, pp 43-45 (*noting* the witness changed his testimony significantly by including attacking civilians in the orders).
[607] T-70-Conf, p. 27, ln. 17 to p. 28, ln. 7.
[608] T-148-Conf, p. 45, ln. 24 to p. 47, ln. 1.

and the civilians.[609] Witness P-406 stated the same general thing.[610] Witness P-264 said they were ordered to collect food.[611] He was also allegedly warned about soldiers being at Odek, but there were no specific orders to kill soldiers.[612] Witness P-264 also stated that Ben Acellam spoke at the RV, unlike anyone else.[613] Witness P-410 said that they were to collect food[614] and that everything was to be killed,[615] but he also stated that Vincent Otti and Buk Abudema were both at the RV addressing the standby on the orders.[616] Finally, P-309 was told they were going to "work".[617]

368. None of the orders are consistent. The most consistent order was to collect food. A few of the more dubious witnesses mentioned that others spoke at the RV, and there was no consensus as to which other commanders were present except for Ben Acellam. Witness P-410 stated that the instructions came from Sudan, apparently by foot with Vincent Otti.[618]

369. The evidence about the alleged instructions at the RV is so unclear that it fails to demonstrate beyond a reasonable doubt that Mr Ongwen was part of a common plan or engaged in a conduct which would result in a crime. Should the Trial Chamber determine that there was a common plan, the collective information about the RV and any alleged orders do not prove beyond a reasonable doubt that Mr Ongwen issued orders which violated Articles 7 and 8 of the Statute. At best, the most common order was to get food, which means Mr Ongwen did not instruct his subordinates to commit a crime.

370. The Defence avers that given this, it sheds serious doubt as to whether Mr Ongwen could be held liable for counts 11-23 under Article 25(3)(a), Article 25(3)(b) and Article 25(3)(d)(i) and (ii) for the alleged acts at the Odek Attack.

iv. Mr Ongwen had no knowledge of the attack on Odek IDP Camp beforehand

371. The Prosecution has failed to demonstrate beyond a reasonable doubt that Mr Ongwen knew of the plans or of the attack before the Odek Attack happened. The Prosecution has also failed

[609] T-93-Conf, p. 16, ln. 6 to p. 19, ln. 8.
[610] T-154-Conf, p. 42, lns. 1-10.
[611] T-64-Conf, p. 38, lns 3-10; p. 41, lns 9-16; and p. 43, ln. 21 to p. 44, ln. 1.
[612] T-64-Conf, p. 38, lns 3-10; p. 41, lns 9-16; and p. 43, ln. 21 to p. 44, ln. 1.
[613] T-64-Conf, p. 43, lns 3-8.
[614] T-151-Conf, p. 35, ln. 21 to p. 36, ln. 11.
[615] T-151-Conf, p. 31, ln. 16.
[616] T-151-Conf, p. 33, ln. 9 to p. 35, ln. 13.
[617] T-60-Conf, p. 74, ln. 24 to p. 75, ln. 3.
[618] T-151-Conf, p. 30, ln. 16 to p. 33, ln. 4.

to reconcile the issues presented by the Defence related to Mr Ongwen's location *vis-à-vis* the alleged RV points before the Odek Attack.

372. The Prosecution has failed to demonstrate that Mr Ongwen was at the RV points as alleged by its witnesses. The Defence incorporates by reference its arguments outlined above about how the Prosecution failed to reconcile that none of the RVs remotely match. The GoU directionally finding material places Mr Ongwen nowhere near any of the alleged RV points for the Odek Attack.

373. Before and after the Odek Attack, Mr Ongwen was located, at the least, 20 km north of Odek.[619] Just before the attack, Mr Ongwen was on the eastern side of the Aswa River during rainy season, and with rain so hard on the evening and night of 27 April 2004, radio communication was not possible.[620] Just after the attack on 1 May 2004, Mr Ongwen was 25 km northwest of Odek.[621] The Prosecution has not demonstrated how Mr Ongwen could be at two places at once, let alone up to eight different locations as described by Prosecution witnesses as outlined in the chart above.

374. The only way to reconcile this conundrum is to admit that Mr Ongwen was where the GoU directional finding material states he was located. It explains why not one person gave the same RV point and why the alleged orders varied so widely. Finally, it also explains why on 30 April 2004 that Labongo (aka Ocan Labongo and Ocan Nono) first claimed responsibility for the Odek Attack at the morning/midday radio calls.[622] Ben Acellam, who is alleged to have been at the attacked too, also made a call that morning before Mr Ongwen, but it was on a different frequency, meaning that one could not listen to Ben Acellam speaking to "Latoni" (Thomas Kwoyelo) if listening to the rest of the LRA communications.[623] Mr Ongwen's alleged communication was not until 18h30.

375. Secondly, the Prosecution has failed to provide intercept evidence of an order being transmitted through radio communications. The Prosecution has in its possession copies of nearly 1,000 hours of alleged intercept communications. With all of these communications, why has it not

[619] *See* section on Directional Finding material above.
[620] UGA-OTP-0017-0130, p. 0130 and 0132.
[621] UGA-OTP-0017-0157, p. 0157.
[622] UGA-OTP-0017-0150, p. 0153; UGA-OTP-0197-1670, p. 1690 (left hand side, *also* noting that someone altered the logbook on the right side where Labongo takes credit during the 18h30 radio chatter); UGA-OTP-0242-7194, p. 7244 (*noting* that the name Abudema appears instead of Labongo); and UGA-OTP-0061-0206, p. 0269 (*noting* that it is written "unknown C/S", but that Mr Ongwen's C/S is known to the operator).
[623] T-136-Conf, p. 26, ln. 19 to p. 30, ln. 6.

been able to produce the alleged order to Mr Ongwen? It is simple, it does not exist.

376. Mr Ongwen did not receive an order to send LRA to attack Odek. The order came directly from Kony to Ben Acellam. There is a simple reason why Ben Acellam (Lam Dogi) was the first person on the radio on 30 April 2004,[624] it was because he was given the order to attack Odek, not Mr Ongwen. He reported to "Latoni", who would have reported it to Kony first.

377. Mr Ongwen did not have knowledge of the Odek Attack beforehand as it was led by another person in the LRA. It is only logical that Labongo and Ben Acellam led these attacks. Had Mr Ongwen ordered the Odek Attack, neither of these two persons would have been on the radio the next morning, and Labongo would not have been reporting on the attack if the orders came from his brigade commander. The fact is that these orders, as happened often in the LRA, came directly from Kony to Ben Acellam, who attacked Odek without the knowledge of Mr Ongwen in advance.

v. Mr Ongwen did not participate in the Odek Attack

378. The facts and circumstances of the Odek Attack clearly state that Mr Ongwen was at the Odek Attack.[625] This is false. The Prosecution has failed to demonstrate that Mr Ongwen was at Odek leading people on the ground during the Odek Attack. The Defence incorporates by reference its arguments outlined above.

379. Firstly, several witnesses listed above state that Mr Ongwen did not go to the Odek Attack.[626] Witness P-410 cannot be believed because according to him, Vincent Otti, Buk Abudema and Mr Ongwen went to the Odek Attack.[627] No one, not even the Prosecution, alleged that those two persons attended the Odek Attack. Witness P-410 invented a story; he knew about plans, but he did not go to Odek or the RV. The Defence also reminds the Trial Chamber that P-245 was not in the LRA at this time, and his testimony should not be considered for Odek.

380. Similar to above, there is varying testimony as to Mr Ongwen's location during the time of the Odek Attack. The conflicts noted above and throughout this section on Odek give reasonable doubt whether Mr Ongwen was at Odek leading people on the ground during the

[624] T-136-Conf, p. 26, ln. 19 to p. 30, ln. 6.
[625] CoC Decision, p. 78, para. 29.
[626] T-70-Conf, p. 29, lns 16-22 (P-142); T-64-Conf, p. 46, lns 8-13 (P-264); T-50-Conf, p. 28, lns 3-7 (P-205); T-224-Conf, p. 76, lns 2-23 (D-75).
[627] T-151-Conf, p. 42, lns 15-20.

attack. As such, the Trial Chamber should decide that the Prosecution failed to present evidence which proves beyond a reasonable doubt that Mr Ongwen planned, commanded, ordered, induced, solicited or significantly contributed to counts 11-23 related to the Odek Attack.

vi. Mr Ongwen did not have the authority to prevent or punish any person under him who may have been involved in the Odek Attack

381. The Prosecution failed to prove beyond a reasonable doubt that Mr Ongwen had the ability to prevent the Odek Attack or to punish those who allegedly went. The Defence incorporates by reference arguments outlined above.

382. Firstly, Mr Ongwen lacked the authority to prevent an attack at Odek. While P-410 may not have been involved in the attack, or been at the RV before the attack, P-410 did get one thing correct; the order to attack Odek came directly from Kony,[628] but not to Mr Ongwen, but to Ben Acellam.

383. It is rather well settled through the evidence that openly refusing to follow Kony's orders would result almost always in death.[629] *In arguendo*, if Mr Ongwen even knew about the orders, he would not have had the capacity to stop the attack. Furthermore, knowing that Kony gave all orders and that refusing to comply meant death, Mr Ongwen would not have had the capacity to punish anyone for their acts during the Odek Attack.

384. Mr Ongwen lacked effective command and control over the persons who went to the Odek Attack. He also lacked the ability to punish anyone for alleged acts at Odek. As such, the Trial Chamber should decide that the Prosecution failed to present evidence which proves beyond a reasonable doubt that Mr Ongwen planned, commanded, ordered, induced, solicited or significantly contributed to counts 11-23 related to the Odek Attack.

385. Should the Trial Chamber determine that Mr Ongwen did have effective command or control over the persons who attacked Odek, the Defence emphasises that the onus is on the Prosecution to prove beyond a reasonable doubt that Mr Ongwen did not investigate and/or punish those allegedly involved in the Odek Attack.

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[628] T-151-Conf, pp 28-29.

[629] *E.g.* T-17-Conf, p. 65, lns 6-9 (P-235); T-113-Conf, p. 44, ln. 6 (P-172) (*noting* that he barely survived); T-121-Conf, p. 36, lns 12-18 (P-138); T-34-Conf, p.78, ln. 22 to p. 80 ln. 6 (P-16); T-202-Conf, p. 61, lns 15-18 (D-27); T-199-Conf, p. 31, lns 5-12 and p. 41, ln. 8 (D-32); T-224-Conf, p. 44,ln. 22 to p. 45, ln. 2 (D-75); T-236-Conf, p. 16, lns 10-14 (D-19); T-226-Conf, p. 27, lns 18-24 (D-25); and T-197-Conf, p. 41, ln. 25 to p. 42, ln. 4 (D-60).

vii. The copy of the radio intercept from 30 April 2004 lacks credibility and should be disregarded for the Article 74 Judgment

386. The Defence has written above about issues related to the audio intercepts in general. The Defence asserts here that the audio intercepts for Mr Ongwen's alleged report of the Odek Attack must be excluded from evidence as its authenticity is dubious at best.

387. During P-242's testimony, the Defence asked P-242 to comment on segments of the alleged report of the Odek Attack allegedly made by Mr Ongwen. Witness P-242 noted, while being questioned by the Defence, that it appears there are pauses and a possible edit in the recording caused at the source of the recording, not by the enhancement process.[630]

388. Noting the Prosecution concedes that there are differences in the different interceptor reports,[631] the authenticity and reliability of the audio intercepts comes into focus. If this alleged key piece of evidence has multiple issues, respectfully, the Trial Chamber has no other option than to disregard evidence from this source for clear and obvious reasons of possible corruption at the source. Finally, as noted above, there may have been further small communications which were not recorded during these pauses and/or edits which could have proven that Mr Ognwen did not lead the attack at Odek.

389. Should the Trial Chamber find the audio intercepts reliable, the Defence emphasises that the onus is on the Prosecution to prove beyond a reasonable doubt that Mr Ongwen did not investigate and/or punish those allegedly involved in the Odek Attack. Specific evidence needs to demonstrate that Mr Ongwen failed to investigate and/or punish those involved; this cannot be inferred.

390. Because there are obvious issues and concerns with the authenticity and completeness of the audio intercepts relating to the Odek Attack, the Defence respectfully requests the Trial Chamber to disregard this evidence when determining its Article 74 Judgment.

C. LUKODI

391. The Prosecution failed to present evidence which demonstrates beyond a reasonable doubt that Mr Ongwen participated in the planning of the attack on Lukodi IDP Camp, significantly contributed to the attack on Lukodi IDP Camp, ordering an attack on Lukodi IDP Camp or

[630] T-128, p. 40, ln. 19 to p. 49, ln. 13. *See also* UGA-REG-0001-0017, UGA-REG-0001-0018 and UGA-REG-0001-0019.
[631] UGA-OTP-0272-0446.

failing to investigate or punish alleged crimes at Lukodi IDP Camp on 19 May 2004. As the Prosecution has failed to meet its burden of proof, the Defence requests that counts 24-36 be dismissed.

392. The Defence recalls its notices on 9 August 2016 whereby it advanced that Mr Ongwen was under a constant state of duress in the LRA and that Mr Ongwen suffered from a mental disease or defect during the charged period.[632] The Defence submits the arguments below without prejudice to the arguments advanced related to Articles 31(1)(a) and (d).

i. Testimony of witness P-245 about Lukodi is not credible and should be disregarded

393. The Defence incorporates by reference the section in Odek directly above which relates to P-245's credibility.

394. Witness P-245 again makes claims unheard from any other witness. He states that Mr Ongwen was a brigadier at this time,[633] the standby was around Abalokodi,[634] and again improperly identified the brigade and/or battalion of Mr Ongwen, Okwonga Alero, Ben Acellam and Opio Makes.[635] The witness lied to the Court and used information known to him on [redacted]2003 to pass it off as if it was from 19 May 2004. Finally, [redacted] asserted that he knows P-245 well and that P-245 did not go to the Lukodi Attack.[636] He also stated that P-245 escaped about a year before he did.[637]

395. For the abovementioned reasons, the Defence asserts that the Trial Chamber should completely disregard the testimony of P-245 in relation to all alleged actions within the LRA [redacted].

ii. UPDF Directional Finding evidence and weather reports demonstrate that Mr Ongwen was not near Lukodi around the time of the attack

396. On 18 May 2004, Mr Ongwen was approximately 10 km south of Lukodi IDP Camp. The directional finding material, provided by the GoU, demonstrates that Mr Ongwen did not attend the Lukodi Attack. Furthermore, considering the locations and timing of when alleged

[632] ICC-02/04-01/15-517 and ICC-02/04-01/15-518.
[633] T-99-Conf, p. 67, lns 16-17.
[634] T-99-Conf, p. 66, lns 6-12 (*noting* it is misspelled in the transcript).
[635] *Compare* T-101-Conf, p. 36, ln. 8 to p. 37, ln. 25 with UGA-OTP-0232-0234, p. 0419 (second arrow) and UGA-OTP-0242-0840, p. 0842.
[636] [redacted].
[637] [redacted].

key insiders left for the attack, it is not possible to reconcile their accounts with the contemporaneous directional finding material.

397. On 18 May 2004, a GoU intelligence report places Mr Ongwen approximately 10 km south of Lukodi IDP Camp in an abandoned school.[638] The map coordinates are 2°49'24.0"N, 32°18'21.0"E.[639] These coordinates place the radio call within a then vacant housing compound used to house teachers of the nearby abandoned primary school. As described in the intelligence report, Mr Ongwen was located about 1.3 km from Gulu.[640] It is noteworthy that the location is at a minimum of 34 km from the Awsa River.

398. Witnesses testified to having RVs with Mr Ongwen before the attack. The locations do not coincide with the contemporaneous data collected by the GoU outlined above. These inconsistencies shall be discussed in further detail below.

iii. The Prosecution evidence is inconsistent as to the location of the RV before the Lukodi Attack

399. Prosecution witnesses testified to having an RV before the Lukodi Attack where Mr Ongwen allegedly gave them instructions for the attack. Below is a chart which gives specific information as to the alleged location of the RV related to Mr Ongwen's location as specified in the directional finding material provided by the GoU.

Chart of Locations of Alleged RVs before the Lukodi Attack

Witness	RV Location of witness	Date	RV Distance from Lukodi	RV Distance from D.O. on 18/05/04[641]	Citation
P-18	Te Got Atoo[642]	18/05/04	22 km SE	19 km E	T-68-Conf, p. 53, lns 12-20
P-142	Omel Kuru, Kanu	18/05/04	30 km E by SE	30 km E	T-70-Conf, p. 43, lns 19-21
P-205	Omel Boke	18/05/04	34 km E	32 km E	T-47-Conf, p. 58, lns 13-18
P-145	Loyo Ajonga	17/05/04[643]	32 km SE	28 km SE	T-143-CONF, p. 21, ln 25
P-410	Gulu District	17/05/04[644]	UNKNOWN	UNKNOWN	N/A
P-406	Koch Goma	Unknown	35 km SW	30 km SW	T-155-Conf, p.

[638] UGA-OTP-0017-0262, p. 0262.
[639] UGA-OTP-0017-0262, p. 0262.
[640] UGA-OTP-0017-0262, p. 0262.
[641] Mr Ongwen's location on 18 May 2004 according to directional finding evidence.
[642] It's misspelled in the transcripts as "Tegot-Atto".
[643] T-143-Conf, p. 21, lns 4-8.
[644] T-151-Conf, p. 62, ln. 25 to p. 63, ln. 2 (*noting* that he said it took two days to get to Lukodi).

Witness	RV Location of witness	Date	RV Distance from Lukodi	RV Distance from D.O. on 18/05/04[641]	Citation
					55, lns 14-18
P-101	Lalogi	18/05/04	39 km SW	32 km SE	UGA-OTP-0173-0109, p. 0115, para. 32
P-54	Te Got Atoo	Unknown	22 km SE	19 km SE	T-93-Conf, p. 30, lns 6-14

400. The significance of the chart above is three-fold. Firstly, it shows the diverse area covered by the witnesses in terms of the alleged RV point before the Lukodi Attack. Secondly, it demonstrates that there is no consensus as to the alleged RV point before the Lukodi Attack. Thirdly, the testimony about the meetings and what was said is too diverse to resolve the differences in the accounts.

1. The area covered by the alleged RVs are too large

401. Firstly, when all of the possible RVs are plotted on a map, it gives locations creating an almost quarter-circle from the southwest to the east of Lukodi. This area encompasses approximately 800 square km.[645] Putting it in local terms, the cities of Delft, Rotterdam, Zoetermeer, Leiden and Gouda would be too close to be possible RV points if Den Haag Centraal Station was Lukodi.[646] Schiphol Airport, Dordrect and Hoofddorp miss the cut by five kilometres or less. This is a massive area that cannot be reconciled through logic.

2. The difference in the distances between the alleged RVs cannot be reconciled

402. Secondly, there is no consensus as to the alleged location of the planning/instructional meeting before the attack. Noting that one of the locations was vague, *i.e.* Gulu District (P-410), the locations vary considerably. It is understandable to have some slight differences, but these locations differ not by a few kilometres, but double digits. The locations are not even neighbouring villages.

403. Witness P-54 stated that the RV was at Atoo Hills.[647] Witness P-18 states the same.[648] The Defence outlined reasons above about why P-245 is not credible.

[645] The area of a circle is A = π x r x r. To get the area of a quarter-circle, merely divide the answer by four. A radius of 32 km was used for this calculation.
[646] The Defence notes that Rotterdam is the only one which is 22 km away, but in the wrong direction.
[647] T-93-Conf, p. 30, lns 6-14.
[648] T-68-Conf, p. 53, lns 12-20.

404. The Defence stresses that Got Atoo (Atoo Hills) is an unmistakable object. It rises several hundred metres in the air and can be seen from all directions for well over 10 km. The Defence requested a site visit to Got Atoo,[649] but the Trial Chamber decided against it.[650] If an RV took place at Te Got Atoo (the foothills), it **could not** be mistaken for any other location.

405. Witness P-205 confirmed that the standby group left for Lukodi on 18 May 2004 and that the meeting with the fighters was held in Omel Boke on that day.[651] This location and time is impossible for Mr Ongwen to have attended as P-205 was located approximately 32 km east of Mr Ongwen's directional finding location.[652] It is impossible that this witness's memory is correct as it conflicts with contemporaneous data collected by the GoU directional finding programme.

406. Witness P-145 located the RV in Loyo Ajonga, about 32 km from Lukodi and that the RV was on 17 May 2004.[653] He testified to the Court that the group found out the day after the RV that they were going to Lukodi and that it took about one and a half days to reach Lukodi.[654] This location and time is impossible for Mr Ongwen to have attended as P-145 was located approximately 32 km southeast of Mr Ongwen's directional finding location.[655] It is impossible that this witness's memory is correct as it conflicts with contemporaneous data collected by the GoU directional finding programme.

407. Witness P-142 stated again that the RV was located in Omel Kuru around Kanu, which is about 30 km southeast of Lukodi.[656] He stated that the standby left the morning before the attack.[657] The Defence reminds the Trial Chamber that this is the second RV which P-142 gives for Omel Kuru around Kanu.[658] While the alleged RV dates are close, LRA groups did not remain stagnant for long for fear of being found and attacked by UPDF. To say that almost three weeks later they were in the same general location is unbelievable and lacks credibility. Finally, it is impossible that this witness's memory is correct as it conflicts with

[649] Defence Observations on a Judicial Site Visit, ICC-02/04-01/15-879-Conf, para. 9(1).
[650] Decision on Judicial Site Visit to the Republic of Uganda, ICC-02/04-01/15-Conf, p. 5.
[651] *See* T-47-Conf, p. 58, lns 13-18 and UGA-OTP-0233-1386.
[652] UGA-OTP-0017-0262, p. 0262.
[653] T-143-Conf, p. 21, lns 6-25.
[654] T-143-Conf, p. 21, lns 6-25.
[655] UGA-OTP-0017-0262, p. 0262.
[656] T-70-Conf, p. 43, lns 19-21.
[657] T-70-Conf, p. 58, ln. 24 to p. 59, ln. 2.
[658] *See* above section for Odek.

contemporaneous data collected by the GoU directional finding programme.

408. Once again, P-406's testimony is dubious. Witness P-406 testified about being in Sudan and seeing Mr Ongwen and Kony together.[659] The witness was abducted on or around [redacted] 2002[660] and returned from the bush in December 2004.[661] Mr Ongwen did not travel to Sudan during this period and no credible witness places Mr Ongwen there. It is doubtful that P-406 ever met Mr Ongwen, let alone being in his group.

409. Additionally, P-406 places the RV in the area of Koch Goma.[662] Koch Goma is southwest of Gulu not far from Nwoya in Nwoya District. It is far away from the directional finding location of Mr Ongwen, 30 km southwest, and nowhere near any of the other RV locations. *In arguendo*, if the Trial Chamber believes his account of the RV, it must discount the testimonies of all other witnesses about the RV before Lukodi.

410. Finally, P-101 confirmed that the location was in Lalogi, which is 32 km southeast of Mr Ongwen's directional finding location and just over 39 km southeast of Lukodi.[663] This is the furthest distance yet, and the witness testified that they did not leave until 21h00 on the day before the attack and arrived at Lukodi around 10h00.[664] With respect, that is a hard distance to travel in that amount of time at night, during the rainy season, and without using conventional roads.

411. While the exact pinpoint location of the RV before the Lukodi Attack should not be at issue, it comes into play here. As shown above in the chart, the distances of the different RV locations vary too much to reach any decision beyond a reasonable doubt as to the memories of the witnesses. With a landmark like Got Atoo looming in the area, it is impossible to think that all but two persons would give such varying locations. As such, the testimony of these witnesses should be disregarded by the Trial Chamber as the Prosecution failed to meet its burden of proof.

3. The testimonies about the meeting at the RV are inconsistent

412. Firstly, as written above in this and the section on Odek, P-245's testimony about what he

[659] T-154-Conf, p. 80, lns 14-20.
[660] T-154-Conf, p. 8, lns 3-22.
[661] T-154-Conf, p. 82, lns 12-14.
[662] T-155-Conf, p. 55, lns 14-18.
[663] UGA-OTP-0173-0109-R01, p. 0115, para. 32. *See also* T-13-Conf, p. 53, lns 17-20.
[664] UGA-OTP-0173-0109-R01, p. 0115, para. 32. *See also* T-13-Conf, p. 53, lns 17-20.

allegedly did while in the LRA [redacted] should be disregarded.

413. Witness P-18 stated that Mr Ongwen's orders were to attack Gwendiya together with people from Tulu's group,[665] not Lukodi. While the alleged instructions were to kill everyone, Gwendiya was a school which was converted into a military installation and not an IDP camp.[666] Looking at P-18's testimony, Mr Ongwen did not order a war crime or a crime against humanity because the group changed its target location from Gwendiya to Lukodi without Mr Ongwen's knowledge.

414. Witness P-145 stated that the orders he received was that the LRA was going to Lukodi to collect food and to attack the government forces.[667] Witness P-145 was in Gilva sickbay at the time of the attack.[668]

415. Witness P-142 originally stated that the order was to attack the military, burn the military homes and take their food,[669] but "remembered" an order to kill everything after his memory was refreshed, but also that the intelligence was that there were no civilians at Lukodi.[670] Getting food for the LRA was of course a big part of the mission.[671] The group comprised soldiers from both Sinia and Gilva.[672]

416. Witness P-205 alleged that Mr Ongwen's ordered the soldiers at Lukodi to be killed and anyone left in the camp to be killed when he testified in Court.[673] The Defence stresses that P-205's testimony significantly changed on the stand. Witness P-205, during his 2015 interview with the Prosecution, stated that the objective was to attack the military, that it was to start before sunset so one could distinguish between military and civilian, and that "in the cases of Lukodi, the mission was not to kill civilians."[674] Witness P-205 testimony drastically changed from his interview to his testimony again, and he testimony about the alleged orders for Lukodi should be disregarded by the Trial Chamber.

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[665] UGA-OTP-0159-0002-R01, p. 0009, para. 37 and p. 0010, para. 42. *See also* T-68-Conf, p. 56, ln. 3 to p. 57, ln. 6. The Defence notes that the name is spelled incorrectly in the statement and transcript.
[666] T-69-Conf, p. 46, lns 3-9.
[667] T-143-Conf, p. 11, ln. 18 to p. 12, ln. 16; p. 13, ln. 15 to p. 14, ln. 15; and p. 19, ln. 18 to p. 20, ln. 7.
[668] T-143-Conf, p. 11, ln. 21 to p. 12, ln. 7.
[669] T-70-Conf, p. 46, lns 16-19.
[670] T-70-Conf, p. 47, lns 9-20.
[671] T-70-Conf, p. 59, lns 21-24; p. 63, lns 17-22; p. 64, ln. 20 to p. 65, ln. 11.
[672] T-70-Conf, p. 44, lns 8-25.
[673] T-47-Conf, p. 54, lns 10-16.
[674] T-50-Conf, p. 54, ln. 1 to p. 56, ln. 13. *See also* UGA-OTP-0243-0690, p. 0696, lns 191-192, p. 0704, lns 464-468, p. 0709, lns 616-629 and UGA-OTP-0247-0175, p. 0185, lns 341-346.

417. Witness P-101 stated that the order to attack Lukodi included attacking the government soldiers, getting food and abducting persons to help carry the food.[675] After the food was carried away, most of the abducted persons were to be released.[676] The group which allegedly went to Lukodi had around 30 people from Sinia and others from Gilva.[677]

418. Witness P-410's testimony is once again unbelievable. The witness stated that at the RV for the Lukodi Attack was General Vincent Otti, Brigadier Buk Abudema, Brigadier Kenneth Banya, Komakech and Okwee.[678] This statement goes against everything the Prosecution has presented to the Court, and calls into question again the Prosecution's investigation abilities. The witness merely repeated the same thing as he did for Odek, that everything was to be killed.[679] Just as it was written in the section on Odek, the Defence asserts that this witness is lying, and it is doubtful if he has ever met Mr Ongwen.

419. It is doubtful too that P-406 attended the RV for the Lukodi Attack. As noted above, the witness states the group came from the southeast, in Nwoya District, near Koch Goma.[680] No one places Mr Ongwen anywhere remotely close to Koch Goma. Regardless, the witness stated that the orders were to attack the barracks, take food and abduct children.[681] He specifically noted that "most times he [Mr Ongwen] also says civilians should not be shot using guns but instead the soldiers are the ones to be shot at."[682]

420. The evidence about the alleged instructions at the RV is so unclear that it fails to demonstrate beyond a reasonable doubt that Mr Ongwen was part of a common plan or engaged in a conduct which would result in a crime. Should the Trial Chamber determine that there was a common plan, the collective information about the RV and any alleged orders do not prove beyond a reasonable doubt that Mr Ongwen issued orders which violated Articles 7 and 8 of the Statute. At best, the most common order was to get food,[683] which means Mr Ongwen did not instruct his subordinates to commit a crime.

421. As noted by D-72, the government forces on patrol from Lukodi engaged a group from Gilva

[675] UGA-OTP-0173-0109-R01, p. 0115, para. 29.
[676] UGA-OTP-0173-0109-R01, p. 0115, para. 29.
[677] UGA-OTP-0173-0109-R01, p. 0115, para. 29.
[678] T-152-Conf, p. 42, ln. 9 to p. 43, ln. 3.
[679] T-151-Conf, p. 61, lns 1-24.
[680] T-155-Conf, p. 55, lns 14-18.
[681] T-155-Conf, p. 53, lns 17-23.
[682] T-155-Conf, p. 53, lns 22-23.
[683] *See* section above on pillaging.

prior to the Lukodi Attack.[684] The Defence notes that witnesses state that it was a combined force between Gilva and Sinia. The Prosecution has failed to prove beyond a reasonable doubt that Mr Onwgen's alleged contribution was essential given that Gilva was recently operating in and around Lukodi. Even if the contribution was essential, which the Defence does not concede, there is insufficient evidence that Mr Ongwen was aware that his alleged contribution was essential because he knew that Gilva was present and capable of conducting the operation on its own.

422. The Defence avers that given this, it sheds serious doubt as to whether Mr Ongwen could be held liable for counts 24-36 under Article 25(3)(a), Article 25(3)(b) and Article 25(3)(d)(i) and (ii) for the alleged acts at the Lukodi Attack.

iv. The location of the LDU barracks at Lukodi violated international humanitarian law, increasing collateral damage and causing civilian casualties

423. It is undisputed that the LDU barracks in Lukodi was almost completely surrounded by Lukodi IDP Camp. The government forces even pitched their tents in the schoolyard playground.[685] It severely blurs the principle of distinction as military objectives were intertwined with the civilian population.[686]

424. Witness D-72 testified that, unlike other IDP camps, Lukodi IDP Camp had staffed outposts for the government soldiers surrounding the IDP Camp.[687] These outposts were almost indistinguishable from the civilian homes.[688] This blurred the line between civilians and military, and explains why P-142 stated that he was told there were no civilians at Lukodi military barracks.

425. A number of witnesses testified that civilians could have been injured or killed from crossfire during the Lukodi attack, including, P-205, P-142, P-172 and D-72[689] and two witnesses who said that people could die in crossfire and that Mr Ongwen only attacked the military, P-85

[684] T-212-Conf, p. 33, ln. 12 to p. 34, ln. 6.
[685] T-78-Conf, p. 24, ln. 24 to p. 25, ln. 6 (P-24).
[686] Galic ITCY Appeals Judgment, IT-98-29, 30 November 2006, para. 133.
[687] T-212-Conf, p. 23, ln. 17 to p. 25, ln. 5.
[688] T-212-Conf, p. 23, ln. 17 to p. 25, ln. 5.
[689] T-51-Conf, p. 17, lns 12-15 (P-205); T-70-Conf, p. 65, ln. 23 to p. 66, ln. 4 (P-142); T-113-Conf, p. 25, lns 14-20 (P-172); and T-212-Conf, p. 38, ln. 23 to p. 39, ln. 23 (D-72) (*noting* that the witness discussed the indiscriminate firing of the 12 on the mamba at the IDP Camp).

and P-209.[690]

426. The forensic report made by P-36 is general in nature and lacks medical and legal reasoning for his conclusions on how people died (*i.e.* killed by LRA).[691] The Defence notes the pathologist's observations about bullet shells. The pathologist stated, "[w]e found lots of bullets and shells scattered all over the area of the military detachment."[692] Later in his statement, the medical officer stated, "I realized that there were lots of shells from big bullets lying on the ground in the civilian parts of the camp."[693] The Defence finds it alarming and instructive that the big bullet shells "went missing" and were not available for forensic analysis.[694]

427. No credible witness states that the LRA had heavy machine guns at Lukodi.[695] Witness D-72 testified though to the UPDF having 12's mounted on the buffalo armoured car and both the buffalo and mamba having mounted machine guns.[696] The existence of big bullet shells in the civilian area could have only come from one place, the UPDF. This demonstrates reasonable doubt as to whether the loss of life was caused by the LRA. In fact, it points to the loss of life being caused by the UPDF, especially since the LRA stayed at Lukodi for less than an hour[697] and the government forces were firing long after that.[698]

428. Furthermore, the Prosecution has failed to demonstrate that the fires were caused by the LRA and not by crossfire of tracer (stretcher) bullets or the battle light used by the UPDF.[699] The Defence draws attention to the pathologist's (P-36) report where he stated, "I observed that only specific parts of the camp had been burned. Not the whole camp was destroyed."[700] Witness P-36 drew a sketch of Lukodi IDP Camp and noted that only the huts on the eastern

[690] T-159-Conf, p. 35, ln. 21 to p. 36, ln. 16 (P-85) (*stating* generally that he never heard of Mr Ongwen targeting civilians and that civilians sometimes died in crossfire) and T-161-Conf, p. 19, lns 10-22 (P-209) (*stating* that civilians sometimes died in crossfire and that Mr Ongwen mostly targeted his assaults on the army).
[691] UGA-OTP-0023-0188. *See also* UGA-OTP-0146-0153 to UGA-OTP-0146-0227 (*noting* specifically the lack of specificity of how the post-mortem examinations were performed).
[692] UGA-OTP-0036-0042-R01, p. 0057, para. 122.
[693] UGA-OTP-0036-0042-R01, p. 0058, para. 130.
[694] UGA-OTP-0036-0042-R01, p. 0058, para. 130.
[695] The Defence notes that D-72 stated that he heard an 82, but the Defence asserts this is not a heavy machine gun as it uses the same or similar rounds to an AK-47. Also, an RPG is not a machine gun.
[696] T-212-Conf, p. 41, ln. 22 to p. 42, ln. 3.
[697] T-72-Conf, p. 74, lns 3-5.
[698] T-212-Conf, p. 39, lns 13-15.
[699] T-212-Conf, p. 41, lns 5-21.
[700] UGA-OTP-0036-0042, p. 0057, para. 123.

part of the camp were burnt.[701] With such a small area burnt, it creates reasonable doubt that huts were intentionally lit on fire. It is more likely that these huts were burned by accident, being lit by tracer (stretcher) bullets and the battle light, not because of an alleged order to destroy everything. Had the LRA been given this order, it is reasonable to assume that more that the eastern most part of the camp would be burned. This demonstrates reasonable doubt as to whether the destruction of property was intentional.

429. Reasonable doubt exists as to the nature of the Lukodi Attack. The Prosecution has failed to demonstrate that civilians were deliberately targeted, and Prosecution witness testimony refutes the assertion that civilians and their homes were targeted. Mr Ongwen should be found not guilty of counts 24-36 as the Prosecution has failed to prove beyond a reasonable doubt that Mr Ongwen ordered or significantly contributed to the alleged acts at the Lukodi Attack.

v. Mr Ongwen did not have effective command and control over the LRA who participated in the Lukodi Attack

430. As noted above, P-18 stated that Mr Ongwen ordered the group to attack the Gwendiya military installation. Witness P-18 further stated that the group changed its objective after meeting with another group from Gilva sickbay under Colonel Tulu. As the group decided, without Mr Ongwen's knowledge, to change its objective, the joint-group fell under the commander of Colonel Tulu and not Mr Ongwen. This indicates that Mr Ongwen's subordinates disregarded his instructions and demonstrates that Mr Ongwen did not have effective command or control.[702]

vi. Mr Ongwen was prevented from investigating and reporting to Kony because he did not have accurate information

431. Witnesses P-142 and P-205 allegedly attended the Lukodi Attack. The witnesses allegedly gave Mr Ongwen a report on the attack after returning. Furthermore, P-101 allegedly overheard a discussion between Mr Ongwen and the alleged leader of the attack, Ocaka. These accounts give rise to reasonable doubt that Mr Ongwen failed to investigate and report illegal acts to Kony in respect to the Lukodi Attack.

432. The Defence incorporates by reference arguments outlined about P-245 credibility.

[701] UGA-OTP-0036-0063, p. 0063.
[702] HADŽIHASANOVIĆ, ITCY Appeals Judgement [sic], IT-01-47-A, 22 April 2008, paras 225-232.

433. Witness P-142, the senior intelligence officer alleged to have gone to Lukodi, testified that he report to his commanding officer, the Sinia Brigade Intelligence Officer, "that we went to the barracks, we chased away the barracks and I did not see anybody killed, nobody died."[703] The BIO would report to his superiors,[704] including Mr Ongwen as the brigade commander.

434. Witness P-142 also stated that P-205 would not have reported the Lukodi Attack to Mr Ongwen because Ocaka was in charge of the operation.[705] Witness P-205 stated that he worked on the written report, discussed the reporting to P-142 and Ocaka,[706] and that the oral report to Mr Ongwen was that no civilians died in the Lukodi Attack.[707]

435. Finally, P-101 stated that Mr Ongwen yelled at Ocaka about the Lukodi Attack.[708] As noted by P-205, Mr Ongwen was not told by Ocaka about the civilian deaths, contrary to what P-101 wrote in her statement. News of the attack was broadcasted over Mega FM, a station Mr Ongwen is said to have listened to while in the bush. Witness P-205 alleged that Mr Ongwen's wives were nearby during the oral briefing, but at a distance of about 50-70 metres and out of hearing range.[709] At that distance, it is impossible that P-101 could have understood with such detail what was being said.

436. Mr Ongwen, having heard the reports on Mega FM that civilians were killed, conducted an investigation. He received reports from his alleged junior commanders which informed him that they did not see any dead civilians during the attack. Assuming this is correct, Mr Ongwen was faced with believing three junior commanders or the government run radio station, Mega FM. Mr Ongwen investigated the alleged acts against civilians at Lukodi to the best of his ability. As such, the Trial Chamber should decide that the Prosecution failed to present evidence which proves beyond a reasonable doubt that Mr Ongwen failed to prevent or punish the alleged crimes in counts 24-36 related to the Lukodi Attack.

vii. The radio intercepts lack credibility and should be disregarded

437. The Defence has written above about issues related to the audio intercepts in general. The Defence asserts here that the audio intercepts for Mr Ongwen's alleged report of the Lukodi

[703] T-71-Conf, p. 20, lns 14-18.
[704] T-72-Conf, p. 53, lns 11-15 (P-142).
[705] T-73-Conf, p. 4, lns 4-8 (P-142).
[706] T-51-Conf, p. 11, lns 18-23.
[707] T-51-Conf, p. 13, lns 3-14. *See also* UGA-OTP-0243-07190-R01, p. 0723, lns 128-140.
[708] T-13-Conf, p. 31, ln. 25 to p. 33, ln. 13. *See also*, UGA-OTP-0173-0109-R01, p. 0116, para. 33.
[709] T-47-Conf, p. 63, ln. 24 to p. 64, ln. 22.

Attack must be excluded from evidence as its authenticity is dubious at best. Noting the Prosecution concedes that there are differences in the different interceptor reports,[710] the authenticity and reliability of the audio intercepts comes into focus. Because there are obvious issues and concerns with the authenticity and completeness of the audio intercepts, as described above, the Defence respectfully requests the Trial Chamber to disregard this evidence when determining its Article 74 Judgment.

D. ABOK

438. The Prosecution failed to present evidence which demonstrates beyond a reasonable doubt that Mr Ongwen participated in the planning of the attack on Abok IDP Camp, significantly contributed to the attack on Abok IDP Camp, ordered an attack on Abok IDP Camp, or failed to investigate or report to Kony alleged crimes committed at Abok IDP Camp on 8 June 2004. As the Prosecution has failed to meet its burden of proof, the Defence requests that counts 37-49 be dismissed.

439. The Defence recalls its notices on 9 August 2016 whereby it advanced that Mr Ongwen was under a constant state of duress in the LRA and that Mr Ongwen suffered from a mental disease or defect during the charged period.[711] The Defence submits the arguments below without prejudice to the arguments advanced related to Articles 31(1)(a) and (d).

i. P-252 is not credible

440. The Defence asserts that the Trial Chamber should disregard P-252's testimony about the Abok Attack. The witness's memory is unreliable. While the Defence does not claim that P-252 intentional misled the Court like P-245, the Defence asserts that P-252 more than likely has a mental disease or defect which impedes his ability to reconstruct memories.[712]

441. The witness claims to have been abducted in 2004.[713] The Prosecution submitted P-252's Amnesty Card into evidence which stated that he was granted Amnesty on 1 July 2004.[714] Amnesty is not granted the day one returns; it is granted when the Amnesty Board meets and approves the application. The witness's application was granted on 1 July 2004, meaning that it must have been filed and sent to the board before 1 July 2004.

[710] UGA-OTP-0272-0446.
[711] ICC-02/04-01/15-517 and ICC-02/04-01/15-518.
[712] UGA-OTP-0269-0678, pp 0679-80 and UGA-OTP-0268-0005-R01.
[713] T-87-Conf, p. 10, lns 4-5.
[714] UGA-OTP-0269-0722, p. 0723.

442. The witness stated that he returned from the bush during the height of the ripening season for mangos,[715] *i.e.* late May.[716] This is also inconsistent with an escape from the LRA in late 2005.

443. This is inconsistent with someone who was abducted on [redacted] and escaped from the LRA in late 2005.[717] The only conclusion is that the witness escaped the LRA in late May 2004. As such, the Defence requests the Trial Chamber to disregard all testimony from P-252 related to the Abok Attack.

ii. The Directional Finding material does not place Mr Ongwen near Abok

444. On 9 June 2004, Mr Ongwen was approximately 15 km southeast of the base of Got Atoo (Atoo Hills)[718] and 21 km north by northeast of Abok IDP Camp. The directional finding material, provided by the GoU, demonstrates that Mr Ongwen did not attend the Abok Attack. The coordinates are 2°45'07.0"N, 32°36'27.0"E. [719] Abok IDP Camp was located approximately 30 km south by southeast from Got Atoo.

445. The Defence highlights this information because while Mr Ongwen is not alleged to have attended the Abok Attack in person, any person alleging to have travelled from Mr Ongwen's position would have walked around 21 km, through swamps and allegedly with young persons, before arriving at Abok.

iii. The Prosecution evidence is inconsistent as to the location of the RV before the Abok attack

446. Prosecution witnesses testified to having an RV before the Abok Attack. Furthermore, two Defence witnesses claim to have been sent from Trinkle for the Abok Attack. None of the witnesses who testified gave, with any accuracy, a planning RV before the Abok Attack.

447. Witness P-54 stated that the RV was in Te Got Atoo.[720] A village is not mentioned. Witnesses P-330, P-406, P-340, D-105 and D-85 do not give an initial RV point before the attack where an alleged planning meeting happened. The Defence disregards P-252's testimony for the aforementioned reasons.

[715] T-88-Conf, p. 47, ln. 22 to p. 48, ln. 1.
[716] *See* T-88-Conf, p. 52, lns 1-3 (*stating* mango season starts around April and ends in June).
[717] *See* T-89-Conf, pp 51-58. *See also* T-88-Conf, p. 15, lns 6-8.
[718] The Defence notes that at this location would not be considered the foothills of Atoo Hills (*i.e.* not Te Got Atoo).
[719] UGA-OTP-0017-0353, p. 0353.
[720] T-93-Conf, p. 33, lns 1-7.

448. While the exact pinpoint location of the RV before the Abok Attack should not be at issue, it comes into play here. Only one witness gives a generalised location for an RV, which is approximately 157 square kilometres.[721] As such, the testimony of these witnesses should be disregarded by the Trial Chamber as the Prosecution failed to meet its burden of proof in regards to the location of an alleged planning meeting.

iv. The testimonies about the instructions from the alleged planner of the attack are inconsistent

449. As written above, P-252's testimony about the RV before the Abok Attack is unreliable.

450. Witness P-330 stated that Okello issued the instructions for Abok, not Mr Ongwen.[722] The witness did not hear Mr Ongwen issue instructions,[723] and it was Okello who selected the standby.[724] The witness only assumed that it was Mr Ongwen.[725] Witness P-330 also stated that "Bomek" was in-charge of the attack and that about 20-28 LRA went.[726] The witness never described the instructions for Abok from Okello, which they were told to line up and be selected for a standby.[727] The Defence notes there is no evidence on the record to corroborate that "Bomek" is D-75, especially since D-75 was not shot in the leg in June 2004.[728]

451. Witness P-330 only stated that an elusive "seasoned soldier who was called Okodi" gave instructions mid-fight to kill civilians.[729] This did not come from Mr Ongwen or Okello. The Defence finds this alleged order highly suspicious. When conducting a work search, the name "Okodi", which is somewhat common, is mentioned only once in the four and a half days of P-330 testimony.

452. Witness P-406 alleges that the instructions were to get food, attack the barracks, abduct people, burn the houses and the barracks.[730] The witness alleges to have overheard this during Mr Ongwen's meeting with the commanders who were leading the attack.[731] He states that

[721] As the foothills could be as wide at a radius of 10 km, the Defence used this radius to determine the area of a semi-circle from the base of Got Atoo (Atoo Hills).
[722] T-52-Conf, p. 28, lns 18-25.
[723] T-52-Conf, p. 28, lns 18-25.
[724] T-52-Conf, p. 29, lns 1-5.
[725] T-52-Conf, p. 28, lns 18-25.
[726] T-52-Conf, p. 29, lns 8-17.
[727] T-52-Conf, p. 28, lns 18-25.
[728] *Compare* T-52-Conf, pp 32-37 with T-224-Conf (*stating* he was injured in his leg and arm before Operation Iron Fist, but no evidence that he was shot in his knee at any time during the charged period).
[729] T-52-Conf, p. 35, ln. 25 to p. 36, ln. 9.
[730] T-154-Conf, p. 66, lns 9-20.
[731] T-154-Conf, p. 66, lns 9-20.

30-40 people went for the standby,[732] about 25-30 people went for the attack[733] and a minimum of five commanders were briefed by Mr Ongwen.[734] He states that he did not see Kalalang at the RV or the Abok Attack.[735] The Defence has written about P-406's credibility in the sections about Odek and Lukodi, and incorporates those arguments by reference.

453. Witness P-54 stated that the instructions were to work, and that he interpreted that to mean to collect food and fighting.[736] The overall commander of the attack was Kalalang.[737] Mr Ongwen did not go in for the attack[738] and P-54 admits that he did not go for or see a meeting where the attack was planned.[739] He did not testify of an overt command to attack civilians.

454. The instructions "Mukwaya"[740] gave to P-340 were that "we are going to collect food, so there were no other instructions."[741] The Defence highlights UGA-OTP-0061-0002 at 0056, whereby the intercept logbook reads that Mukwaya, Abola and Kidega were in Gilva brigade, not Sinia brigade.[742]

455. Witness D-105 states that he was selected by Odhiambo to meet with Kalalang and to collect food "because we were running out of food."[743] The witness met Mr Ongwen only once while he was in the LRA at Lacekocot before the LRA went to Teso.[744]

456. Witness D-85 states that the reason for Abok was to collect food,[745] and that some females were sent into the camp earlier in the day to look for places with food.[746] Witness D-85 never met Mr Ongwen while in the LRA.[747]

457. There is almost nothing about instructions or a planning meeting for the Abok Attack. No clear order or plan exists which allegedly comes from Mr Ongwen. Furthermore, when looked

[732] T-154-Conf, p. 66, ln. 16 to p. 67, ln. 3.
[733] T-155-Conf, p. 66, lns 11-12.
[734] T-154-Conf, p. 66, ln. 16 to p. 67, ln. 3.
[735] T-155-Conf, p. 67, lns 12-16.
[736] T-93-Conf, p. 34, lns 9-14.
[737] T-93-Conf, p. 33, lns 1-7.
[738] T-94-Conf, p. 26, lns 9-13.
[739] T-93-Conf, p. 34, lns 3-14.
[740] The Defence notes that P-340 is the only person who speaks of "Mukwaya". With all the testimony given, the Defence would expect, if this person was in Sinia, to have heard the name Mukwaya more than one.
[741] T-102-Conf, p. 38, ln. 25 to p. 39, ln. 1.
[742] T-103-Conf, p. 59, ln. 19 to p. 60, ln. 2.
[743] T-190-Conf, p. 26, lns 13-23 and p. 28, ln. 25 to p. 29, ln. 2. *See also* T-190-Conf, p. 28, lns 4-8.
[744] T-190-Conf, p. 37, ln. 21 to p. 38, ln. 8.
[745] T-239-Conf, p. 21, lns 19-22.
[746] T-239-Conf, p. 22, lns 7-17.
[747] T-239-Conf, p. 18, lns 4-6.

at its totality, the only common instruction to persons who allegedly attended the Abok Attack was to collect food. The Prosecution has failed to present sufficient evidence that proves beyond a reasonable doubt that Mr Ongwen planned, ordered or significantly contributed to the Abok Attack. The Defence avers that given this, it sheds reasonable doubt as to whether Mr Ongwen should be held liable for counts 37-49 under Article 25(3)(a), Article 25(3)(b), Article 25(3)(d)(i) and (ii) and Article 28(a) for the alleged acts during the Abok Attack.

v. Mr Ongwen did not have effective command and control and lacked an essential contribution to the crimes allegedly committed by the LRA

458. *In arguendo*, if Mr Ongwen sent troops to fight at Abok, Mr Ongwen lacked effective command and control over the group which attacked Abok. Furthermore, Mr Ongwen did not make an essential contribution to the alleged crimes.

459. Noted above, P-340 spoke of three names during his testimony, Mukwaya, Abola and Kidgea.[748] According to P-340, these persons where all in Siba battalion.[749] He testified that he received his instructions to go to Abok from Mukwaya and that they both fought there.[750] The witness confirmed that he was still in Siba, the same battalion which abducted him.[751]

460. As the Defence asserted during its questioning of the witness, and reiterates in this brief, Mukwaya, Abola and Kidega were in Gilva brigade.[752] The chance of Mukwaya appearing in a radio communication is infrequent as it is not such a common name, but the chance of all three of those names appearing within the same battalion is impossible! If the Trial Chamber believes that P-340 participated in the Abok Attack, it must also decide that at least one battalion of Gilva brigade sent fighters to the Abok Attack.

461. Similarly, D-105 stated that he was under Odhiambo when he was selected to go to Abok.[753] The witness stated that he was with Trinkle[754] until about one month after the Abok Attack.[755] Witness D-105 is the second witness from a non-Sinia brigade to testify about attending the

[748] *See* T-103-Conf, p. 19, lns 5-7 and T-102-Conf, p. 16, lns 2-10.
[749] T-103-Conf, p. 19, lns 5-7 and T-102-Conf, p. 16, lns 2-10.
[750] T-102-Conf, p. 38, ln. 23 to p. 39, ln. 5.
[751] T-102-Conf, p. 39, lns 6-8.
[752] T-103-Conf, p. 59, ln. 19 to p. 60, ln. 2 and UGA-OTP-0061-0002, p. 0056 (bottom right).
[753] T-190-Conf, p. 26, lns 17-23.
[754] *E.g.* T-190-Conf, p. 8, lns 21-22 and p. 15, lns 3-9.
[755] T-190-Conf, p. 37, lns 12-20.

Abok Attack. The witness estimated that around 200 people went to the Abok Attack.[756]

462. Finally, D-85 testified that she was abducted by Trinkle and remained in that group until she escaped in 2004.[757] The witness testified that she escaped the LRA shortly after the Abok Attack.[758] She stated that more than 100 people attended the Abok Attack.[759]

463. The Defence avers it is unreasonable to believe P-330 that between 20-28 LRA went to Abok[760] and P-406 that around 25-30 fighters went.[761] It is more likely that the numbers estimated by the Defence's witnesses are correct and that this was a combined force. With this many brigades giving fighters, any alleged contribution which Mr Ongwen may have made was not essential to the commission of the alleged crimes at Abok IDP Camp, and the Trial Chamber should hold that Mr Ongwen's is not liable for counts 37-49 under Article 25(3)(a) for the alleged acts during the Abok Attack.

464. The Defence also asserts that it is unreasonable to believe that Mr Ongwen would have effective command and control if General Okot Odhiambo and Colonel Ocan Bunia were sending fighters to an attack. Furthermore, P-330 admitted to taking impromptu orders from someone other than the alleged commander of the attack.[762] The Prosecution has failed to present evidence proving beyond a reasonable doubt that Mr Ongwen commanded and controlled a combined force with General Okot Odhiambo and Colonel Ocan Bunia and that he had effective command and control over the persons at Abok. As such, the Trial Chamber should decide that Mr Ongwen is not liable for counts 37-49 under Article 28(a) for the alleged acts during the Abok Attack.

vi. The radio intercepts lacks credibility and should be disregarded for the Article 74 Judgment

465. The Defence has written above about issues related to the audio intercepts in general. The Defence asserts here that the audio intercepts for Mr Ongwen's alleged report of the Abok Attack must be excluded from evidence as its authenticity is dubious at best. Noting the

[756] T-190-Conf, p. 26, ln. 24 to p. 27, ln. 1.
[757] T-239-Conf, p. 8, lns 10-11 and p. 12, lns 12-14.
[758] T-239-Conf, p. 31, lns 14-17.
[759] T-239-Conf, p. 24, ln. 23 to p. 25, ln. 2.
[760] T-52-Conf, p. 29, lns 8-17.
[761] T-155-Conf, p. 66, lns 11-12.
[762] T-52-Conf, p. 35, ln. 25 to p. 36, ln. 9.

Prosecution concedes that there are differences in the different interceptor reports,[763] the authenticity and reliability of the audio intercepts comes into focus. Because there are obvious issues and concerns with the authenticity and completeness of the audio intercepts, as described above, the Defence respectfully requests the Trial Chamber to disregard this evidence when determining its Article 74 Judgment.

VII. THE CRIMES OF ENSLAVEMENT AND ATTACKING A CIVILIAN POPULATION ARE NOT PROVED BEYOND A REASONABLE DOUBT

A. The Prosecution failed to prove that the crime of enslavement was committed under any circumstances by persons allegedly under the control of Mr Ongwen

466. The Defence reiterates its position that the elements for the crime of enslavement are not distinct from sexual slavery and the charges of enslavement should be dismissed.[764] Further, the elements of exercising powers attaching to ownership and the intent and knowledge to exercise such powers cannot be proved beyond a reasonable doubt in this case.[765] The following *indicia* can demonstrate that the perpetrator exercised the powers of ownership: control of the individual's movement, psychological control, measures done to prevent escape, threat of coercion, decisions on exclusivity, forced labour, control of sexuality.[766] The Defence submits that it was Kony who exercised the powers attaching to ownership; he decided who would be executed. Mr Ongwen could not and did not form an intent to exercise any such powers due to his indoctrination in the LRA that all powers emanated solely from Kony and due to his mental disabilities.

B. The Defence objects to the Prosecution qualifying certain counts as the underlying conduct of the war crime of attack against a civilian population pursuant to Article 8(2)(e)(i) of the Statute

467. Mr Ongwen is charged with Article 8(2)(e)(i) for counts 1 (Pajule), 11 (Odek), 24 (Lukodi) and 37 (Abok). The CoC Decision does not list the counts that qualify as the underlying conduct of the war crime of attack against a civilian population.

468. The Defence objects to the Prosecution qualifying murder as a crime against humanity ('CAH') (counts 2, 12, 25, 38), attempted murder as a CAH (counts 14, 27, 40), torture as a

[763] UGA-OTP-0272-0446.
[764] *Ongwen*, Motion for Immediate Ruling on the Request for Dismissal of the Charge of Enslavement, ICC-02/04-01/15-1708, paras 49 and 69.
[765] Element 1 of Article 7(1)(c) Elements of Crimes.
[766] *Kuranac et al.*, Judgment, IT-96-23-T & IT-96-23/1-T, 22 February 2001, para. 543.

CAH (counts 4, 16, 29, 42), other inhumane acts as a CAH (counts 7, 18, 31, 44) and enslavement (counts 8, 20, 33, 46) as an underlying conduct of the war crime of attack against a civilian population.[767] The Defence submits that it is incorrect to use Article 7 crimes as an underlying conduct for an Article 8 war crime.[768]

469. Therefore, the Trial Chamber should dismiss murder CAH (counts 2, 12, 25, 38), attempted murder as a CAH (counts 14, 27, 40), torture as a CAH (counts 4, 16, 29, 42), other inhumane acts as a CAH (counts 7, 18, 31, 44) and enslavement (counts 8, 20, 33, 46) as an underlying conduct for the war crime of attack against a civilian population pursuant to Article 8(2)(e)(i) for counts 1, 11, 24 and 37.

470. Alternatively, while the Defence maintains its position that it is incorrect to use Article 7 crimes as an underlying conduct, it maintains that Article 7(1)(f) torture and Article 7(1)(c) enslavement cannot amount to an underlying conduct for the war crime of attack against a civilian population. This is because torture under Article 7(1)(f) requires that the individuals be "in the custody or under the control of the perpetrator"[769] and enslavement under Article 7(1)(c) necessitates that the perpetrator exercises "any or all of the powers attaching to the right of ownership".[770] Thus, for those crimes to occur, based on their requisite elements, they cannot be committed before the individuals fall into the hands of the attacking party, as required by Article 8(2)(e)(i).[771] For these reasons, the Defence alternatively requests the Trial Chamber to dismiss counts 4, 16, 29, 42 (torture as CAH) and counts 8, 20, 33, 46 (enslavement as CAH) as an underlying conduct for the war crime of attack against a civilian population pursuant to Article 8(2)(e)(i) for counts 1, 11, 24 and 37.

VIII. SEXUAL AND GENDER-BASED CRIMES (COUNTS 50-68)

471. Mr Ongwen is charged as a direct perpetrator for Counts 50-60[772] and through indirect modes

[767] PPTB, paras 217, 295, 377, 437 *see also* PPCB, paras 158, 236, 320, 384.
[768] *Ntaganda*, Confirmation Decision, ICC-01/04-02/06-309, paras 45-48. *Ntaganda* Pre-Trial Chamber found that Article 8(2)(e)(i) does not exhaustively list the underlying acts but only considered war crimes as underlying acts.
[769] Element 2 of the Elements of Crime ('EoC') for Article 7(1)(f) torture as CAH.
[770] Element 1 of the EoC for Article 7(1)(c) enslavement as CAH.
[771] *Ntaganda* Judgment ('TJ'), ICC-01/04-02/06-2359, 8 July 2019, para. 904.
[772] Counts 50-60 include the crimes against humanity of forced marriage, torture, rape, sexual slavery, enslavement and forced pregnancy and the war crimes of torture, rape, sexual slavery, forced pregnancy and outrages upon person dignity. Confirmation Decision, para.117.

of liability for Counts 61-68.[773] The Defence submits that all charges should be dismissed. As raised previously by the Defence,[774] and incorporated here by reference, the Defence submits that forced marriage is not a crime under the Rome Statute.

A. The Prosecution did not prove the participation of Mr Ongwen in the formulation of a plan to abduct and distribute women in the Sinia Brigade

472. Prosecution evidence that Mr Ongwen took women to Sudan during the charge period[775] is not credible. During that period, Mr Ongwen was in the sick bay or detained.[776] Additionally, the Prosecution concedes that the Sinia Brigade was prohibited from abducting women in 2002-2003.[777] Moreover, Prosecution evidence established that Kony alone made decisions on the distribution of women.[778] Counts 50 to 60 should be dismissed because Mr Ongwen did not possess the intent required and acted under duress.

473. The Chamber should find that Mr Ongwen is not liable for Counts 50 to 60. Kony's rules and regulations regarding the relationship between men and women in the LRA created a highly coercive environment for relationships between men and women. Within this context, and with Mr Ongwen's mental illness (discussed *infra*), Mr Ongwen did not have the capacity to form the intent required for the crimes. Moreover, Mr Ongwen's actions were the result of severe duress imposed by Kony and the LRA environment.

i. Mr Ongwen was a victim of the coercive environment

474. Mr Ongwen was a victim of the coercive environment created by Kony's use of punishment, indoctrination, and other fear tactics to control the actions and behaviour of LRA members. The creation of a coercive environment is not limited to use of force.[779] Rather, "threats, intimidation, extortion, and other forms of duress which prey on fear or desperation" contribute to the creation of a coercive environment.[780]

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[773] Counts 61-68 include the crimes against humanity of forced marriage, torture, rape, sexual slavery and enslavement and the war crimes of as crimes against humanity and torture, rape and sexual slavery, Confirmation Decision, para.124.
[774] *See Defence Request for Leave to Appeal Issues in Confirmation of Charges Decision*, ICC-02/04-01/15-423, paras 40-44. *See also* ICC-02/04-01/15-404-Red3, paras 128-130 and T-23-Conf, pp13-17.
[775] T-48-Conf, p. 9-10, lns 7-14.
[776] *See* section VI(A)(ii).
[777] Arrest Warrant Request, para. 104; T-48-Conf, p. 21, lns 8-10.
[778] T-48-Conf, p.19, ln. 4.
[779] Katanga CoC, para. 440; *see also Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-424, para. 162.
[780] *Ibid.*

475. Here, Kony created a coercive environment in which survival depended on following the rules. Survival even required following Kony's rules regarding the relationship between men and women within in the LRA. Even in sexual relations, neither men nor women had a choice but to follow the rules.[781] For example, D-32 testified that Kony issued orders that girls should be distributed to men and "whoever is given a girl cannot refuse to accept that girl."[782] In order to force members of the LRA to follow the rules, Kony created a coercive environment using indoctrination, infliction of severe punishment for failure to obey, and other fear tactics.

476. For example, Kony used indoctrination to create a coercive environment in which he "manipulated the belief systems of abductees"[783] and forced people to follow his rules.[784] According to PCV-0003, "Kony knew how to manipulate people psychologically."[785] This manipulation allowed Kony to convince members that "unseen persons" and spirits were watching them at all times.[786] Many members of the LRA believed that spirits were watching and punished them for wrongdoing. For example, [redacted].[787] According to D-60, "if you don't follow the rules the spirits, they will punish you, you will be hit by a bullet, you will be killed."[788] In other words, LRA members, including Mr Ongwen, believed they would die if they did not follow the rules.[789]

477. As discussed *supra*, the use of spiritualism greatly influenced Dominic. The indoctrination into Kony's perverted version of spiritualism created a coercive environment because people thought that everything they did was being watched. This fear of being watched by the Spirits, and of Kony knowing personal thoughts, compelled people to follow rules by preying on their fears of death or severe punishment.

478. Kony also created a coercive environment by inflicting severe punishment on those who did

[781] UGA-OTP-0217-0218 at 0224.
[782] T-201-Conf, p. 47, lns 4-9.
[783] The witness confirms that Kony instilled beliefs in abductees and expected members to believe. T-175-Conf, P. 56, lns 14-19.
[784] The witnesses confirm that one must follow the rules to survive. T-248-Conf, p. 114, lns 5-21; T-249-Conf, p. 3, lns 15-20.
[785] T-177-Conf, pp 83-84, lns 25-1.
[786] The witness explained that members believed the spirits knew their thoughts. T-203-Conf, p. 48, lns 2-23; pp 59-51, lns 25-8.
[787] [redacted].
[788] T-197-Conf, p. 42, lns 3-4.
[789] T-197-Conf, p. 20, lns 3-5; T-121-Conf, p. 36, lns 12-18; T-199-Conf, p. 41, lns 6-8.

not follow his rules. For example, sexual intercourse was only permitted in the context of "marriage" as understood in the bush and serious punishment, including death, was meted on those who disregarded the rules. It did not matter if one was a senior officer or a foot soldier. Agweng, for instance, a senior commander who lived in Kony's Control Altar was punished for violating these rules.[790]

479. Kony also threatened to attack and kill the rule breaker's home village. For example, D-32 stated, "if you escape, if you are apprehended, you will be punished. Or they will follow you, they will follow you all the way to your home, the home where you were abducted, and they would punish the people in that home if you are not found."[791]

480. With regard to the crime against humanity of rape under Article 7 (1) (g)-1 and the war crime of rape under Article 8 (2) (b) (xxii)-1, the Defence additionally submits that the element of taking advantage of a coercive environment is not met. Mr Ongwen did not take advantage of a coercive environment.[792] Instead, he was a victim, forced to obey the rules and regulations of Kony, including those relating to sexual relationships.

481. This highly coercive and controlling environment is the context in which the mentally disabled Mr Ongwen grew up and lived. The Defence submits below that Mr Ongwen is not guilty of all crimes alleged in Counts 50-60 due to lack of *mens rea* and duress.

ii. Mr Ongwen did not possess the intent required by Article 30 for any of the crimes alleged in Counts 50-60

482. Mr Ongwen did not possess the intent required by Article 30 of the Statute. Here, Mr Ongwen could not formulate the *mens rea* required for conviction for any of the crimes charged in Counts 50-60. As discussed *supra*, Mr Ongwen suffered from multiple mental diseases and defects. He did not have the capacity to appreciate the unlawful nature of his actions and lacked the capacity to conform his conduct to the requirements of law. Because Mr Ongwen lacked the capacity to form intent, he could not possess the intent required by Article 30 of the Statute. Thus, the Chamber should find that Mr Ongwen is not liable because he did not possess the requisite intent. Additionally, as discussed *infra*, Mr Ongwen acted under duress, which is a complete defence to all crimes.

[790] T-65-Conf, p. 69, lns 5-20.
[791] T-199-Conf, pp 15-16, lns 23-1.

B. The Prosecution did not prove the modes of liability beyond a reasonable doubt for Counts 61-68

483. Mr Ongwen was charged through the theories of indirect perpetration-Article 25(3)(a); ordering-Article 25(3)(b); common purpose-Article 25(3)(d)(i) and (ii); and command responsibility-Article 28(a).

484. As discussed in Section VI(A)(ii), Mr Ongwen was in sick bay during 2002-2003 and not in a position to participate in a common plan, to order, or to command anyone to take action. Even when not in sick bay, Mr Ongwen operated under the complete control of Kony, who manipulated and controlled through life-threatening threats and a perverted form of spiritualism.

485. Mr Ongwen further did not significantly contribute to a common purpose, if one existed, to commit the crimes charged in Counts 61-68, nor did he have the intent to further criminal activity or a criminal purpose. As discussed in section III(F)(ii), Mr Ongwen's actions were not done with an aim to further the criminal activity or criminal purpose of the group as he was completely controlled by Kony's rules and all-encompassing brand of spiritualism. He lived and acted under duress and further, did not understand right from wrong. Any knowledge that Mr Ongwen had of the intention of the group to commit the crime was so distorted by his life in the LRA that he would not have comprehended that the group, if there was one, was planning to commit specific crimes.

IX. CONSCRIPTION AND USE OF CHILD SOLDIERS (COUNTS 69 AND 70)

A. Introduction

486. Mr Ongwen is charged with (i) conscripting and using child soldiers under 15 years of age (Article 8 (e) (vii)); jointly with others (Art. 25(3)(a)); (ii) ordering, (iii) contributing to the commission of these crimes by a group, with the aim of (Art. 25 (3)(d)(i)), or in the knowledge that (Art. 25(3)(d)(ii)), the assistance would further the commission of the crimes (Art. 25(3)(d)); and (iv) failing to exercise effective control over subordinates committing these crimes (Art. 28(a)).

487. The Defence submits that Mr Ongwen is a victim of the crimes he is alleged to have committed. Various international instruments offer protection to children from recruitment into armed forces. Having been abducted as a child at the age of around 8 - 9 years, Mr Ongwen's rights were not protected; and he was thereby victimised.

488. It is further submitted that Ongwen's status as a victim did not end after attaining the age of 18, as alleged by the Prosecution. He remained under LRA bondage. Once a victim, always a victim. Even if it were to be agreed that Ongwen committed the crimes he is alleged to have committed (which is denied), he did so as a victim under duress; and therefore is not criminally responsible for the crime.

489. Mr Ongwen understands the acts charged regarding the allegation of abduction and conscription to be acts alleged against Kony, Otti and other LRA commanders as contained in the amended arrest warrant pleadings but which are confirmed against Mr Ongwen due to the inability of the Prosecution to find and bring Kony to justice. All the charges stemming from the abductions in Teso, Lwala School, Pajule, Barlonyo and other locations were against Kony, Vincent and other commanders and not Mr Ongwen.[793] Further it is stated in the amended application for an arrest warrant that Kony's LRA rules about abduction were rigorously enforced and that it was pursuant to this that Ongwen was abducted and subjugated to Kony's control and command.

490. Without prejudice to the above, the Defence further submits that the charges of conscription and use of child soldiers under Counts 69 and 70 are fatally defective in so far as they do not specifically describe the alleged crimes in accordance with Articles 8 (2) (e) (vii) and 67 (1) (a) of the Rome Statute.

491. The Defence reiterates its submission contained in the Defence motion on Defects in the Confirmation of Charges Decision.[794] The pleading of charges in counts 69 and 70 is fatally defective and facially deficient since the elements and modes of liability charged were not factually supported. The Defence further submits that the Prosecution has failed to prove beyond reasonable doubt that children under the age of 15 were conscripted into an armed group or that children under the age of 15 were used to participate activity in hostilities. The Defence notes that most of the evidence adduced by the Prosecution went beyond the confirmed charges and was outside the temporal jurisdiction of the Court which violated Mr Ongwen's fair trial right to notice.[795]

492. Mr Ongwen is charged as battalion commander and brigade commander. It is unclear and

[793] Arrest Warrant Request, under charges: Counts 6-26.
[794] ICC-02/04-01/15-1433, Part IV, paras 62-70.
[795] T-148-Conf, pp 4-7.

unspecified which particular allegation on child soldiers is made against him as battalion commander and which as brigade commander. During the charged period, Ongwen was not in effective command due to his injury. The LRA command structure kept at Internal Security Organisation during the charged period in particular between 2002 and 2003 did not contain the name of Ongwen.[796]

493. The Prosecution adduced evidence alleging that Ongwen was responsible for abductions in Pajule and Teso like the Lwala school girls. The evidence shows Mr Ongwen was in the sickbay between November 2002 to about the end of 2003.[797]

B. Article 21(3) prohibits charging a victim of a crime with the same crime

494. Article 4(3) of Additional Protocol (II)[798] to the Geneva Conventions of August 12, 1949 provides that Children shall be provided with the care and aid they require and *inter alia*, those who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities. [799] Articles 39 and 6 of the Convention on the Rights of the Child[800] and the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict[801] respectively oblige the government to assist former child soldiers by providing "all appropriate assistance for their physical and psychological recovery and social reintegration."

495. The Defence submits that, it is inapposite to hold Ongwen individually criminally liable for crimes allegedly committed while under bondage in the LRA as a result of the failure of protection by the Government of Uganda and the international community under the law.

496. The Government of Uganda actively participated in assisting the Prosecution in the collection of evidence, on the one hand; and the International Community, responsible for the establishment of this Court, holds collateral responsibility with Kony for the consequences of Ongwen's abduction. The Government of Uganda and the international community, represented by the NGO world failed to protect Mr Ongwen. Child soldiers, who found their way out of the LRA bondage, were severely traumatised and needed psycho-social support, as

[796] T-38-Conf, pp 50-51 (P-59).
[797] *See* section dealing with Mr. Ongwen's injury during the Pajule attack.
[798] Ratified by Uganda on 13/03/1991.
[799] Article 77(2) of Additional Protocol I to the Geneva Convention provides for the same and was ratified by Uganda on 13/03/1991.
[800] Ratified by Uganda on 17/8/1989.
[801] Ratified by Uganda on 6/5/2002.

clearly shown by their rehabilitation in different reception Centres run by both the Government of Uganda and Non-Governmental Humanitarian Organisations, including but not limited to; GUSCO, World Vision, CARITAS, UNICEF, and Rachele.

C. The Prosecution failed to prove beyond reasonable doubt the mental states for the modes of liability and the alleged crimes

497. Article 30 prescribes that a person shall be criminally responsible only if the material elements are committed "with intent and knowledge." Intent arises where the person "means to engage in the conduct" or bring about a consequence, or at least knows that the prohibited consequence will "occur in the ordinary course of events."[802] The latter requires, according to the Appeals Chamber's decision, foreseeability equivalent to "virtual certainty."[803]

498. Commission of a crime "jointly" – *i.e.* as part of a group or organization – requires the same standard of intent. Liability cannot be imputed to others unless the commonly held plan includes this shared criminal intent, and cannot be imputed if the crime is different from the intended crime.

499. The Elements of Crimes dilute and lower the standard prescribed by Article 25(3)(a) and Article 30 from "knowledge" that the subjects were under 15, to "should have known". The Elements, whose remit is only to "assist" interpretation of the Statute, may not "clearly deviate[]"[804] from a standard prescribed by the Statute.[805] Knowledge that the person is under 15 is the minimum requirement for commission of the crime.

500. Article 25(3)(d) also requires, at the least, knowledge that assistance is being provided to others who intend to conscript, enlist or use subjects whom they know are under 15.

501. Mr Ongwen is not criminally responsible for any conscription, or use of child soldiers that may have occurred because arising out of the testimonial evidence; such abductions were ordered by Kony[806] since the LRA did not have a proper chain of command and he was the sole decision making person of the Organisation. Similarly the LRA did not maintain a proper

[802] ICC Statute, Art. 30(2).
[803] Lubanga AJ, paras 6 and 447.
[804] "*The Rome Statute of the International Criminal Court: A Commentary*", 3rd Ed.(2015), Triffterer/Ambos, p. 527.
[805] Lubanga TJ, para. 1015.
[806] T-15-Conf, p. 12 lns 11-14 (P-214); T-17-Conf, p. 51 lns 21-23 (P-235); T-48-Conf, p. 18 ln. 24 and p. 29 ln. 4 (P-205); T-71-Conf, p. 29 lns 1-4 (P-142); T-194-Conf, p. 23 ln. 23 to p. 24 ln. 11 (D-6); T-202-Conf, p. 23 lns 9-15, p. 31 lns 3-6, p. 39 ln. 24 to p. 40 ln. 2 (D-27).

military structure akin to that of a conventional army.[807] As such, common planning was not achievable in the LRA since Kony issued his edicts only in consultation with or at the dictates of the Spirits of which he was the medium.

502. The evidence relied on does not show that Mr Ongwen intended or contributed knowingly to the conscription and use of children under 15; neither does it demonstrate that he failed to exercise effective control over his subordinates knowing that they were committing, or were about to commit, this crime. The orders always came from Kony and it was only he who was the authority to whom others reported such matters.

503. Liability cannot arise under Article 28 unless the subordinate commits the crime based on the "knowledge" standard. Hence, Ongwen's liability on the "should have known" standard can arise only if he knew that the subject recruited, enlisted or used was under 15. Where the commander should have known that this crime was being, or was about to be, committed failure to prevent or punish such recruitment, enlistment or use may give rise to liability under Article 28.

504. The perpetrator must have intentionally used children under the age of 15 years to participate actively in hostilities. This intention shall be shown if the perpetrator deliberately acted or failed to act in order to use children under the age of 15 to participate actively in hostilities or in the knowledge that such participation would occur in the ordinary course of events.

505. The scope of the duty to take "all necessary and reasonable measures" is intrinsically connected to the extent of a commander's material ability to prevent or repress the commission of crimes or to submit the matter to the competent authorities for investigation and prosecution. Indeed, a commander cannot be blamed for not having done something he or she had no power to do.[808]

506. As noted in paragraph 501 above, Mr Ongwen did not have effective control in the LRA as all orders and decisions were made by Kony. Evidence on record further goes ahead to demonstrate that whoever dared to disregard Kony's orders and/or directives would face dire

[807] T-49-Conf, p. 52 lns 9-17 (P-205); T-116-Conf, p. 26 lns 10-12 (P-38); T-110-Conf, p. 3 lns 15-23 (P-359); T-107-Conf, p. 34 lns 11-17 (P-70); T-123-Conf, p. 45 lns 10-17 (P-231); T-240-Conf, pp 33-34 lns 1-5 (D-134); T-185-Conf, pp 64-70 (D-18); T-200-Conf, p. 13 lns 7-8 (D-32); T-226-Conf, p.25 (D-25); T-224-Conf, pp 39-41 (D-75); T-197, p. 20 lns 3-5, p. 41 ln. 25 to p. 42, ln. 4 (D-60).
[808] *Bemba* AJ, para.167.

consequences the inevitable being death.[809]

D. The Prosecution failed to prove beyond a reasonable doubt that any of the individuals conscripted or used in hostilities were under the age of 15

507. Testimony was heard from witnesses who claimed that they observed the subjects amongst Dominic's Oka battalion and later Sinia brigade (as either his escorts or escorts for other commanders or fighters) whom they believed, based on appearance, were under 15 (*e.g.* P-245, P-314, P-205, P-97, P-0252, P-275, P-309, P-379,[810] P-233, P-189, and P-359[811]).

508. The Defence submits that testimony from a witness about the age of a person who is not before the Court is subject to a wider margin of error than the Trial Chamber's own direct observation.[812] The Chamber which had no opportunity to observe the subject, cannot know what standard of certainty the observer applied, and cannot know with specificity how the observer arrived at their estimate. The Chamber's task is more difficult due to the fact that the witnesses were not experts; nor did they purport to be experts in the determination of age; and also did not show that direct knowledge about the specific or even approximate dates of birth; or even any relevant information about the dates of birth. Judge Anita Ušacka in her dissenting opinion in the Lubanga Appeal remarked thus:

> Indeed it is questionable whether it is possible at all to determine that an unidentified child is under the age of fifteen based solely on physical appearance.[813]

509. No reliable evidence has been adduced that anyone in Mr Ongwen's immediate proximity or whom he saw – such as his escorts, soldiers or trainees – were so manifestly below 15. Even witnesses who alleged to have been former child soldiers could not positively identify Mr Ongwen even in Court.

510. The Defence further notes that the Prosecution did not call an expert on the determination of ages and did not bring the alleged child soldiers whose ages were being speculated based on

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[809] T-17-Conf, p. 65 lns 6-9 & p. 65 lns 12-15 (P-325); T-113-Conf, p. 44 ln. 6 (P-172); T-121-Conf, p. 36 lns 12-18 (P-138); T-34-Conf, p. 78 ln. 22 to p. 80 ln. 6 (P-16); T-194-Conf, p. 24 lns 14-15 and p. 24 lns 21-24 (D-6); T-202-Conf, p. 23 ln. 18, p. 61 lns 15-18, p. 19 lns 1-19 (D-27); T-199-Conf, p. 41 ln. 8 (D-32); T-224-Conf; p. 44 ln. 22 to p. 45 ln. 2 (D-75); T-236-Conf, p. 16 lns 10-14 (D-19); T-226-Conf, p. 27 lns 18-24 (D-25); T-197, p. 41 ln. 25 to p. 42 ln. 4 (D-60).

[810] T-57-Conf, p. 53, lines 1-6.

[811] T-109-Conf, p. 75, lines 7-8.

[812] Lubanga TJ, para. 643, Where the trial chamber acknowledged that distinguishing between young people who are relatively close to the age of fifteen (whether above or below) seems extremely difficult and therefore there is a wide margin of error. Caution has to exercise caution.

[813] ICC-01/04-01/06-3121-Anx2 01-12-2014.

untested subjective physiological factors to testify or obtain evidence from the parents of alleged victims. No details of the identification of the alleged victims was provided and in the absence of such information in the pleadings about specific victims whose ages were being speculated, Mr Ongwen cannot legally be said to have sufficient notice in order to defend himself.

i. The Prosecution's evidence on age is not credible.

511. P-0330's testimony was not credible. He alleged that he was born in 1989 and was abducted in 2003[814] allegedly by Ongwen's group and became his escort[815]. He further stated that there were kadogos in Dominic's group between the ages of 13-15[816]. It is inconceivable that someone who alleges to be an escort could neither remember any of Mr Ongwen's other escorts[817] nor Mr Ongwen's wives and children[818]. The witness could also not remember any close commanders to Mr Ongwen like Lapaicho[819]. Hence his evidence cannot be relied upon.

512. P-200 alleged that he was abducted by Dominic on [redacted], Teso[820]. That when he was abducted, he testified that Dominic was with some young boys of like 12 and 13 years[821]. Evidence led by this particular witness was outside of the confirmed charges[822]. He also alleged that Dominic ordered the abduction of the Lwala girls.[823]The Defence first invites Court to take cognisance of P-28's and P-15's testimonies admitted through rule 68 (2)(b) of the RPE. P-28 stated that it was Kony who ordered Otti to oversee the invasion of Teso[824] while P-15 herself a victim of the abduction at Lwala girls stated that it was Charles Tabuley who oversaw the abduction.[825]

513. The Pre-Trial Chamber noted *inter alia*, "the evidence of Witness P-200 suffers from the same problems as that of P-198 in that it is incompatible in several material aspects with the rest of the available evidence, including the testimonies of seven former so-called "wives" of

[814] T-51-Conf, p.51, lns 4-9.
[815] T-51-Conf, p.68, lns 8-21.
[816] T-52-Conf, p. 60, lns 6-8.
[817] T-55-Conf, p.3, lns 9-17.
[818] T-55-Conf, p. 5, lns 3-9.
[819] T-55-Conf, p. 7, lns 9-12.
[820] T-145-Conf, p.10, lns 17 & 18.
[821] T-145-Conf, p. 21, lns 13-19.
[822] T-145-Conf, p. 17, lns 9-19.
[823] T-145-Conf, p. 13.
[824] UGA-OTP-0217-0192 at 0198-0208.
[825] UGA-0043-0131-R01, at 0136, para. 23.

Dominic Ongwen which the Chamber considers fully credible." [826] *(Bold added).* The Prosecution had presented P-200's statement as corroborative evidence to support P-198's narrative that Dominic allegedly fathered a child with her. This narrative was found to be false after conducting DNA tests.

514. It is the Defence submission that P-200's testimony should be disregarded for being incredible. In addition the witness' demeanour was wanting. He was evasive throughout his testimony. He could not answer some of the basic questions and quite often admitted how he had forgotten certain facts and could not remember[827]. Secondly, as demonstrated by the Defence through many witnesses[828], Dominic did not go to Teso and therefore it is impossible that he could have been abducted by Dominic let alone Dominic ordering the abduction of the Lwala girls.

515. P-0138 testified that he was abducted in 1996[829] and during Operation Iron Fist in 2002; he was with Kwoyelo and thereafter with Vincent Otti.[830] He further stated that he was in Oka Batallion during that period[831]. That Mr Ongwen was in charge of the 3rd battalion of the Sinia brigade during the Teso campaign and also went to Teso.[832] That they kept on abducting children from 10 years onwards.[833] This witness' testimony is riddled with contradictions and inconsistencies. First he says he worked with Kwoyelo and then Vincent Otti. Dominic's name came as an afterthought after being asked about him[834]. In any event, as stated in the immediately forgoing paragraph, Mr Ongwen was not part of the Teso campaign and the witness emphatically testified that orders for abductions normally came directly from Kony to Otti who would relay it to the brigades[835].

516. P-0231 testified that he was abducted in 1994 and escaped in 2004. That he was in Oka Battalion when Operation Iron Fist started and Mr Ongwen was the battalion commander.[836] [redacted]

[826] Confirmation Decision, para. 133 and Trial Chamber Decision on Submitted Materials for P-200 by email sent on 8 February 2018 at 10h18.
[827] T-145-Conf and T-146-Conf.
[828] D-122, D-123, D-124, D-125, D-138.
[829] T-120-Conf, p. 8, ln. 4.
[830] T-120-Conf, p. 13, lns 8-11.
[831] T-120-Conf, p. 14, ln. 16.
[832] T-120-Conf, p. 18, lns 22-25.
[833] T-120-Conf, Page 23.
[834] T-120-Conf, p.18, lns 13-20.
[835] T-120-Conf, p. 23 lns 4-9.
[836] T-122-Conf, p. 28 lns 1-5.

and moved to Teso.[837] He added that he was [redacted].[838]As earlier noted, Dominic did not go to Teso during the time the witness is referring to. The witness further categorically mentions Dominic's alleged escorts and estimates that they were all above the age of 15[839]. He further testified that it was only Kony who had the power to order abductions[840].

517. P-309's testimony is full of contradictions and inconsistencies especially regarding his true age which goes to the root of the impugned charges of conscription and use of child soldiers. It is the Defence submission that the same should be disregarded for being unreliable. He presented a National Identity card and Driver's license showing that he was born on [redacted] December, 1988 and that it was his mother who told him about this age.[841]He stated that he was abducted in September, 2002[842] along with his brother and nephew who were younger than him[843] and that they allegedly met up with Dominic who was and looked like the overall commander[844]. That there were other children whose approximate age was between 12-16. He further stated that he became Dominic's escort and named some so called escorts of Mr Ongwen some being older and some younger than him.[845] He also alleged that Dominic selected some people between the ages of 10-15 to participate on attacks on Pajule and Odek.

518. There is controversy about the real age of this witness (P-309), considering that he presented an amnesty document showing that he was born on [redacted] January 1989[846] and also a voter registration form showing his date of birth as [redacted] October 1987[847]. The Defence can only decipher an ulterior motive on his part in misrepresenting his date of birth on various documents which are meant for different purposes. During cross-examination he conceded that he did not know his right age at the time of getting his amnesty certificate in 2004 after coming back from the bush. Therefore documents produced by such a witness which are contradictory and inconsistent, coupled with his estimates regarding the age of those who he alleges were escorts to Mr Ongwen and other children, should be disregarded.

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[837] T-122-Conf, p. 29 lns 7-8.
[838] [redacted].
[839] T-122-Conf, p. 72 lns 15-19.
[840] T-122-Conf, p. 74 lns 13-16.
[841] T-60-Conf, p. 12 lns 1-4.
[842] T-60-Conf, p. 12 ln. 19.
[843] T-60-Conf, p. 13 lns 8-9.
[844] T-60-Conf, p. 20 lns 1-2.
[845] T-60-Conf, pp 24-30.
[846] T-61-Conf, p. 48 lns 1-4.
[847] T-61-Conf, p. 48 lns 4-14.

519. P-0410's evidence should be disregarded as being not credible. This witness testified that he was born on [redacted] May 1989[848] and was abducted by a one Komakech in June 2002, who belonged to Sinia brigade[849]. He also alleged to have been abducted along with other children whom he believes were under 15. Regarding the date of getting his birth certificate, he testified that he procured it in 2016 after his original documents were allegedly burnt[850]. The defence takes strong exception to such evidence especially in regards to proof of age considering it was procured after the commencement of the case and could have been doctored with the witness' sole intention to mislead Court into believing that he was indeed under the age of 15 when he was abducted and conscripted into the LRA. His age evaluation regarding the other abductees is subject to a wider margin of error considering that he would look at their size in comparison with his size to determine whether they were under or above 15.[851]

520. Witness P-252 testified that he was born in 1993[852] and alleged to have been abducted by "Ongwen's" soldiers in 2004 [redacted]. He however contradicted himself during cross examination when he admitted that he had told the VWU that he was 14 years at the time of abduction. [853] When pressed further about how he got the documents proving his age, he said he went to the local leaders to find out since most of his documents had gotten burnt.[854]

521. Witness P-0307 alleged that he was an escort to an officer in Dominic's group and that the other officers also had escorts between 12 years upwards because at the time he was 12 years and would look at their size vis-à-vis his.[855] However there were glaring contradictions in the documents presented to prove his age and the year of his abduction as even acknowledged by the Chamber.[856] According to his witness statement, he was born in November 1989 whereas his National Identity card shows that he was born in November 1990. He further stated that he studied Primary One [redacted] in 1998, went to [redacted] following year and repeated Primary one and studied until Primary five when he was

[848] T-151-Conf, p. 5 ln. 10.
[849] T-151-Conf, p. 6.
[850] T-152-Conf, p. 5 lns 22-25.
[851] T-152-Conf, p. 64 lns 17-25.
[852] T-87-Conf, p. 7 ln. 15.
[853] T-88-Conf, p. 45 lns 10-12.
[854] T-88-Conf, p. 46 lns 1-5.
[855] T-152-Conf, p. 64 lns 21-25.
[856] T-153-Conf, p. 6 lns 12-20.

abducted in 2002.[857] The Defence submits that the witness' statement is unreliable as his recollection of the time line does not add up to prove the age at which he was allegedly abducted. His narrative would bring only Primary Four.

522. The Defence further submits in relation to P-307 that although minor differences in time line may not be material, it is submitted that when it is related to a time – specific and sensitive issue, and the date is borderline relative to the statutory age, there is clear indication that there could have been an attempt to conveniently fix the date of birth to beat the date line, Court is advised to warn itself of the dangers of falling in the trap of a deceptive witness.

523. Witness P-314 alleged to have been abducted by a group which was under Lapaicho and he further alleged that Ongwen selected children under the age of 15 to participate in attacks. He also alleged that Ongwen had escorts who were under the age of 15.[858]He presented a national Identity card and a driving permit which showed that he was born on [redacted] July 1988. He however admitted that whilst in the bush, he did not know his true age[859] and only asked his mother about his age in 2006 having come back from the bush in 2004.[860] The witness surely did not know his right age. As such, his attempt to conveniently fix his age within the below 15 years age bracket at the time of his alleged abduction should be viewed with caution; and we invite court to reject it.

524. Witness P-0097 testimony was riddled with major contradictions and inconsistencies with his prior written statement. He testified that he was born on [redacted]Nov 1993.[861] He stated that he was abducted in February 2005 by a group under Kalalang.[862] His baptism card however stated that he was born on [redacted]eptember, 1993[863]; his school ID issued in 2015 indicated 20 years; immunisation card for measles done in 2003 indicated that he 12 years then;[864] birth certificate obtained in 2016 indicated [redacted]November 1993[865] whereas his national ID indicated [redacted]January, 1993 as the date of birth.[866] When asked to explain the apparent inconsistencies,

[857] UGA-OTP-0266-0428, para. 13.
[858] T-75-Conf, pp 31-32.
[859] T-75-Conf, p. 36 ln. 21.
[860] T-75-Conf, p.37 lns 18-19.
[861] T-108-Conf, p. 6 ln. 5.
[862] T-108-Conf, p.7 lns 3-5.
[863] T-108-Conf, p. 60 lns 3-12.
[864] T-108-Conf, p. 62 lns 1-5.
[865] T-108-Conf, p. 63 ln. 24 to p. 64 ln. 5.
[866] UGA-OTP-0269-0735; T-108-Conf, p. 64 lns 7-13.

he admitted that sometimes while at school, he could lie about his right age.[867] The Defence therefore submits that this witness does not know his right age due to the glaring inconsistencies on the aforementioned documents and it would be unsafe to conclude that he could have been below the age of 15 years while in the LRA.

525. The Defence further submits that there were major contradictions, inconsistencies which make D-97's testimony unreliable. The areas included among others Dominic not ordering attacks on civilians;[868] abduction of civilians;[869] regarding his injury whilst in the bush and contact with Dominic;[870] Dominic listening to the radio;[871] alleged attack on Abok;[872] and his year of escape from the bush.[873] Indeed the Chamber recognised the witness's ability not to remember about past events and what he could have stated in the past.[874] We therefore ask Court to disregard his testimony.

526. Witness P-0275 testified that he was allegedly abducted from Odek and that he was born in 1994. He however categorically testified denying knowledge about knowing Mr Ongwen and that he never met him which aspect was also acknowledged by the Chamber.[875] His evidence regarding the conscription or use of child soldiers against Mr Ongwen should be disregarded.

527. Witness P-264 testified that he was abducted by Lapaicho's group of Oka Battalion. His evidence regarding his true age is subject to major contradictions in his evidence as well as the national identity card presented allegedly to prove that he was under the age of 15. He alleged to have been 11 years at the time of abduction in 2002[876] which does not correspond with the date of birth which is indicated on his national Identity card as [redacted] July 1989. In his written statement, he explained the divergence to the effect that it was a mistake on those who registered him for the national identity card. The age factor is further complicated by the lack of any corroborating documents like birth certificate and/or school documents.[877] The Defence therefore submits that arising from the apparent contradictions, the witness evidence

[867] T-108-Conf, p. 60 lns 17-18.
[868] T-108-Conf, p. 40 lns 8-25.
[869] T-108-Conf, p. 31 lns 7-25.
[870] T-108-Conf, p. 34 lns 12-18.
[871] T-108-Conf, p. 45 lns 3-9.
[872] T-108-Conf, p. 48 ln. 25 to p. 49 ln. 6.
[873] T-108-Conf, p. 52 lns 20-24.
[874] T-108-Conf, p. 47 lns 14-16.
[875] UGA-OTP-0244-3404, paras 49-51 and T-124-Conf, p. 61 lns 9-11.
[876] T-65-Conf, pp 46-47.
[877] UGA-OTP-0256-0142 paras 18-20.

should as well be disregarded.

528. The Defence submits that the age element of the crimes has not been established beyond reasonable doubt even by those Prosecution witnesses who alleged to be child soldiers. All of them never availed birth certificates or alternative documentation to conclusively prove that they were under the age of fifteen years during the charged period. Their evidence regarding their true age was shrouded in controversy and we implore the Chamber to expunge their evidence from the record in as far as counts 69 and 70 are concerned.

X. GROUNDS FOR EXCLUDING CRIMINAL RESPONSIBILITY

A. The Burden of Proof Should be on the Prosecution to Disprove the Defences Beyond a Reasonable Doubt

529. The *Ongwen* case is the first case at the ICC to raise grounds for excluding criminal responsibility under Article 31(1)(a) and (d). For this reason, the Trial Chamber's articulation of the burden and standard of proof for these defences prior to the end of the Defence evidence was imperative for fair trial and for the legitimacy and transparency of the Court. The failure of the Trial Chamber to rule on the Defence motion,[878] and instead, defer a ruling until the Judgment, resulted in particularly egregious fair trial violations, including lack of notice and right to present a defense, leaving the Defence (and everyone else) "in the dark" as to how the evidence for Article 31(a) and (d) would be legally assessed. The Defence incorporates by reference its motion and arguments in the "Defence Request for the Chamber to Issue an Immediate Ruling Confirming the Burden and Standard of Proof Applicable to Articles 31(1)(a) and (d) of the Rome Statute," ICC-02/04-01/15-1423 (28 January 2019).

530. The issue of the burden and standard of proof must be resolved. The Rome Statute is silent on the burden of proof, which means that this Court must decide the issue. Imposing the burden of proof on the Prosecution, rather than the Defence, is the most consistent position in light of Articles 66, 67(1)(i), and 22 (2).

531. Article 66(2) on the presumption of innocence clearly states that the Prosecution bears the burden to prove guilt beyond reasonable doubt.[879] An accused is not guilty if a complete

[878] Defence Request for the Chamber to Issue an Immediate Ruling Confirming the Burden and Standard of Proof Applicable to Article 31(1)(a) and (d) of the Rome Statute, ICC-02/04-01/15-1423 ('Burden and Standard of Proof Request').
[879] Article 66 of the Statute provides:

defence, such as duress, exists. Consequently, in order to prove guilt, the Prosecution must disprove a defence of duress. The argument for the burden of proof on the Prosecution is strengthened and supported by Article 67(1)(i), which specifically states that an accused shall be entitled "[n]ot to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal." This language is categorical, with no exceptions listed. It would, thus, contradict the clear language of the Statute to require the Defence to prove duress.

532. The Defence submits that, on the basis of Articles 66 and Article 67(1) (i), the interpretation of the Statute is unambiguous and the burden of proof must rest on the Prosecution to disprove duress. However, if the Court views the issue as ambiguous, the principle of strict construction embodied in Article 22(2) further mandates placing the burden of proof on the Prosecution. While Article 22(2) refers to the interpretation of a crime, the criminal law concept of strict construction applies more broadly and is reflected in the second sentence of the provision: "In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted." Strict construction in favour of an accused is based on fundamental fairness and notice.

533. In its opinion to defer a decision on the burden of proof, the Trial Chamber noted that the Defence has the obligation to raise the grounds for excluding criminal responsibility;[880] this is not the same as a burden of proof. The Defence has met its obligation, through the submission of the five expert reports[881] and the expert testimonies in its case and on rejoinder as well as its filing of notice of the Article 31(a) and (d) defences.[882]

534. In the absence of a ruling by the Trial Chamber, the Defence is applying its proposed standard which is "in sync" with the provisions of Articles 66 and 67: the Prosecution must disprove each element of 31(a) and (d) beyond a reasonable doubt. This is also supported by the Trial Chamber's emphasis that:

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1. Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law.
2. The onus is on the Prosecutor to prove the guilt of the accused.
3. In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.

[880] Decision on Defence Request for the Chamber to Issue an Immediate Ruling Confirming the Burden and Standard of Proof Applicable to Articles 31(1)(a) and (d) of the Rome Statute, ICC-02/04-01/15-1494 ('Burden and Standard Proof Decision'), para. 15.

[881] Brief Report, UGA-D26-0015-0154; First Report, UGA-D26-0015-0004, Second Report, UGA-D26-0015-0948; Supplemental Report, UGA-D26-0015-1219; Rejoinder Report, UGA-D26-0015-1574.

[882] Defence Notification Pursuant to Rules 79(2) and 80(1) of the Rules of Procedure and Evidence, ICC-02/04-01/15-517 ('Rules 79(2) and 80(1) Notification').

> [T]he Chamber underscores that an accused must never be required to affirmatively disprove the elements of a charged crime or mode of liability, as it is the Prosecution's burden to establish the guilt of an accused pursuant to Article 66 of the Statute.[883]

B. Mental Disease or Defect is a Complete Defence to the Crimes

i. Introduction

> **In fact, Ongwen himself is a victim. From being a child, up to when he reached the time of 2002 up to now, given the history, a given his life-long experiences, he was forced into his situation against his will. He is a victim.**[884]

535. The *Ongwen* case is the first case at the ICC to raise an affirmative defence of Article 31(a). In the case at bar, the Defence presented the expert evidence of two psychiatrists, D-41, Dr Dickens Akena and D-42, Prof Emilio Ovuga.[885] In its case-in-chief, the Prosecution presented the expert evidence of two psychiatrists, P-446, Dr Gillian Mezey and P-445, Dr Catherine Abbo and psychologist, P-447 Prof Roland Weierstall-Pust, who also testified as its rebuttal witness.[886] The Trial Chamber also appointed an expert psychiatrist, Prof Joop T. de Jong, who submitted an expert report.

536. In summary, the Defence Experts concluded that Mr Ongwen suffered from the following mental diseases: in the 1st Report, they identified severe depressive illness, post-traumatic stress disorder ('PTSD') and dissociative disorder (including depersonalization and multiple identity disorder) as well as severe suicidal ideation and high risk of committing suicide;[887] in the 2nd Report, they identified dissociative amnesia and symptoms of obsessive compulsive disorder.[888]

537. The Defence Experts concluded that Mr Ongwen's mental illnesses stemmed from his forced abduction by the LRA around 1987, continued through his years in the LRA and still plague him today.[889] Mental disease destroyed Mr Ongwen's capacity to appreciate the unlawfulness

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[883] Burden and Standard Proof Decision, para. 14.
[884] T-251-Conf, p. 41 lns 15-17.
[885] This includes Expert Reports *supra* and testimonial evidence in T-248-Conf, T-249-Conf, T-250-Conf, T-251-Conf, T-254-Conf, T-255-Conf.
[886] Mezey: T-162-Conf, T-163-Conf, UGA-OTP-0280-0786; Abbo: T-166-Conf, T-167-Conf, T-168-Conf, UGA-OTP-0280-0732; Prof Weierstall-Pust: T-169-Conf, T-170-Conf, T-252, T-253, UGA-OTP-0280-0674 and UGA-OTP-0252-0253.
[887] First Report, UGA-D26-0015-0004, pp 12, 14-15.
[888] Second Report, UGA-D26-0015-0948, pp 24-25.
[889] Second Report, UGA-D26-0015-0948, pp 23-27 (noting, for example, chronic exposure to life-threatening traumatic experiences from 1986; hospitalization in Juba for mental illness after battle in 1997, incidents of loss of consciousness reported in 1996, 1997, 1999 and 2002).

or nature of his conduct and capacity to control his conduct to conform to the requirements of law:

a. under circumstances of dissociation and depersonalization, he could not control himself,[890]

b. while in the bush, he did not appreciate that his acts were wrong,[891]

c. his involvement in crimes of the LRA was under the influence of dissociative episodes, including dissociative amnesia and two distinct personalities, (Dominic A and Dominic B) which made it impossible for him to control his actions.[892]

538. The Defence Experts take a holistic approach[893] in diagnosing Mr Ongwen's mental disease, and conclude that the coercive and violent LRA, controlled by Kony (and the Spirits), with its "do or die" rules and regulations, disrupted his development of any moral values and of the Acholi culture leaving Mr Ongwen with no free will. Every activity that Mr Ongwen participated in while in the LRA was under duress.[894]

539. The Defence Experts unequivocally placed the mental illnesses Mr Ongwen suffers in the context of the mass trauma experienced in Acholiland in the period 2002-2005. The trauma had two sources: initially from the enemy [Ugandan government] and then the mass trauma of the LRA insurgency.[895] The notion of mass trauma was first introduced in this trial by the evidence of Dr Musisi, a Victims Expert, as well as others who described the effects of the at least twenty-year and counting UPDF war against the LRA.[896] Dr Musisi vividly described the trauma suffered by people living in the North during the war, at the hands of both the LRA and the UPDF.[897] In sum, mass trauma is part of the complete contextual picture of Mr Ongwen and his mental disease defence, and cannot be overlooked or dismissed as a factor in assessing the evidence.

540. The Court-appointed expert, Dr de Jong, concurred with the three fundamental diagnoses of

[890] First Report, UGA-D26-0015-0004, p. 14.
[891] First Report, UGA-D26-0015-0004, p. 11.
[892] Second Report, UGA-D26-0015-0948, pp 28-32.
[893] Second Report, UGA-D26-0015-0948, pp 25-26.
[894] Second Report, UGA-D26-0015-0948, pp 28-33.
[895] T-250-Conf, pp 81-83.
[896] Dr Otunnu report: UGA-D26-0018-2279, Adam Branch Expert Report, UGA-D26-0015-1172; T-218.
[897] Dr Musisi's Expert Report, UGA-PCV-0003-0046.

the Defence Experts: based on a clinical interview and using standardized psychological and psychiatric instruments, he concluded that Mr Ongwen suffered from Major Depressive Disorder (MDD); PTSD; and Other Specified Dissociative Disorder. He labelled MDD and PTSD as severe.[898] He also agreed with the Defence Experts' analysis that Mr Ongwen suffers multiple mental illnesses simultaneously.[899]

541. The Prosecution Experts,[900] on the other hand, treated Dr de Jong – who was appointed by a neutral and professional Bench – as a Defence Expert, based on his concurrence with the Defence Experts' conclusions of mental illness. They criticized Dr de Jong, as well as the Defence Experts, for their inadequate and unprofessional methodology, and their use of their clinical interviews with Mr Ongwen in making diagnoses. These criticisms on methodology are unfounded. On closer examination, the evidence indicates that the Prosecution Experts' conclusions were not unequivocal and, in fact, in some instances, the Prosecution Experts shared the views and conclusions of the Defence Experts and the Court-appointed Expert.

542. In the *Ongwen* case, the Defence has adduced evidence that the Defence Experts, using methodology accepted in their profession, reached the conclusion that Mr Ongwen's mental diseases during the charged period (as well as prior and subsequent to it) destroyed his capacity (a) to appreciate the lawfulness or nature of his conduct, or (b) to control his conduct to conform to the requirements of law. The Prosecution has to now disprove each of these elements, beyond a reasonable doubt.

543. This section of the Closing Brief addresses the three issues that the Prosecution must disprove beyond a reasonable doubt in respect to the Defence evidence:

a. The validity of the Defence Experts' methodology;

b. The applicability of their conclusions to the charged period; and

c. Whether their conclusions meet the legal requirements: did the identified mental illnesses result in incapacities to appreciate lawfulness or to control conduct in conformity with law.

[898] Dr de Jong Expert Report, UGA-D26-0015-0046-R01, p. 5-6 (p. 0051-0052).
[899] Second Report, UGA-D26-0015-0948, pp 27-28 on differential diagnoses and co-morbidity; Dr de Jong Expert Report, UGA-D26-0015-0046-R01, pp 6 - 8 on differential diagnoses, and suggests that Complex PTSD "may best capture DO's prolonged trauma experiences."
[900] This applies to Prof Weierstall-Pust and Dr Mezey.

544. The absence of legal guidance on the burden of proof has placed the Defence in a "which came first, the chicken or the egg" quandary of how to organize this material. Although conclusions are only as credible as the makers and methodology used to arrive at them, the elements of Article 31(a) and how the evidence supports them is discussed first, and the latter part of the brief focuses on methodology.

ii. PART I

1. Introduction

545. One of the central issues to be decided in this case is whether Mr Ongwen was suffering from a mental disease that destroyed his capacity (1) to appreciate the unlawfulness of his conduct; or capacity (2) to control his conduct to conform to the requirements of law[901] in the charged period 2002-2005.

546. Under Article 31(a) the disease's destruction of either capacity is required to satisfy the defence; both are not required. However, there is overlap: a key component is the notion of mental capacity.[902] This means that the mental disease must be evaluated, in the first instance, in terms of how it impacts on a person's capacity to appreciate or understand as well as control her or his conduct.

547. Here, the Defence Experts and Dr de Jong presented evidence that Mr Ongwen's mental illnesses destroyed these capacities. The diseases originated with his forced abduction by the LRA in 1987 or 1988. They also presented evidence that the diseases were co-morbid: they existed together and at times they combined in their effects on Mr Ongwen.

548. Thus, the Defence evidence satisfies both criteria (1) and (2) and the burden is on the Prosecution to refute these elements beyond a reasonable doubt.

2. The Prosecution did not disprove beyond a reasonable doubt that the conclusions made in 2016 were inapplicable to the charged period.

549. The preliminary issue concerns timing. As Judge Schmitt pointed out, in a forensic setting, "you always have to go back in time and try to figure out how the state of the client…was at

[901] References to "control of conduct" in text should be read a "control of conduct to conform with the requirements of law."
[902] The definition of this concept far exceeds this brief, but the idea is similar to that of incapacity in the U.S. Model Penal Code (1962).

that time. I think that is inherent in forensic psychiatry".[903]

550. Working in the present to make conclusions about the past, especially in the "confused" field of psychiatry,[904] is not an exact science.[905] Dr Akena discussed the practical difficulties of obtaining psychiatric histories.[906] It is driven by data provided and from which conclusions may be drawn. What is important is that these conclusions may be re-drawn based on new data, or insights which may result in a different or amended analysis of previous data. This is exactly what happened in the diagnoses by the Defence experts: Mr Ongwen was consistent in his narratives in 2016 and 2018 about three of the diagnosed disorders of depressive illness, suicide, PTSD symptoms in 2016 and 2018; but that new information about dissociative disorders appeared later, and the approach is to build on information you have with new information.[907]

3. The Prosecution Failed to Disprove Beyond a Reasonable Doubt the Defence Evidence that Mr Ongwen's Mental Diseases Destroyed His Capacity (i) To Appreciate the Unlawfulness of His Conduct and (ii) Control His Conduct To Conform to the Requirements of Law

a. Introduction

551. The destruction in Mr Ongwen of the two capacities in Article 31(1)(a) by his mental diseases is interrelated, and is dealt with together in this section, particularly in the examples of the triumvirate mental illnesses of dissociative disorders (DID and amnesia), PTSD and OCD. The co-morbidity of suicidal tendencies and severe major depression with these illnesses should be considered as well, and they are also detailed in the Defence Expert Reports.

552. The fundamental result of these mental diseases, combined with the LRA's forceful and continuing disruption of Mr Ongwen's moral and personality development and indoctrination placed him in a situation where he was incapable of formulating the criminal intent for the crimes and modes of liability charged against him. Mr Ongwen's mental development ceased, from the time he was abducted, and this ensured that throughout the LRA, and even today, he has a "child-like" mind which is incapable of forming the required *mens rea* for crimes or

[903] T-248-Conf, p. 67, lns 16-21.
[904] T-250-Conf, p. 22, lns 13-14.
[905] In addition, the inexactness is underscored in Mr Ongwen's case by fact that he was not diagnosed with any mental illness until 2016, and for a number of the diagnoses, they are listed in the DSM and in DE's evidence as co-morbid with other diseases, and there is an overlap of symptoms.
[906] T-248-Conf, p. 66.
[907] T-249-Conf, p. 127 ; Second Report, UGA-D26-0015-0948, section on OCD.

determining right from wrong.

b. The Defence Expert Evidence

553. The Defence Experts ('DE') diagnosed the following mental illnesses in Mr Ongwen during the charged period: in the First Report,[908] they identified severe depressive illness, dissociative disorder (including dissociative identity disorder); PTSD; and he experiences severe suicidal ideation and is at a very high risk of committing suicide.[909] The First Report also identified depersonalization and derealisation associated with dissociation. In the Second Report, which built upon the First Report,[910] two further illnesses were identified: dissociative amnesia and symptoms of obsessive compulsive disorder.[911]

554. The DE described Mr Ongwen as someone who was "emotionally tough, resilient" and also as "cheerful and humorous."[912] And they concluded that this outward presentation was "deceptive and it covers up the intense internal emotional turmoil he experiences almost daily."[913] Contrary to the Prosecution's one-sided view that this was an inconsistency and the client was malingering, the DE's conclusion could be interpreted as the client was "masking" his inner feelings. But, this is evidence that the picture of Mr Ongwen's mental health was complex, and multi-dimensional: where two different Dominics co-existed in the same body.

555. Even in the First Report, where Dominic "A" and "B" do not specifically appear or are not specifically revealed in the interview by the client, the effects of dissociation are evidence in the co-existence of two personalities: the tough one who comes to the fore in the bush to carry out the orders of the LRA, and who displaces the normal personality who may find the orders reprehensible. In the Report, the DE conclude that this duality from dissociation makes it difficult for the individual "…to choose right from wrong under a pressing, life-threatening, stressful experience. During an episode of dissociation, an individual automatically (without deliberate conscious awareness) assumes another personality for whom mental capacity to know right from wrong does not exist…."[914] The DE notes, that ICC-DC documentation they

[908] First Report, UGA-D26-0015-0004; Brief Medical Report, UGA-D26-0015-0154, diagnosing depression and PTSD with "very high scores on 3 rating scales for PTSD, Depression and Suicide".
[909] First Report, UGA-D26-0015-0004, p. 12, pp 14-15.
[910] T-250-Conf, pp 29-30, lns 20-25; 1-6.
[911] Second Report, UGA-D26-0015-0948, pp 24-25.
[912] First Report, UGA-D26-0015-0004, p. 10.
[913] First Report, UGA-D26-0015-0004, p. 10.
[914] First Report, UGA-D26-0015-0004.

saw also described Mr Ongwen's experience as being a 'split person'.[915]

556. Thus, even as early as late 2016, when the dissociation was diagnosed, the conclusions of the DE supported the view that dissociation resulted in an incapacity to tell right from wrong as well as to control his conduct. It is implicit that an individual dealing with two different beings inside one body would be unable to control the conduct of each, separately or together.

557. In the Second Report, two years later, the DE identified more clearly the symptoms of dissociative disorders and obsessive-compulsive disorders.[916] They confirmed that Mr Ongwen still suffered from PTSD and depression.

558. The Second Report contained more detail, building on the First Report. The section entitled 'Altered levels of consciousness', includes that:

a. Mr Ongwen report partial awareness of events surrounding him, first in 1996 when he was hospitalized in Juba for 2 months; and in the 2002 **– the charged period** – when he was injured and left for dead. In both instances, he thought he had died and reported a vision which included colleagues who had died earlier, and were calling him to join them;

b. Dominic reported Dom B (his alter personality) and Dom A (him) who had little control over Dom B;

c. During the charged period, he reported an episode in **Pajule in 2002 and one in 2005** involving his wife, who was a collateral source for the DE, where he also was unaware of what was happening.

559. Mr Ongwen reported episodes of dissociation since 1996, which continued through the current trial.[917] [redacted]

[915] First Report, UGA-D26-0015-0004, p. 2.
[916] Second Report, UGA-D26-0015-0948, p. 4.
[917] In the Second Report, UGA-D26-0015-0948, he estimated his understanding of the courtroom proceedings as 50-50 (p.8) and this is reminiscent of the complaint in the Article 56 pleadings. There, in the pleading of 19 October 2015 CONF filing – Doc 321, paras 13 and 14, it states that "MR ONGWEN was sometimes unable to follow the entirety of the proceedings" due to length of examinations and no breaks…Mr Ongwen had a hard time following witness' testimony which caused him distress." It is unclear from the pleading what triggered the distress – whether it was "re-living" the testimonies, or being unable to concentrate for the long periods. But, in any case, given Mr Ongwen's history of dissociation, it cannot be completely ruled out that he was also disassociating in this instances.

[redacted][918] Prof Ovuga testified that dissociation occurred in relation to the battlefield,[919] and described Mr Ongwen's situation in the command room as probably the factor responsible for his first dissociative experience "…you either go or you perish…"[920]

560. Prof Ovuga also testified that the two personalities Dominic A and Dominic B existed "way before 2002" and were active during the charged period, 2002-2005.[921] In fact, he asserted that both still exist today,[922] and that both co-exist within Mr Ongwen's body: Dominic B ruled his life on the battlefield and it is he who should be on trial, not Dominic A.[923] While in the LRA, he saw his double – Dom B, sometimes frequently during the week, and then weeks would pass without seeing him.[924] This was also repeated in the ICC-DC. He also reported dissociative episodes while in the bush in 1996, 1999, **2002 (2), 2003 and 2005**, which included episodes of dying.[925] The illness also took the form of dissociative identity disorder (multiple personality disorder) with the existence of the two Dominics, A and B, in 1996, 1997 and during the period of **2002-2005**.[926] (Bold added)

561. Particularly in respect to dissociative amnesia, the episodes of memory loss dates back to 1996, 1997, 1999 and 2002 following battles. Mr Ongwen was hospitalized for mental illness after a battle with the SPLA in 1997 where he had lost consciousness for between 1.5 and 2.5 hours.[927]

c. Dissociate Disorders destroyed Mr Ongwen's sense of reality and his capacity to understand or control his conduct

562. The evidence provided by the Defence Experts and Dr de Jong[928] supports that Mr Ongwen suffered from dissociation and related mental health illnesses during the charged period. Dr Akena described dissociative disorders as:

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[918] Second Report, UGA-D26-0015-0948, p. 6 and pp 17-18; *see also* Prof Ovuga testimony about dissociation and Kony replacing Dr M in Mr Ongwen's perception at T-250, p. 44.
[919] T-254, p. 25.
[920] T-250, p. 41.
[921] T-250, p. 42.
[922] T-254, pp 29-30 (relating to incidents in Courtroom and at the Detention Centre)
[923] T-250, p. 42; *see also* T-254, pp 23-26; Mr Ongwen refers to "Dominic A" and "Dominic B" himself (Second Report, UGA-D26-0015-0948, p. 6).
[924] Second Report, UGA-D26-0015-0948, p. 18.
[925] Second Report, UGA-D26-0015-0948, pp 18-19.
[926] Second Report, UGA-D26-0015-0948, p. 19.
[927] Second Report, UGA-D26-0015-0948, p. 24.
[928] Dr de Jong Expert Report, UGA-D26-0015-0046-R01, p. 23 notes dissociation reported as early as 1998 after he was abducted. Note: this appears to be a typographical error, and should be 1988.

> […] situations where an individual has a loss of awareness of their surroundings and usually it follows a severe form of psychological distress…it's a mechanism the brain puts in place to take away a traumatic event….or happening…or memory….when somebody has dissociated, they are really not fully aware about what it is that is happening to them at that point.[929]

563. Thus, the conclusions of the DE indicate that DO suffered from mental illnesses associated with dissociative disorders that affected, and skewed his sense of awareness and reality. In addition, Prof Ovuga testified that in periods of dissociation, Mr Ongwen could not understand what was going on.[930] One of the common denominators of these was that he simply was not aware of his conduct, because he disassociated.[931] Dr Akena describes examples of Mr Ongwen doing things that normal soldiers would not have done: in one of these incidents, he was not fully aware of one of the incidents, and in the other, second, expressed his suicidal wish: if he had died in battle, maybe things would be better.[932] In another example, Mr Ongwen developed amnesia about what happened during battle.[933] By definition, amnesia episodes affected Mr Ongwen's mind and judgment. As Prof Ovuga testified, the dissociation which Mr Ongwen experienced in the LRA "protected him from the burden of telling right from wrong".[934]

d. Mr Ongwen had no capacity to control his conduct

564. Due to the dissociative disorders (DID and amnesia), Mr Ongwen's capacity to control his conduct (including during the charged period) was destroyed. It is inconceivable that for Mr Ongwen, with two (competing) personalities and suffering dissociative episodes including amnesia, could have recollection and control over his own conduct. As the Prosecution Expert Dr Mezey stated,[935] "….in severe mental illness you do not have control over your thought processes and behaviours and feelings."

4. Mr Ongwen's moral development was frozen when he was abducted by the LRA

a. LRA Recruited children because they had "moral malleability"

565. The capacity to appreciate the lawfulness of one's conduct is predicated on a certain level of

[929] T-248, p. 81.
[930] T-251, p. 41, lns 24-25.
[931] Second Report, UGA-D26-0015-0948, p. 5 "Altered level of consciousness."
[932] T-249-Conf, pp 7-8.
[933] T-249-Conf, pp 75-78, p. 99.
[934] T-250, p. 40.
[935] T-163, pp 44-45.

moral development and judgment.

566. It is undisputed by the Prosecution that Kony focused on abducting very young children into the LRA for their "moral malleability".[936] In the Arrest Warrant Request, at paragraph 82, two former LRA officers are quoted as saying that Kony "compelled young people to do things against their own desires because the young people were 'at a stage where we couldn't really differentiate [between] good and bad.'" Another is stated that Kony said that "….[I]t was easy to play around with minds, their thinking. . .[It] was easy to completely change the way they think."[937]

567. As part of initiation and control, Kony forced the obliteration of family ties[938] and replaced it with the brutal regime of the LRA, where an abductee's mind was not his or her own.[939] D-133, a former abducted child soldier in the NRA, described:

> [T]he reality is that a child in the ranks of a rebel group is in total captivity of both the mind and the body. Even on attaining the age of 18, such a person is not in command of his her will and actions.[940]

568. The DE also referred to Mr Ongwen after his abduction as being "in captivity."[941]

569. Dr Judith Herman describes the "brainwashing" of the perpetrator to maintain power and the "final step of 'breaking' victim's "most basic attachments, by witnessing or participating in crimes against others."[942] Dr Akena described three traumatic incidents which Mr Ongwen experienced at the time of, or close to, his abduction at age 8 or 9: being forced to watch the killing of young relative by child soldiers; forced to participate in a reprisal attack on a village and being forced to skin alive a young abductee who had tried to escape.[943]

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[936] This was also corroborated by collateral sources interviewed by the Defence, T-248-Conf, p. 98.
[937] Defence Witness Expert D-133, T-203, p. 63, lns 22-25 to p. 64, lns 1-7 [abducted child does not know any moral authority to decide wrong and right); Elizabeth Schauer, Psychological Impact of Child Soldiering, UGA-PCV-0001-0095, at pp 0100-0101.
[938] For example, D-26, testifying about the initiation ritual using camoplast, testified that its purpose was "…meant to change you to become part of them. So much so that it will remove any feelings or thought about returning home. You will never think of going back home", *see* T-191, p. 7, lns 20-25 and p. 8, l 1.
[939] Defence Witness Expert D-133, T-203, pp 32-34. *See also*, Dr Akena testified that those who were abducted at a young age were impacted by abduction longer than those who were abducted much later. T-249, p. 9.
[940] Defence Witness Expert D-133, Expert Report, UGA-D26-0015-1022 at 1028, explained by witness at T-203, pp 32-33; see also ICC-02/04-01/15-3-Conf-Red3, para. 82.
[941] T-250-Conf, p. 53; T-254, p. 31, lns 4-19.
[942] Complex PTSD: A Syndrome in Survivors of Prolonged and Repeated Trauma, Judith Lewis Herman, *J. of Traumatic Stress*, Vol 5 No 3, 1992, pp 383-4 (UGA-D26-0015-1395, pp 1401-02).
[943] T-248-Conf, pp 97-101, 104-105.

b. Mr Ongwen's moral development was frozen in a "child-like" state

570. The Defence and its Experts have repeatedly referred to the "child-like" mind of Mr Ongwen, and witnesses have described his "child-like" manners and conduct.[944] In interpreting the testimony of P-235 that Mr Ongwen liked to joke and play with the boys, Prof Ovuga stated that this is "due to arrested cognitive and psychological development."[945] In essence, the DE concluded that Mr Ongwen is a man in his body, but a child in his mind – even today. [946]

571. The Prosecution Expert Witness, Dr Abbo, similarly echoed this theme of "child-like" development. She testified that while in the LRA, Mr Ongwen saw himself as a child when he looked at the children who were soldiers under his command:

> Okay, then the--that same witness towards the end he requests Mr Ongwen to release the children that were with him, but Mr Ongwen then refused, according to this. But this could be interpreted as--because he says, he says that**, "You call these kids children, but I call them my soldiers. So we are talking about my soldiers. We are not talking about the children you are talking about."** So this could be interpreted as his concept, Mr Ongwen's concept of a child which could have been carried on from--from his own experience of having been abducted as a child and he became a soldier then and **so his [concept]**[947] **of a child is a soldier and not a child because that is what he experienced as himself.**[948] (Bold added)

572. The DE concluded that from the point of abduction, Mr Ongwen's moral development – his sense of right and wrong – stopped, or was frozen.[949] As Prof Ovuga testified, "All the teachings [from his family] were thrown out….the door…and he was left with things that he summarized as the LRA were killers."[950] Mr Ongwen had learned some Acholi cultural traditions and acquired rudimentary moral values from his family before his abduction.[951] These values were "nullified by the violent social order in the bush following his abduction, resulting in no sense of right and wrong.[952] Thus, these were erased and "replaced," often ruthlessly, by the LRA with its cult-like warped value system. This left Mr Ongwen basically

[944] ICC-02/04-01/15-404-Conf; Second Report, UGA-D26-0015-0948, at 0964.
[945] T-255, pp 7-8; Dr de Jong agrees that Mr Ongwen's personality development got disrupted by his forced recruitment at a very young age." Dr de Jong Expert Report, UGA-D26-0015-0046-R01, p. 25.
[946] T-249, pp 27-29, Dr Akena commenting on Dr Abbo's testimony as well Defence experts' experiences with Mr Ongwen.
[947] T-166-Conf, p. 47, ln. 12 says "consent of a child…" but this does not make sense and is probably an error; it should read "concept of a child…."
[948] T-166-Conf, p. 47, lns 5-9.
[949] Dr Abbo acknowledged that there may be indications that Mr Ongwen's psychosocial development was arrested at the time of his abduction. Dr Abbo report, p. 3.
[950] T-250, p. 45.
[951] Second Report, UGA-D26-0015-0948, p. 32; T-250-Conf, pp 64-65.
[952] Second Report, UGA-D26-0015-0948, p. 32.

stripped of his Acholi traditional social system, without free will and, as D-133, himself abducted as a child by the NRA, testified, in a situation of total captivity of mind and body, where his mind was not own, and he had no command over himself.[953]

573. In addition, the horrific traumas that Mr Ongwen was forced to witness and participate in as a child left him emotionally dead and therefore unable to tell right from wrong. As Prof Ovuga testified, Mr Ongwen was "forced to be emotionally dead. A person who is emotionally dead cannot tell right from wrong. Nothing else matters after the experiences." The experience of watching his cousin's sister being brutally killed left him helpless, followed by the incident of the killing of the four boys, and being ordered to kill his victim in a cruel and brutal manner. If he did not do it, he, Mr Ongwen would be killed.[954]

574. In short, Mr Ongwen's "handbook of morality written before his abduction was shredded…destroyed, and a new book or handbook was written."[955]

575. This does not mean that every concept or idea was extinguished. It would be wrong and simplistic to argue that no shred of an abductee's former moral development survived the LRA rituals and indoctrination methods. But, as discussed above, even where an abductee sensed something was wrong, s/he had no choice but to shut out and bury these feelings or face death.

576. But, the aggregate factors of Kony's control – brutal indoctrination, severe punishments of death for disobeying the rules, the constant surveillance and reporting to Kony (and, to the spirits) of disobedience, fear and terror, etc. created an environment in which any pre-LRA teachings were suppressed.[956]

577. Based on this notion of arrested development, or frozen development, this means that Mr Ongwen was mentally a child, while physically being a grown man. This means that any conduct after he reached the age of 18 (which the Prosecution argues is the chronological age of culpability) could not have been carried out with the intent of an adult who could differentiate right from wrong. Thus, the Prosecution did not disprove Mr Ongwen's arrested child development beyond a reasonable doubt.

[953] T-203, pp 32-34.
[954] T-250, pp 45-46.
[955] T-254, pp 32-33.
[956] For references to surveillance and intelligence structures within the LRA, *see* the Defence Witness Expert D-60, T-197-Conf, pp 53-54; T-203, pp 47-53.

c. The LRA environment encouraged the growth of mental illness

578. The environment in the LRA, as pointed out by Dr Abbo, was an adverse environment and it offered no alternatives to abductees.[957] Dr Akena went a step further, characterizing it as a hostile environment.[958] Regardless of how it is described, it was characterized by the elements of duress.

579. While duress occurs independently of any mental disorder or defect,[959] the overwhelming coercive environment it creates destroyed any scintilla of mental health that abductees may have had to protect them against the LRA. To the contrary, it was an environment that promoted and rewarded unhealthy human activities: rife with trauma, where little children were forced to watch helplessly or carry out heinous acts, such as the skinning of escapees.

580. Moreover, Mr Ongwen, like other abducted children (and adults) were "kind of like hostages," were "removed from their natural habitat and taken and kept incommunicado in the bush against their will." Prof Ovuga noted the similarities to the Stockholm syndrome, with one important difference: Mr Ongwen was not an ally of the boss, Kony.[960]

d. Child soldiers faced penalties, up to death, for expressing any feelings

581. In this context, Mr Ongwen needed to put on a brave face: orders were always followed with death. If you defied orders, or expressed doubts about the rules and regulations, it could cost you your life.[961]

582. As Prof Ovuga testified:

> [R]emember, that you are, as a kid…controlled by the spirits, so you must –know exactly what's going on and you must do it well. The intelligence was all over the place, and these people are watching you and they are taking back information. So in the immediate term, you needed to put up a very brave face for you to be able to survive death, at least at that point or at least that the information goes back to the boss they you didn't defy his orders.[962]

583. Lack of defiance of rules, as the DE explained, was about survival: "[…] So, if you followed

[957] Dr Abbo Expert Report, UGA-OTP-0280-0732 at p. 25 (p. 0756) and T-166, p. 61 lns 18 to 25.
[958] T-249-Conf, p. 4 ln. 22 to p. 5 ln. 9.
[959] T-250-Conf, p. 53.
[960] T-250-Conf, pp 53-57.
[961] T-249-Conf, p. 3.
[962] T-250, pp 17-18.

the rules, you didn't get killed…..So you don't follow the orders, you die […]".[963] Prof Ovuga explained that in the LRA, similar to cult movements, Mr Ongwen (and others) held a shared belief system that made him follow the rules and regulations of Kony involuntarily.[964]

584. Mr Ongwen, as he became nominally more senior, challenged Kony and was punished for this. But, as Prof Ovuga explained, he did this "at that point staying alive meant nothing to him […]".[965] Hence, it comes as no surprise that Mr Ongwen did not express remorse until he was out of the bush.[966]

585. The Prosecution simplistically points to Mr Ongwen's lack of expressions of remorse while in the LRA as one of the indicia of his guilt. This analysis contradicts the evidence – both from Defence Experts cited above, and the Prosecution's own analysis of the ruthless revenge and punishment exacted by Kony on those who challenged him or expressed doubts about his rules – that abductees did not express remorse for fear of punishment, including death.

e. Recurring episodes of PTSD contribute to no control over conduct

586. Mr Ongwen suffers from PTSD, and from recurring traumas.[967] The origin of these traumas is traced by the Defence Experts to his forced abduction. While some traumas are related to battle in the LRA, Dr Akena points out that the trauma which Mr Ongwen experienced initially after he was abducted in the first months was not related to battle. Recounting this severe, life-threatening experience, the expert said:

> The trauma was related to skinning of people alive, being forced to carry the heads of severed persons and dumping them into a pit. Having the intestines of people hung up on walls. The trauma was related to bludgeoning of little children who had tried to escape and had been brought back. The events were bad. That was the context in which the traumatic events happened.[968]

587. Dr Akena describes that other events, such as the fireworks in The Hague, can trigger these traumas.[969] The Prosecution Witness Expert Dr Mezey concurs that in severe PTSD, the person can be re-traumatised by triggering events,[970] including even in a "safe" environment

[963] T-248-Conf, pp 112-114; *see also* T-249, pp 107-108.
[964] T-250-Conf, pp 77-80.
[965] T-250-Conf, pp 77-80.
[966] T-248-Conf, pp 115-118.
[967] First Report, UGA-D26-0015-0004, Second Report, UGA-D26-0015-0948; Dr de Jong Expert Report, UGA-D26-0015-0046-R01.
[968] T-249-Conf, pp 103-104.
[969] T-249-Conf, p. 104; *see also* T-250-Conf, pp 75-76.
[970] T-162, pp 19-21.

at the Detention Centre in The Hague when he heard fireworks outside. In the fireworks re-traumatisation, there was no objective danger of battle or Kony or the LRA, but Mr Ongwen's sense of where he was and what he was experiencing was totally up-ended by his disease, and he was left without any control over his conduct. As D-133 has testified, the trauma of being a child soldier never ends, and does not stop at the age of majority (age 18).[971]

588. Victims' witness Prof Reichterter confirmed the following general propositions about children and trauma, which can be applied to Mr Ongwen:

a. Symptoms identified (in his report) are applicable to other traumatic experiences;[972]

b. Trauma results in more developmental damage to a child, versus someone older with a more developed personality;[973]

c. Trauma triggers survival skills in children;[974]

d. Traumatic experiences cause bad mental health outcomes;[975]

e. Children who have experienced severe trauma are at great risk for developing mental pathology and this includes tortured child soldiers and others.[976]

589. Assuming that this heinous crime and others in the LRA which Mr Ongwen was forced to commit suffices as severe, life-threatening trauma, and the evidence that they are still contributing to re-traumatisation, it is fair to conclude that traumatization occurred during the charged period.

590. But for the Prosecution Witness Expert Dr Mezey, who finds no symptoms of PTSD (or any other mental illness) in Mr Ongwen,[977] the other two Prosecution Witness Experts recognized trauma in Mr Ongwen's life in the LRA: Prof Weirstall-Pust's position was that he suffered from traumatic events but they did not reach the level of PTSD.[978] Dr Abbo appears to accept

[971] T-203, pp 65-66.
[972] T-175-Conf, pp 66-67.
[973] T-175-Conf, pp 70-71.
[974] T-175-Conf, pp 71-72.
[975] T-175-Conf, pp 73-74.
[976] T-175-Conf, pp 74-75.
[977] Dr Mezey Expert Report, UGA-OTP-0280-0786, paras 62, 89-92, 118.
[978] Prof Weierstall-Pust Report, UGA-OTP-0280-0674, conclusions at pp 27-28.

the PTSD diagnoses in the reports of the Defence Experts and Dr de Jong.[979]

591. This lack of unanimity of the Prosecution Experts on PTSD is another factor which shows that the Prosecution did not disprove the evidence submitted by the DE.

f. Symptoms of OCD destroyed Mr Ongwen's capacity to appreciate the lawfulness of his conduct or to control his conduct to conform to the requirements of law

592. The Defence Experts identified the symptoms of OCD in the Second Report; although there were symptoms at the time of First Report, they were not included because they did not meet diagnostic criteria. The DE described that the presentation generally of symptoms "evolves and changes over time."[980] Prof Ovuga concluded that appetitive aggression may be a form of OCD and in respect to Mr Ongwen, appetitive aggression does not apply but he suffers from a "poorly formed" obsessive compulsive disorder.[981]

593. The symptoms presented for OCD were tied to battle: "going to and engagement in battle was the "compulsive" component….while the urge to go to battle was the 'obsession'".[982] This was supported by Mr Ongwen's information that colleagues referred to his "spirit for fighting" and that "*cen* had fallen on me during battle".

594. Prof Ovuga explained how symptoms of OCD and dissociation occurred together on the battlefield for Mr Ongwen, creating a situation where he could not tell right from wrong.[983]

595. Mr Ongwen would feel or experience the smell of blood or gunpowder as intrusion and then have a premonition they were being attacked. He would organize his forces to ward off the attack. Mr Ongwen was motivated by an instinct for survival, not necessarily a deliberate desire, to go into battle. Unless he took some action, he would be overcome with severe levels of anxiety, distress, unease, insecurity. The only way to get relief from these feelings was to ward off danger to himself and to his soldiers. He also experienced amnesia and could not remember his role in the battlefield.[984]

[979] Dr Abbo Expert Report, UGA-OTP-0280-0732, p. 25.
[980] Second Report, UGA-D26-0015-0948, p. 21.
[981] T-250-Conf, pp 72-74.
[982] Second Report, UGA-D26-0015-0948, p. 21.
[983] The Rome Statute uses the terms "capacity to appreciate the lawfulness" of one's conduct. Throughout their Reports, the Defence Experts refer to the ability to tell right from wrong to convey the same criterion.
[984] T-250-Conf, pp 27-28, 33-34, 37-40.

596. Having dissociative amnesia in battle clearly put Mr Ongwen in a situation where the disease made it impossible for him to control his conduct. The symptoms of OCD, such as intrusions, combined with the dissociative identify disorder with the existence of Dominic A and Dominic B. All three mental illnesses, individually and in the aggregate – support the conclusion that there was no one unified Mr Ongwen and he was not in control of his conduct during battles while in the LRA.

g. Suicide Ideation and Suicidal Attempts

597. The Defence also points out that the mental illness associated with suicidal ideation and eight suicide attempts illustrates that Mr Ongwen's conduct was motivated by a destructive self-harm. The depression and hopelessness which drove him to these suicide attempts indicates that Mr Ongwen felt as if he had no control over life, and simply wanted to end his suffering.[985]

598. The repeated suicide attempts, dating back to the 1990's and including the charged period, are found in the Defence Experts and Prof de Jong Reports.[986] Yet the Prosecution appears to argue that the severity of the attempts is undermined by the fact that Mr Ongwen survived.[987] The Defence is stunned by this analysis: it says that an attempt is only severe if the person does not survive.

5. Conclusion

599. The Prosecution has failed to satisfy its burden to disprove the elements of the Article 31(a) defence beyond a reasonable doubt.

600. The evidence of the triumvirate mental diseases of Dissociative Disorders (DID and amnesia), PTSD and symptoms of OCD suffered by Mr Ongwen destroyed his capacities to appreciate the lawfulness of his conduct, or to control his conduct to conform with the requirements of the law. Suicide ideation and depression – in combination with the triumvirate – significantly contributed.

601. The most significant results of this destruction, in the context of this case, is that Mr Ongwen was unable to form the intent, or *mens rea* required for the alleged crimes and modes of

[985] First Report, UGA-D26-0015-0004, pp 6, 11; Second Report, UGA-D26-0015-0948, pp 20-21.
[986] First Report, UGA-D26-0015-0004, p. 6; Second Report, UGA-D26-0015-0948, p. 10; Supplemental Report, UGA-D26-0015-1219; Dr de Jong Report, UGA-D26-0015-0046-R01, p. 23.
[987] Prof Weierstall-Pust Expert Report, UGA-OTP-0280-0674, p. 18.

liability for which he has been prosecuted, or to tell right from wrong.[988]

602. In addition, this same inability to form the *mens rea* due to his mental disease applies to the the Article 31(1)(d) defence of duress. Mr Ongwen's mental disease – with his arrested child-like mental state – destroyed his capacity to "act reasonably and necessarily" in his situation to avoid the LRA's threats, and made it not possible for him to formulate any intent not to cause a greater harm

603. Even if the Trial Chamber finds *mens rea* with regard to individual crimes or modes of liability (a finding the Defence contests), the mental illnesses that Mr Ongwen suffered, and continues to suffer, meet the test for a complete defence to all crimes.

iii. PART II

1. The Prosecution did not disprove the validity of the methodology of the Defence Experts beyond a reasonable doubt.

a. The Prosecution accepted the expert status of the Defence Experts

604. The issue of who is carrying out a methodology is both a predicate to, and closely-linked with, conclusions about the methodology. Therefore, it appears incongruous that despite the Prosecution Experts' core criticism that the methodology of the Defence Experts invalidated their conclusions, there was no procedural challenge by the Prosecution to their expert qualifications or the multiple Expert Reports submitted by the Defence.[989] The qualifications of both – Ugandan psychiatrists, collectively with over 50 years-experience in psychiatry, including in clinical and academic settings and decades of work in forensic psychiatry – were not disputed.

605. Moreover, their professional credibility and integrity were magnified by their frank acknowledgements of the difficulties each had to personally overcome to carry out the work in the *Ongwen* case. In the words of Dr. Akena:

> I knew some of the areas the client kept on talking about…but I also looked at the client and his age, and I looked back at that time and I, like, oh my goodness, this could have actually been me.[990]

[988] T-250, p. 40. (Prof Ovuga testified that the dissociation which Mr Ongwen experienced in the LRA "protected him from the burden of telling right from wrong.")
[989] Brief Report, UGA-D26-0015-0154; First Report, UGA-D26-0015-0004, Second Report, UGA-D26-0015-0948; Supplemental Report, UGA-D26-0015-1219; Rejoinder Report, UGA-D26-0015-1574.
[990] T-248-Conf, p. 42, lns 8-25; p. 43, lns 1-2.

606. Prof Ovuga recounted that his relative had been brutally killed with others in a granary by the LRA, but that as medical practitioner and psychiatrist, he "swore to help even [his] enemies when [he] can….I have to attend to them without prejudice, without hard feelings in order to give relief to them…to prevent them from dying…from continuing to suffer. And that was why I accepted eventually."[991]

607. Both discussed the importance of cultural psychiatry throughout their testimonies,[992] and Prof Ovuga explained that "culture and psychiatry cannot be separated during this modern practice."[993] Yet, he also distinguished between holding cultural belief systems similar to the client as helpful to understanding him, "but it does not affect the way we make our conclusions […]".[994]

608. In sum, the Defence Experts acknowledged that the cultural aspects of their identities were helpful in interacting with the client and eliciting information from him, but that the professional assessments of the client's mental illnesses involved using diagnostic approaches and tools that were culturally sensitive in the context of applying recognized criteria in the appropriate context.[995]

b. Prosecution critiques of Defence Experts' methodology

609. Nevertheless, the Prosecution and some of its Experts critiqued the qualifications and professionalism of the Defence Experts (and Dr de Jong) "through the front and back doors" in Reports and in the courtroom, and in a manner and style that too often reeked of unprofessionalism and emotion. Dr Mezey criticized the reports of the Defence Experts and Dr de Jong for not challenging Mr Ongwen's malingering, and adopting a "credulous and uncritical approach."[996]

610. In his Rebuttal Report, Prof Weierstall-Pust was even more sweeping in his criticism: he concluded that the Defence Experts' report, "is insufficient, or unfounded, or inconsistent, or contradictory, or sloppy in almost every aspect and does not fulfil the minimal quality criteria

[991] T-250-Conf, pp 15-17.
[992] *See*, for example, T-248-Conf, pp 23-24, 46-49; T-250-Conf, pp 23-25.
[993] T-251-Conf, p. 95, lns 15-21.
[994] T-250-Conf, p. 20, lns 17-21 and generally pp 19-20.
[995] T-248-Conf, pp 46-47.
[996] Dr Mezey Expert Report, UGA-OTP-0280-0786, paras 43 and 81 (Defence Experts' reports critized as "extremely credulous").

of a professional forensic report according to the current state-of-the-art."[997]

c. Sloppiness and Nonsense

611. Dr Weierstall-Pust, in fact, misrepresented testimony of the Defence Experts about the DC reports in his Rebuttal Report, accusing the Experts of "degrading their [the DC] clinical ratings as sloppy clinical notes."[998] When you look at the Defence testimony cited, this is a blatant lie.[999] Dr Akena explained how clinical notes were written and how they analysed them – but never called them "sloppy." In the Rejoinder Report, this false premise is refuted.[1000]

612. In cross-examination, the Prof Weierstall-Pust had to concede that Dr Akena did not criticize the DC notes as sloppy.[1001]

613. In the courtroom, the critique of the Defence Experts took a nose-dive: During the cross-examination of Prof Ovuga, the Prosecution accused the expert of suggesting "nonsense," and then, after being rebuked by the Trial Chamber, Defence counsel and the witness, apologised that he was out of order and used hypoglycaemia as an excuse.[1002]

614. But the general strategy was to undermine the credibility and reliability of the Experts conclusions by arguing: (1) their methodology was defective: there was insufficient corroboration, especially through testing and use of collateral sources, in light of a malingering client; and that (2) the determinant gauge of mental illness is its visibility to observers, and there was no such witness evidence that anything appeared to be wrong with Mr Ongwen.

615. The Prosecution viewed methodology as one-dimensional, static and "written in stone." This approach most often involved the tactic of plucking phrases from witness testimony or medical reports out of their context, and asking for piecemeal[1003] interpretation. When this

[997] Rebuttal Report, UGA-OTP-0287-0072, p. 27; *see also* T-253, pp 29-32.
[998] Rebuttal Report, UGA-OTP-0287-0072, p. 10.
[999] T-249, pp 12-13; see also T-253, pp 81-85.
[1000] Rejoinder Report, UGA-D26-0015-1574 at 1577.
[1001] We note that Prof Weierstall-Pust, as a psychologist, was asked to criticize two Defence psychiatrists, whereas the Prosecution had two other psychiatrists who had presented evidence. The issue of qualifications is somewhat collateral, but it raises the question as to why the Prosecution did not choose one of psychiatrists to, in the view of the Defence, as a rebuttal witness.
[1002] T-251-Conf, pp 31-34.
[1003] The erroneous notion that quotes can be strung together to present a holistic picture, with no attention to context, was espoused by Prof Weierstall-Pust at T-252, p. 34, lns 18-20. Yet, he also agreed that a complete picture was

phrase plucking was used in respect to the DC Clinical Notes, the Defence Expert Dr Akena testified that clinical notes are written, as are notes of other health professionals, for specific purposes, and must be properly interpreted in this context.[1004] He also commented that they included somatic symptoms, but were not necessarily helpful in making a diagnosis.[1005] He further explained that "[w]e don't interpret signs and symptoms on mental disorders, mental illnesses in isolation. We interpret them in context. We interpret them as a whole. We use a diagnostic manual like the DSM to guide us in that assessment."[1006]

d. The Prosecution did not meet its burden to disprove its allegation that collateral sources were lacking

616. First, the Defence Experts used collateral information, from individuals who knew Mr Ongwen in the LRA during the charged period and from mental health professionals at the DC. The last pages of the First Report (pp 17-20) discuss the collateral interviews, and a subsequent filing by the Defence[1007] identifies the sources of the quotes used from collateral interviews in the First Report. These interviews were from one of Mr Ongwen's wives; one of Kony's wives [redacted]; a senior commander; and a subordinate of Mr Ongwen.[1008]

617. Second, the Defence submits that there is corroborative testimony from Defence and Prosecution witnesses about the LRA's forced abductions, its collective punishments against villages of those who tried to escape and the environment of Kony's control, which was maintained by his misuse of spiritualism, and by instilling fear and terror in the abductees.

618. One of these witnesses was Mr Joe Kakanyero, who was abducted by the LRA at the same time, with Mr Ongwen, when they were on their way to school in 1987. Mr Kakanyero's and Mr Ongwen's parents were brothers in the same clan. He described the first days of initiation into the LRA, including being forced to watch the killing of one of the commanders, Omony from Patiko, who had tried to escape. The new abductees, including Kakanyero and Ongwen,

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preferable and that "you must not take one single line and say this is the evidence I base my decisions on. This wouldn't be….professional approach…" T-253, pp 49-50. Prof Weierstall-Pust finally expressed agreement with Dr Akena that it was necessary to assess symptoms for a diagnosis, and it was not enough to attach a label based only on checking off diagnostic criteria. T-253, p. 98.

[1004] T-249-Conf, pp 56-60.

[1005] T-249-Conf, p. 12, pp 56-60.

[1006] T-249-Conf, p. 100; *see also* Prof Ovuga describing Multi-Axial Diagnoses Chart at end of Second Report, UGA-D26-0015-0948, pp 24-25.

[1007] See UGA-D26-0015-0081.

[1008] UGA-D26-0015-0081, at 0084.

were forced to watch as soldiers hacked his head and body with an axe. This was a lesson that whoever wanted to escape would not survive and suffer the same punishment as Omony. They were also forced to witness other killings. He remained with Dominic for about three and one-half months; then they were split up. Kakanyero saw Mr Ongwen again for the first when he testified in Court in November 2018.[1009] When he returned home, he learned that Mr Ongwen's parents had been killed.[1010]

619. Mr Kakanyero testified that the killing of Omony gave him a lot of fear, and the killing of someone "in a very gruesome manner in broad daylight" changed his life. "I realized that if I were to defy any of their orders, or if I don't do what they want me to do, they will kill me."[1011]

620. Mr Kakanyero thought that Mr Ongwen was "really depressed, but he didn't have anything to do. We were all children. It was very difficult. If you were in the hands of a beast, you will have to follow the instructions of the beast so that you can survive. If you defy, it can work against you, just to use you to teach others who want to do something you had tried to do".[1012]

621. Similar to testimony of others, including D-133, he stated that "the three of us were being forced to do the things we were doing. We weren't doing them on our own volition".[1013]

2. The Prosecution did not disprove beyond a reasonable doubt the Defence Experts' view of what mental illness looks like

a. Prosecution Myth #1: Mental illness, including severe mental health illness is visible 24/7 to anyone observing but especially those closest to the person affected.

622. The Defence Experts stated that mental illness does not present its symptoms 24/7. As Prof Ovuga testified, "[t]he problem…is…multiple identity disorder, or any form of dissociation does not occur all the time every day […] and not even a medical doctor would recognize severe mental illness on its face".[1014] (Underlining added).

623. The Prosecution Witness Experts concur with this. Prof Weierstall-Pust concludes that

[1009] T-193, pp 5-8; 11-12.
[1010] T-193, p. 16; T-251-Conf, pp 92-93 (Prof Ovuga on psychological impact of killing of parents).
[1011] T-193, p. 18.
[1012] T-193, p. 19.
[1013] T-193, p. 21.
[1014] T-251-Conf, p. 30, lns 10-16.

"[e]very mental disorder fluctuates over time"[1015] and he testified that dissociative identity disorder is difficult to identify, and quoted a publication that asserted that only 64% of all health professionals are able to correctly identify this disorder.[1016] Dr Mezey describes re-experiencing symptoms in the context of PTSD, which implies a fluctuation over time.[1017]

624. Yet, the Prosecution Experts wrongly concluded that Mr Ongwen was not suffering from mental illness during the charged period because he appeared "normal" to those around him: Mr Ongwen joked with people and appeared happy. This conclusion contradicts the Prosecution Experts' evidence on fluctuation, which implies that there could be times where a mentally ill person appears "normal" and not in a visible state of distress from mental illness. Thus, the Prosecution Experts wrongly concluded that these observations were inconsistent with mental illness, and contradicted what would be expected from a person suffering from severe mental illness.

625. Along with this erroneous notion, the Prosecution repeatedly insisted that if something were abnormal or wrong with Mr Ongwen, someone with him would have noticed. Dr Mezey stated in respect to dissociative identity disorder (DID), "[v]ery often the person is not aware that they have the disorder, but it is noticed by other people".[1018] In her Report, she wrote that "If Mr Ongwen had been suffering from serious mental illness and mental instability, one would have expected this to have been readily apparent to other fighters and members of the LRA, and would, moreover, been a bar to Mr Ongwen's rapid promotion through the ranks".[1019]

626. Prof Ovuga explained that "[i]n our part of the world, we somatise. What that means is we convert psychological distress into physical symptoms. And we also spiritualise…we explain our psychological distress in the terms of the effects of the spirits, ancestral sprits, the wrong we have done […]"[1020] The Defence adduced evidence to refute the Prosecution's claimed apparent "inconsistencies" (or, as Prof Weierstall-Pust expressed it, "prominent

[1015] Prof Weierstall Expert Report, UGA-OTP-0280-0674, at 0681, p. 8.
[1016] T-253, p. 99.
[1017] T-162, p. 20.
[1018] T-162-Conf, p. 42.
[1019] Dr Mezey Expert Report, UGA-OTP-0280-0786, para. 98.
[1020] T-254, pp 14-15; see also T-248-Conf, pp 46-49 on mental health literacy and cultural issues re expressing symptoms.

inconsistencies"[1021]).

627. First, Prof Ovuga testified that the inconsistencies were known as reaction formation. This occurs where a person visibly shows the opposite emotion that s/he may be feeling inside. "On the outside, the mental picture can change on the outside to the opposite of what is being experienced internally".[1022] This concept was echoed by Dr de Jong who described that Mr Ongwen tries to hide his feelings:

> He tends to hide his depressed mood in a culturally congruent manner in order not to embarrass others, and sometimes laughs to cover up emotions.[1023]

b. LRA abductees were punished for showing their feelings

628. Second, there was evidence that in the context of the LRA, abductees were forced to not express their feelings upon the threat of severe punishment, including death. So, if Mr Ongwen was feeling sad or agitated, his normal instinct would be to suppress these feelings and appear happy and calm.[1024]

629. The Defence Experts testified that child soldiers were not free to show signs of remorse or despair within the LRA. Remorse was a sign of weakness because you would be suspected to planning to escape. If you were suspected, your peers would be ordered to kill you.[1025] The Defence Experts stated that "[e]veryone in the LRA was trained and conditioned not to mourn or show any sign of remorse….Any sign of despair, apathy and self-isolation…was 'severely punished'''.[1026]

c. The LRA member-observers were themselves traumatized

630. Third, one has to look, also, at the sources of these observations of "happiness" and "nothing amiss." These were fellow abductees who lived or worked with Mr Ongwen in the same coercive, hostile environment as he.[1027] What would appear "normal" or "nothing amiss" to them is affected by the LRA environment. For example, women who lived with Mr Ongwen would not have normally noticed his two different personalities, or, "if they noticed it, they probably "explained it…as an experience of possession or as an….after effects of battle

[1021] Rebuttal Report, UGA-OTP-0287-0072, p.10.
[1022] T-255, pp 3-6; *see also* Rejoinder Report, UGA-D26-0015-1574 at 1578; and T-254, pp 13-14.
[1023] Dr de Jong Expert Report, UGA-D26-0015-0046, at 0049-R01, p. 5.
[1024] T-248-Conf, p. 106, lns 5-12 and pp 113-114.
[1025] T-248-Conf, p. 106, lns 5-12.
[1026] First Report, UGA-D26-0015-0004, p. 9.
[1027] T-251-Conf, pp 12-13.

activities, so they would regard this as normal".[1028]

631. The Defence Experts, however, discussing the DSM criteria and the explanation about possession, did not agree that Mr Ongwen's distress was due to a normal possession state as a result of chemical, physiological changes or as result of participating in ritual activities in the bush.[1029]

632. Prof Ovuga also stated that Mr Ongwen experienced dissociation in battlefield operations, and that anger or violence or frustration expressed in this context would appear normal in this situation to others.[1030]

633. In addition, the Defence Experts explained that some individuals are able to "mask" his or her inner feelings to appear normal or function normally, so that "there should be no surprise his associates could not tell there was something amiss."[1031]

634. It may appear extreme to summarize that the Prosecution Experts are arguing that mental illness can be diagnosed by laypeople, especially by those who themselves have been forcibly abducted and subjected to inhumane and criminal conditions of living by the LRA. But the use and interpretation of evidence elicited from those around Mr Ongwen and the "inconsistencies" the Prosecution highlighted does just that: it places laypersons in the positions of experts to diagnose mental illness.

635. As Prof Ovuga said, "[…] a layperson cannot make an informed opinion on the mental state of someone that they live with because it requires the – that recognition requires prior full training...in how to recognize, in how to relate, in how to assess and therefore come to a conclusion".[1032]

636. In sum, the Prosecution's argument that Mr Ongwen's contemporaries and colleagues in the LRA would have noticed his mental illness, if it existed and that his exhibitions of normalcy and happiness re-inforce its premise that he did not suffer from mental illness during the charged period is not supported. Neither does it disprove beyond a reasonable doubt the Defence evidence that mental illness can exist in a person who sometimes may exhibit signs

[1028] T-251-Conf, p. 35, lns 2-8; see also T-249-Conf, pp 95-96.
[1029] T-254, pp 21-23.
[1030] T-254, pp 25-27.
[1031] T-251-Conf, pp 40-41.
[1032] T-251-Conf, p. 94.

of happiness, or joking or sociability.

3. The Prosecution did not disprove beyond a reasonable doubt that mental illness and functionality can co-exist

a. Prosecution Myth #2: Those who suffer from mental illness are dysfunctional.

637. The Defence evidence demonstrates that mental illness and functionality are not mutually exclusive. As Prof Ovuga clearly stated: "the presence of a mental disorder does not necessarily negate the ability of someone to execute activities or functions that are given to him or her."[1033] In addition, he concluded that "having a severe mental disorder in the form of PTSD does not necessarily impair…the social functioning of Mr Ongwen […]".[1034] Or, in short, functionality is not incompatible with mental illness.

638. The Prosecution argues the opposite: evidence of Mr Ongwen's functionality, particularly in leadership positions in the LRA, supports the conclusion that he did not suffer from mental illness, including during the charged period. Prof Weierstall-Pust stated that these "severe mental disorders….are usually associated with a significant impairment of psycho-social functioning," and based on the information reported, it was highly unlikely that Mr Ongwen "suffered from a severe mental disorder during his time in the LRA.[1035] He pointed to the "intact level of functioning of Mr Ongwen during his time in the LRA"[1036] and concluded at end of his Report that "…the probability that Mr Ongwen maintained intact level of functioning for most of the time during this period is high." [1037] These views were echoed by Dr Mezey.[1038]

639. But, by the time of the Rebuttal Case, Prof Weierstall-Pust clearly backtracked from this probability. On cross-examination, he held the opposite view: In the context of PTSD and functioning, he concluded that being able to function was not inconsistent with PTSD.[1039] This position is similar to that of the Defence Experts.

640. No doubt realizing the contradiction, Prof Weierstall-Pust tried to mitigate his inconsistency

[1033] T-251-Conf, p. 73, lns 19-21, p. 58, lns 8-10, p. 76, lns 1-7; *see also* T-249-Conf, pp 89-92.
[1034] T-255, pp 12-14.
[1035] Prof Weierstall-Pust Expert Report, UGA-OTP-0280-0674, p. 12, at 0685.
[1036] Prof Weierstall-Pust Expert Report, UGA-OTP-0280-0674, p. 18, at 0691.
[1037] Prof Weierstall-Pust Expert Report, UGA-OTP-0280-0674, p. 28, at 0701.
[1038] Dr Mezey response to question about Chart No. 6, T-162, p. 51.
[1039] T-253, p. 41, lns 20-23.

by qualifying "functioning":

> I don't want to say that it's not possible to function at all, but I mean the high level of functioning is not possible in the way it was described in the report, as I read it from the material that is available to me.[1040] (Underlining added)

641. Even if the Trial Chamber accepts Prof Weierstall-Pust's conclusion that there was no level of high functionality, the standard that should be applied is functionality – plain and simple. The level of functionality was not qualified in Prof Weirstall-Pust's original Report.

642. The evidence of Prof Weierstall-Pust raises reasonable doubt that the Prosecution's position that mental illness is incompatible with functioning is unequivocal, even as articulated by its experts. In sum, Prof Weierstall-Pust's concession that functionality and mental illness are compatible is reasonable doubt as to the Prosecution position; thus, the Defence position cannot be disproved beyond a reasonable doubt.

643. In addition, Mr Ongwen's cognitive abilities, contrary to the Prosecution's assertions, were uneven: although in one situation he could discuss important tactical issues, in other situations, he would not exhibit cognitive abilities.[1041] This is illustrated by the interruption of thought progression when he suddenly stopped talking and became glassy eyed while talking about his suffering in the bush.[1042]

644. Lastly, the Prosecution Experts failed to recognize that functioning could, in fact, represent a coping or survival mechanism. Dr Akena testified that resilience is linked to the need to survive, and is a coping mechanism, but it is very unlikely to immunize a child soldier from mental health issues.[1043] In contrast, Dr Mezey's position was that resiliency is a factor which is inconsistent with the presence of a depressive disorder.[1044] The Prosecution position also contradicts the evidence of the Victims' Expert, Dr Wessels who testified that resilience is not a permanent state and dysfunction can occur "if the protective factors are withdrawn and the risk factors increase".[1045] Even accepting, *arguendo*, that Mr Ongwen could have exhibited

[1040] T-253, p. 40, lns 7-10.
[1041] T-255, pp 14-15.
[1042] Second Report, UGA-D26-0015-0948, p. 16.
[1043] T-249-Conf, pp 18-20.
[1044] T-163-Conf, p. 71.
[1045] "[…] by resilience we mean that a child is doing relatively well despite exposure to high levels of adversity. So they might have been expected to develop a mental disorder, but more children do not. The answer I believe goes back to the social environment. We say that a child – a child exhibits resilience when the child has quite a number of protective factors, such as being in the care and love and protection of a mother and a family, having support from peers, having their basic needs met, you know, having access to medical care, having favourable

resilience on some occasions, life in the LRA for an abductee, especially a child, was filled with adversity, overwhelming risk factors and was without protections. Any signs of resiliency were temporary and sporadic, and should not be interpreted as indicative of functionality.

b. The Prosecution narrative of "rising through the ranks" is specious

645. The core of the Prosecution's argument that Mr Ongwen's "rising through the ranks" is indicative of functioning and incompatible with mental illness is porous. First, the Defence contests that "rising through the ranks" is accurate in terms of the LRA. The Defence evidence amply supports that the LRA was unlike a conventional army; while Kony adopted on paper the organizational structure of a conventional army, in practice, he mutilated its elements. For example, he ignored his chain of command and made decisions about all rules and regulations and ranks were issued by the Spirits through Kony.[1046] He operated the LRA essentially as a cult.[1047] Thus, any illusions of power and control associated with rank, as well as protection from the punishment of Kony were just that: illusions. One of the clearest examples of this was Kony ordering the killing of Vincent Otti, his 2nd in command – a fact stipulated to by the Prosecution.[1048]

646. But leaving aside the "show" ranks of the LRA, those who had been forced into its clutches faced death for disobedience on a daily basis. Following orders and rules was a way to survive. It was in this context that Mr Ongwen, an abducted child, became an unwilling soldier within the LRA structure.

647. However, as Prof Ovuga testified, when Mr Ongwen became a commander, he was still suffering from mental illness but tried to overcome his personal distress because others were looking up to him as a leader. Prof Ovuga explained this as an example of reaction formation.[1049]

648. The Prosecution failed to disprove that survival motivated Mr Ongwen.

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religious spiritual beliefs and practices. So all of those things have a protective value. **When protective factors outweigh the risk factors, that's when we see resilience. But resilience is dynamic and that is where the problem can come in. A child who is resilient today will become – may become quite overwhelmed and even dysfunctional tomorrow if the protective factors are withdrawn and the risk factors increase**", see T-176, page 35, lns 12 to 25. (bold added)

[1046] T-187, pp 33-36.

[1047] T-255, pp 9-10; see also Prof Musisi Expert Report, UGA-PCV-0003-0046.

[1048] Decision in Response to Article 72(4) Intervention, ICC-02/04-01/15-1256, para. 14.

[1049] T-255, p. 13 lns 19-25; p. 14, lns 1-7.

649. Now, the Prosecution may say that it is contradictory to argue survival and also suicidal tendencies and attempts dating back to the late 1990's and during the charged period and later.[1050] But, the report of the Court-appointed expert posits that Mr Ongwen perceived of promotion in rank as bringing him closer to death in battle.[1051] The Defence Experts also cite suicide attempts which included trying to get killed by the enemy and wanting to die in battle.[1052] Thus, promotions were a means of pursuing his suicidal tendencies.

650. In sum, the Prosecution did not satisfy its burden to disprove that mental illness is incompatible with functionality.

4. The Prosecution did not disprove beyond a reasonable doubt that the Defence Experts' methodology was faulty so as to invalidate their conclusions.

651. The Defence Experts, both of whose expertise included decades of teaching and mentoring medical students – in Uganda and throughout the world – described their methodological approach in great detail. They presented cogent evidence on the issues of corroboration, various diagnostic scales, psychometric testing and the DSM and the multi-axial diagnostic approach.[1053] The Defence experts used the DSM as a living manual and described their approach to psychometric tests.[1054] And, while each is the author of a diagnostic scale related to two of the diagnoses they identified in the client[1055] – suicide ideation (the intention to kill oneself) and depression – they chose not to use their own scales because it was a waste of time and unnecessary to take the client through a 35 item screening tool when he was, in fact, providing information that he was obviously suicidal.[1056] In respect to eliminating alternatives, Dr Akena addressed that it was not a limitless exercise with the example of depression[1057] and the Second Report specifically discusses elimination of alternatives presented in this case.[1058]

[1050] *See* references on suicide attempts in First Report, UGA-D26-0015-0004 and Second Report, UGA-D26-0015-0948.
[1051] Dr de Jong Expert Report, UGA-D26-0015-0046-R01, p. 13.
[1052] First Report, UGA-D26-0015-0004, p. 6; Second Report, UGA-D26-0015-0948, pp 20-21.
[1053] Second Report, UGA-D26-0015-0948, pp 23-26; *See also*, Dr Akena: T-248-Conf, pp 31-40(generally), pp 60-63 (on DSM), pp 82-85 and pp 116-120 (on psychometric testing and use re diagnosing malingering); Prof Ovuga on psychometric tests T-254, pp 12-13, Prof Ovuga: T-250-Conf, pp 34-35 (multi-axial diagnoses).
[1054] T-249, pp 82-85; T-249-Conf, pp 116-120.
[1055] T-250-Conf, pp 11-12. Prof Ovuga authored 3 tests, including one to detect suicidal individuals, an instrument to describe the impact of trauma on former child soldiers or abducted children in a government rehabilitation school outside Gulu town, and one to measure the severity of PTSD as related to trauma over specific periods in their lifetime. Doc Akena developed a test for depression for illiterate population, *see* UGA-D26-0015-0849, at 0851.
[1056] T-250-Conf, p. 12.
[1057] T-248-Conf, pp 63-64.
[1058] *See*, for example, Second Report, UGA-D26-0015-0948, p. 22 (regarding malingering); p. 28 (regarding epilepsy).

652. Nevertheless, the criticisms of the Prosecution experts boiled down to: the primary source of information for the Defence experts and Court-appointed expert was a malingering client whose information was insufficiently collaborated by others and both untested, and unconfirmed, by "objective" tests. There was persistent focus by the Prosecution on the DSM criteria and psychometric tests, especially for malingering and the purported failure to eliminate alternative diagnoses.

653. Yet, no evidence was proffered to disprove the conclusions of the Defence Experts as unfounded, or incredible and unreliable beyond a reasonable doubt.

a. The Prosecution Experts' lack of unanimity on the importance of a clinical interview in diagnosing mental illness

654. The importance of the clinical assessment and interview was emphasized by the evidence of Dr Akena and Prof Ovuga.[1059] While it does not stand alone, it is a critical part of the methodology used to eventually make a diagnosis.

655. The Defence notes that the Prosecution Experts disagreed on the importance or use of clinical interview in making diagnoses. Prof Weierstall-Pust testified that he agreed with the DSM-5 guideline for making diagnoses which states that "[d]iagnostic criteria are offered as guidelines for making diagnoses, and their use should be informed by clinical judgment".[1060] His position was similar to the Defence Experts.

656. But, Dr Mezey not only failed to acknowledge it as a "missing" element in her conclusions, she claimed it as an "advantage."

> The--however, I had an advantage in being provided with an enormous bundle of documentation which gave different perspectives and provided different sources of information on--which reflected on his mental state over a period of time; including the medical records, including witness statements, including video material. I therefore felt that having all this information gave me a very accurate picture and very good picture of Mr Ongwen's mental state and his level of functioning over a period of time, including the period that period that [she] was particularly asked to comment on. [1061]

657. Obviously the Defence is not faulting the Prosecution for not being able to interview the client when he had refused their requests: he agreed only to be interviewed by the Defence

[1059] T-248-Conf, pp 43-45.
[1060] T-253, p. 98 quoting the DSM-5, 5th Edition, Diagnostic Criteria and Descriptors, p. 21, *see* UGA-D26-0015-1582.
[1061] T-162-Conf, p. 17, lns 15 to 22.

Experts and the Court-appointed expert Dr de Jong. However, none of them acknowledged this as a shortcoming in the preparation of their Reports, nor included a caveat in their Report.[1062] In contrast, Dr Akena, in fact, expressed that he felt sorry for his colleagues, and, in their situation, would be cautious about making conclusions.[1063]

658. In sum, those who interviewed and interacted with the client (Dr Akena, Prof Ovuga and Dr de Jong) shared common diagnoses: PTSD, Dissociative Disorders, Depression, and Suicidal Risk.[1064] In fact, the Defence Experts testified as to the similarity of conclusions with the DC reports to which they had access.[1065]

b. The Prosecution Experts' lack of unanimity on Mr Ongwen's PTSD

659. The Prosecution Experts were divided on the diagnosis of PTSD: on one end was Dr Mezey's unequivocal denial of PTSD.[1066] Prof Weierstall-Pust position, however, was that he suffered from traumatic events but they did not reach the level of PTSD.[1067] Dr Abbo's appears to accept the PTSD diagnoses in the reports of the Defence Experts and Dr de Jong.[1068]

660. The examples cited above, regarding the clinical interview and analysis of PTSD, illustrate that the Prosecution Experts were inconsistent in their analyses, and this provides reasonable doubt, making it impossible for the Prosecution to meet its burden of proof for the affirmative defence.

5. The Prosecution did not disprove beyond a reasonable doubt that culture impacted on the conclusions of Mr Ongwen's mental health.

661. The DSM-V states that "diagnostic criteria are offered as guidelines for making diagnoses, and their use should be informed by clinical judgment." It also says that "it is not sufficient to simply check off the symptoms in the diagnostic criteria to make a mental disorder diagnosis."[1069] The DSM-V sections on Mr Ongwen's diagnoses made by the Defence Experts and Dr de Jong all include culture-related diagnostic issues. While the psychiatric

[1062] Dr Akena, in fact, expressed that he felt sorry for his colleagues, and, in their situation, would be cautious about making conclusions, see T-248-Conf, pp 43-45.
[1063] T-248-Conf, pp 43-45.
[1064] This is based on the first report of Prof Ovuga/Dr Akena and does not include later diagnoses of dissociative amnesia and symptoms of OCD in the second report.
[1065] T-249-Conf, p. 53 lns 24 to p. 54 ln. 5; T-254, pp 36-37.
[1066] Dr Mezey Expert Report, UGA-OTP-0280-0786, paras 62, 89-92.
[1067] Prof Weierstall-Pust, UGA-OTP-0280-0674, conclusions at pp 27-28.
[1068] Dr Abbo Expert Report, UGA-OTP-0280-0732, p. 25.
[1069] DSM-V, UGA-D26-0015-1582, p. 19.

profession recognizes the importance of cultural factors, the Prosecution experts repeatedly minimized and even dismissed them.

662. The Defence Experts addressed cultural issues throughout their testimonies,[1070] but they explained that mental health symptoms are not solely determined by cultural factors. "While core symptoms would be similar across cultures, the diagnosis of mental illness doesn't rely squarely on the core symptoms."[1071] However, the expression of mental health symptoms and the interpretation of these – the factors that are a predicate to diagnosing a conclusion, are culturally based.

663. The Defence Experts testified that Mr Ongwen's cultural milieu impacted on the interpretation of the evidence. A few examples:

a. Dr Akena interpreted Mr Ongwen's request for termites as a serious food request for white ants, found in Uganda and did not regard it, as was suggested by the Prosecution, as a joke;[1072]

b. Dr Akena testified that many African languages cannot translate the word "blues" so his patients do not say, "I am feeling blue…..";[1073] Prof Ovuga added that symptoms of mental illness are somatised;[1074]

c. Prof Ovuga, responding to Prosecution questions on DSM-V Criterion B for PTSD, testified:

> I would expect they would notice….they would regard what they notice as the consequences of his involvement in...bush or bush activities. They would interpret this as spirit possession, signs of spirit possession and they would expect that if only rituals could be conducted, Mr Ongwen would be normal. But otherwise, I cannot say that they did not notice.[1075]

d. Dr Akena testified that it was "ill-advised" for someone to simply look at somebody and come up with a diagnosis, and he refuted Dr Mezey's position that mental illness would have been "readily apparent" to other LRA fighters and members. He pointed to descriptions of mentally ill people, for example, the term "eating from the dustbin" (a

[1070] T-248-Conf, pp 46-49.
[1071] T-248-Conf, p. 46, lns 9-11.
[1072] T-249-Conf, pp 50-52, discussing ICC-DC Reports, UGA-D26-0015-0098.
[1073] T-248-Conf, p. 47.
[1074] T-254, p. 15, lns 13-24.
[1075] T-251-Conf, p. 12-15.

term which was also used by D-133 to describe one of his fellow mentally ill abductees), and identification of signs and symptoms in an African context which would not be described as mental illness. [1076]

664. Although the Prosecution may accuse the Defence of making culture primary over science in evaluating whether Mr Ongwen suffered from a mental illness, this would be an incorrect: cultural factors, according to the DSM-V, need to be considered in evaluating symptoms and diagnoses.[1077]

665. In his Rebuttal Report, Prof Weierstall-Pust concedes that Dr Akena is correct to highlight the "general necessity" to view and interpret a patient's symptoms within her/his cultural context, but he completely misunderstands the implications of this. Prof Weierstall-Pust misrepresents the conclusion of the Defence Experts, claiming that they are saying that non-African professionals cannot diagnose illness in an African population.[1078] The Defence Experts never expressed this view.

666. An example of importance of cultural considerations in diagnosis and treatment is the case of PTSD and *cen* and *orongo.*[1079] All three have similar manifestations.[1080] Prof Ovuga also concluded that rehabilitation at home, including with ritual cleansing, had a more beneficial effect on children involved/affected by this mass psychotic episode (as opposed to children who had come directly from reception centres). These same children scored lower on a modified Harvard Trauma Questionnaire, indicating they suffered less trauma. Thus, rehabilitation at home with cleansing rituals had a beneficial on their mental health.[1081]

6. The Prosecution failed to disprove beyond a reasonable doubt that Mr Ongwen was not malingering and that his self-reporting could not be relied upon as a factor in diagnosing his mental illness.

667. The Prosecution challenged the validity of "working backward" to make conclusions about

[1076] T-248-Conf, pp 74-77.
[1077] In addition, the Defence notes the challenge from Professor Kristof Titeca, in his Washington Post OpEd: "While international law claims to apply universal justice, it is underequipped to deal with integral parts of the worldview of many of the people it tires and relies on for testimony", *see* UGA-D26-0015-1213.
[1078] Rebuttal Report, UGA-OTP-0287-0072, Section 2.7, page 8; Rejoinder Report, UGA-D26-0015-1574 at 1577 discusses points on culture in the Rebuttal Report.
[1079] Article from Prof Ovuga and Dr Abbo: UGA-D26-0015-0197.
[1080] T-250-Conf, pp 67-70.
[1081] T-250-Conf, pp 71-72.

the charged period, based on the assertion that Mr Ongwen was malingering or faking it.[1082] It further charged that the Defence had not even considered this possibility, based on its failure to administer a particular test for malingering.[1083]

668. Both of the Prosecution allegations are false. First, the Defence Experts, who discussed rating scales and tests extensively, point out in their Rejoinder Report that there is no test for assessing malingering.[1084] Secondly, the Defence Experts had considered the possibility of malingering, assessed this possibility and then rejected it.[1085] The Defence Experts concluded that the client was reliable based on the self-report he gave,[1086] as well as collateral history they obtained from others[1087] and from notes from the ICC-DC.[1088]

669. As to Mr Ongwen's conduct, the Defence Experts addressed self-reporting, malingering and exaggeration extensively.[1089] A key criterion was whether the person feigning an illness would benefit or gain something from this behaviour. But, Mr Ongwen repeatedly expressed his desire not to be ill: "….I also want to be normal, like you people. I don't understand these things that are disturbing me….I don't understand why I'm ill."[1090]

670. Even Dr Mezey, the Prosecution Expert who led the charge of malingering, gave evidence that malingering, although common, is not an easy posture to maintain. She stated:

> [F]aking of symptoms is well described. It's very common. It's quite difficult, unless you have read a lot of books, are very clever and are very persistent…..to fake convincingly over a period of time. **You can occasionally produce symptoms that look like mental illness, but to maintain that is impossible.**[1091] (Bold added)

671. The Prosecution position is especially unconvincing when one considers that Mr Ongwen would have had to maintain these symptoms at least since the beginning of the Defence

[1082] Dr Mezey's testimony at T-162-Conf, pp 18-23, 38-39, 61; T-163-Conf, pp 45, 53, 60; Dr Mezey Expert Report, UGA-OTP-0280-0786, paras 54, 72 and 81 (criticisms of Defence Experts and Prof DeJong re exaggeration and malingering).
[1083] Rebuttal Report, UGA-OTP-0287-0072, p. 16, Section 3.1.5.2.
[1084] Rejoinder Report, UGA-D26-0015-1574 at 1580.
[1085] T-248-Conf, p. 57; pp 18-25.
[1086] Mr Ongwen's description of his first dissociative episode, followed by amnesia, when he was carrying out an assignment with his team, convinced the Defence Experts that he was not malingering re the events of 2002-2005; see also T-254, pp 19-20.
[1087] *See* First Report, UGA-D26-0015-0004: Attached at the end of First Report, and additionally in UGA-D26-0015-0081, at 0084.
[1088] T-248-Conf, p. 58, lns 1-5.
[1089] T-248-Conf, p. 49; T-249-Conf, pp 79-81; T-254, pp 16-20 (on malingering and factitious disorder).
[1090] T-248-Conf, pp 53-56.
[1091] T-163-Conf, p. 45, lns 16-20.

Experts' interviews in early 2016 and continuing through the present.[1092] And, these symptoms would have to be constantly maintained not only with the Defence Experts, but the ICC-DC health professionals who treat him and the security guards who observe him multiple times per day. This would be a gargantuan task, especially for someone whose schooling was disrupted by abduction at Primary 3 level (age 8 or 9), was isolated from the world outside the LRA and thoroughly indoctrinated by Kony for almost three decades. The Prosecution has failed to answer where Mr Ongwen would have learned to feign symptoms of dissociative disorders (identity and amnesia), PTSD, depressive disorder, obsessive compulsive disorder and suicidal tendency.

672. Prof Ovuga, on cross-examination, repeated previous testimony that Mr Ongwen was not "faking good" and explained the methodology again; he criticized the Prosecution position that it was unfair for a witness who had never had contact with Mr Ongwen to accuse him of malingering.[1093]

673. In sum, the Prosecution did not disprove beyond a reasonable doubt that Mr Ongwen was not a malingerer or faking his symptoms.

iv. Conclusion

674. The Defence has presented evidence of the affirmative defence of mental disease or defect under Article 31(1)(a) of the Statute and has demonstrated that the Prosecution has not met its burden to disprove the elements of the defence beyond a reasonable doubt. But, the Defence evidence demonstrates something else as well: regardless of the outcome of the case, Mr Ongwen will have to continue to live with the consequences of his mental illnesses. The tragic lesson is that being a child soldier victim never ends.

C. Duress is a Complete Defence to the Crimes

675. Article 31(1)(d) defines the defence of duress as:

> …[A] person shall not be criminally responsible if, at the time of that person's conduct:

[1092] In addition, Prosecution evidence from a phone call in November 2015 between Mr Ongwen and a woman in his former LRA household indicates that he believed he had died and was resurrected, *see* ICC-02/04-01/15-342-Conf-Exp-AnxIV. This confirms similar information of the deaths he experienced in the bush, which are described especially in the Second Report, UGA-D26-0015-0948.

[1093] T-251-Conf, pp 14-23.

> (d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:
>
> (i) Made by other persons; or
>
> (ii) Constituted by other circumstances beyond that person's control.

i. Duress is a complete defence that excludes criminal responsibility for all crimes

676. The Rome Statute explicitly identifies duress as a complete defence. Article 31 specifically provides that "a person shall not be criminally responsible" if the conduct satisfies one of the listed defences, including duress. Further, there is no qualification or exemption for particular crimes. On its face, the Statute provides a complete defence to any crime charged.

677. Although the *ad hoc* tribunals treated duress solely as a mitigating factor for homicide crimes, the Rome Statute is qualitatively different in that it recognizes duress and other listed defences as excluding criminal responsibility. While duress may also be a mitigating factor in sentencing, that use does not pre-empt the unequivocal statutory language that provides for a complete defence.

678. The reasoning of Judge Antonio Cassese in *Prosecutor v. Erdemovic* is embodied in the duress provision of the Rome Statute. The majority of the ICTY Appeals Chamber concluded that, without a statutory mandate, and based on general principles of law, duress could only be a mitigating factor for the killing of innocent civilians.[1094] Judge Cassese dissented from the majority view, finding that: "In logic, if no exception to a general rule be proved, then the general rule prevails."[1095] Although Judge Cassese recognized that homicides, particularly the killing of innocent civilians, poses the most difficult situation for a defence of duress, he nevertheless stated that it is a possibility in that circumstance, especially where the victims would have been killed regardless of the actions of the accused. He stated:

> Conversely, however, where it is not a case of a direct choice between the life of the person acting under duress and the life of the victim - in situations, in other words, where there is a high probability that the person under duress will not be

[1094] *The Prosecutor v Erdemovic*, Judgement [sic], IT-96-22-T (7 October 1997).
[1095] *The Prosecutor v Erdemovic*, Separate and Dissenting Opinion of Judge Casseese, para. 11(i), IT-96-22-T, (7 October 1997).

> able to save the lives of the victims whatever he does - then duress may succeed as a defence. [1096]

679. Judge Cassese's reasoning and conclusions are reflected in the clear language of the Rome Statute. Duress is a complete defence and no crimes are exempted from the defence.

ii. The Prosecution failed to disprove that Mr Ongwen was under duress from a threat of imminent death or of continuing or imminent serious bodily harm against his person or another person

680. Mr Ongwen was under a continuing threat of imminent death and serious bodily harm from Kony and his controlling, military apparatus. Article 31(1)(d) provides that the threat may either arise from another person(s) or may be "[c]onstituted by other circumstances beyond that person's control. Both existed in this case.

1. Kony exerted complete control over Mr Ongwen through imminent threats to the lives of Mr Ongwen and his community

681. From the inception of this case, Prosecution materials identified threats against those who were abducted by the LRA.[1097] In the application for an amended warrant, the Prosecution noted that new abductees were promptly warned that any "attempt at escape would be punished by death" and in the event of successful escape, Kony ordered that "the LRA would kill the abductee's whole family". Kony also "disseminated the message that even a successful escapee could never survive, because the Ugandan government would poison him or her". [1098]

682. Both Prosecution and Defence witnesses testified about the threat of death for breaking the rules or for trying to escape. [1099] Moreover, there were countless examples of young

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[1096] Separate and Dissenting Opinion of Judge Casseese, para. 42, IT-96-22-T, (7 October 1997).
[1097] Arrest Warrant Request, paras 68-77.
[1098] Arrest Warrant Request. 70, 73 and 77.
[1099] T-8-Conf, p.22, ln. 13 and T-9-Conf, p.3 ln. 3 (P-226); T-14-Conf, p. 23 lns 18-25 (P-99); T-16-Conf, p. 10 ln. 22 to p. 11 ln. 5 (P-236); T-17-Conf, p. 23 ln. 19 to p.24 ln. 3 (P-235); T-34-Conf, p. 40, lns 9-17 and p. 41 lns 1-14 (P-16); T-41-Conf, p. 13 lns 12-20 (P-440); T-49-Conf, p. 3 lns 1-3 and p. 6 lns 8-16 (P-205); T-48-Conf; p. 31 lns 7-22 (P-205); T-56-Conf, p. 21 ln. 23 to p. 22 ln. 16 (P-379); T-60-Conf, p. 40 lns 6-12 (P-309); T-68-Conf, p. 61 lns 24-25 (P-18); T-79-Conf, p. 13 lns 1-9 (P-249); T-82, p. 37 ln. 23 to p. 38 ln. 10 (P-9); T-85-Conf, p. 24 lns 13-19 (P-269); T-87-Conf, p. 67 (P-252); T-90, p. 85 lns 1-6 (P-218); T-91-Conf, p. 10 lns 1-5 (P-144); T-97, p. 16 lns 23-25 (P-355); T-103-Conf, p. 73 ln. 8 (P-45); T-111-Conf, p. 10 lns 12-16 (P-233); T-120-Conf, p. 9 lns 4-16 (P-138); T-123-Conf, p. 20 lns 15-20 (P-231); T-126-Conf, p. 9 lns 17-21 (P-396); T-140-Conf, p. 25 ln. 22 to p. 26 ln. 4 (P-6); T-146-Conf, p. 13 lns 10-14 (P-200); T-148-Conf, p. 59 lns 14-25 (P-372); T-150-Conf, p. 45 lns 7-14 (P-374); T-153-Conf, p. 19 lns 20-23 (P-307); T-157-Conf, p. 27 ln. 20 to p. 28 ln. 5 (P-448); T-158-Conf, p. 9 lns 8-10 (P-85); T-163-Conf, lns 22-25 (P-446); T-72-Conf, p. 46 lns 2-16 (P-142); T-160-Conf, p. 35 lns 11-18 (P-209); T-106-Conf, p. 59 ln. 24 to p. 60 ln. 2 (P-70); T-65-Conf, p. 25 lns 18-24 (P-264); T-171-Conf, p. 12 lns 7-11 and p. 14 lns 5-9 (V-2); T-181, p. 24 lns 9-18 (D-28); T-187, p. 9 lns 1-3 (D-74); T-189-Conf, p. 10 lns 14-25 and p. 19 lns 18-25 (D-79); T-192, p. 16 lns 4-15 (D-24); T-193, p. 8 lns 1-9 (D-7); T-194-Conf, p. 12 lns 1-7 (D-6); T-208-Conf, p. 14 lns 12-25 and p. 22 lns 18-22 (D-92); T-219-

abductees being forced to watch or participate in the punishments meted out in these threats. D-007 who was abducted together with Dominic testified how one abductee tried to escape and when he was brought back, he witnessed him being hacked to death with an axe and was warned that the same would happen to him if he dared to escape.[1100] In order to survive, he needed to do exactly what they told him to do.[1101] D-41 further testified that Dominic told them that from day one it was risky to escape and those caught trying to escape would face the inevitable punishment of death.[1102] Indeed several testimonies attest to this.[1103]

683. Everyone in the LRA had to abide by the sexual relations rules in the bush. P-28 whose statements were admitted through Rule 68(2)(b) testified about how neither man nor woman had a choice in case they were given a partner. Refusal to accept the partner would be interpreted otherwise as a move of wanting to escape, which would call for execution. He stated that he was forced to take a girl, after he had initially refused when Kony called for a public meeting and out of fear of being killed.[1104] Several witnesses consistently testified and affirmed that neither men nor women had a choice when partners were distributed to them by Kony.[1105]

684. The threats were imminent. Kony repeatedly demonstrated swift and severe consequences to those who broke his rules. Commanders like Otti Lagony and Okello Can Odonga,[1106]

Conf, p. 20 lns 15-19 (D-76); T-222-Conf, p. 20 lns 17-21 (D-68); T-224-Conf, p. 11 lns 3-8 (D-75); T-226-Conf, p. 11 lns 1-11 (D-25); T-230, p. 13 lns 4-11 (D-88); T-203, p. 58 lns 5-11 (D-133); T-215-Conf, p. 9 ln. 9 to p. 11 ln. 21 (D-117); T-216-Conf, p. 18 lns 4-14 (D-118).

[1100] T-193, p. 8 lns 1-9.

[1101] T-193, p. 18 lns 23-24.

[1102] T-248-Conf, pp 102-104.

[1103] T-8-Conf, p.22, ln. 13 (P-226); T-16-Conf, p. 10 ln. 22 to p. 11 ln. 5 (P-236); T-17-Conf, p. 23 ln. 19 to p. 24 ln. 3 (P-235); T-34-Conf, p. 40, ln. 9 to p. 41 ln. 14 (P-16); T-56-Conf, p. 21 ln. 23 to p. 22 ln. 16 (P-379); T-79-Conf, p. 13 lns 1-9 (P-249); T-60-Conf, p. 40 lns 6-12 (P-309); T-85-Conf, p. 24 lns 13-19 (P-269); T-87-Conf, p. 67 (P-269); T-90, p. 85 lns 1-6 (P-218); T-91-Conf, p. 10 lns 1-5 (P-144); T-103-Conf, p. 73 ln. 8 (P-45); T-111-Conf, p. 10 lns 12-16 (P-233); T-140-Conf, p. 25 lns 22-25 and p. 26 lns 1-4 (P-6); T-146-Conf, p. 13 lns 10-14 (P-200); T-148-Conf, p. 59 lns 14-25 (P-372); T-150-Conf, p. 45 lns 7-14 (P-374); T-153-Conf, p. 19 lns 20-23 (P-307); T-157-Conf, p. 27 ln. 20 to p. 28 ln. 5 (P-448); T-158-Conf, p. 9 lns 8-10 (P-85); T-171-Conf, p. 12 lns 7-11 (V-2); T-208-Conf, p. 22 lns 18-22 (D-92); T-160-Conf, p. 35 lns 11-18 (P-209); T-65-Conf, p. 25 lns 18-24 (P-264); T-215-Conf, p. 11 lns 15-21 (D-117).

[1104] UGA-OTP-0217-0218, pp 0224-27.

[1105] T-48-Conf, p. 20 ln. 25 to p. 21 ln. 2 (P-205); T-71-Conf, p.27 lns 18-21 (P-142); T-98-Conf, p.54 lns 13-16 (P-245); T-91-Conf, p.66 ln. 21 to p.67 ln. 3 and p.68 lns 1- 3 (P-114); T-208-Conf, p. 37 lns 6-12, p. 58 lns 24-25, p. 60 ln. 22 to p. 61 ln. 8 (D-92); T-226-Conf, p. 39 ln. 14 to p. 41 ln. 1 (D-25); T-240-Conf, p.27. ln. 3 (D-134); T-216-Conf, p. 20 ln. 25 to p.21 ln. 2 and p.23 ln. 5 (D-118); T-194-Conf, p. 26 lns 1-5 (D-6); T-202-Conf, p. 39 ln. 15 to p. 40 ln. 25 (D-27).

[1106] T-123-Conf, p. 43 lns 4-16 (P-231); T-49-Conf, p. 29 lns 3-4 (P-205); T-199-Conf, p. 41, ln. 8 and p. 31 lns 5-12 (D-32); T-202-Conf, p. 24 lns 8-12 and p. 27, lns 23-25 (D-27); T-208-Conf, pp 29- 31 (D-92).

Vincent Otti,[1107] and James Opoka[1108] were all arrested and executed for breaking rules and not towing Kony's strict edicts. The executions were done before, during and after the charged period, augmenting the fact that the threats were imminent and continuing. There was therefore an unquestionable obligation to follow Kony's orders, failure of which would result into death.[1109] Dominic himself came close to execution for getting in touch with and receiving money from Lt General Salim Saleh.[1110]

685. Witness P-231[1111] testified [redacted]. This was corroborated by Witness P-379's[1112] testimony and a UPDF intelligence report that showed that Dominic was under surveillance following his involvement in peace talks with Lt. Gen. Salim Saleh and that he narrowly escaped a firing squad when he reportedly received some bags and money from Saleh.[1113]

686. The Defence therefore submits that it was nearly impossible to escape from the LRA. There are no known cases where children escaped from the LRA voluntarily. For most of them, the process of getting them out was through the Ugandan military.[1114] To further put in context and demonstrate how impossible it was to escape from the LRA, D-18 testified that, despite being a well-trained military person and having been invited by Kony, he was held captive for four years and it was nearly impossible for him to escape.[1115] Furthermore D-134 testified that he was so worried about his plan to escape being discovered that he [redacted].[1116]

687. The Defence submits that the communication regime put in place by Kony meant the threats were imminent and real as they were intended to ensure strict adherence to his orders. The

[1107] T-49-Conf, p. 29 lns 5-9 (P-205); T-100-Conf, p. 24 ln. 18 to p.25, ln. 1 (P-245); T-112-Conf, p.13 lns 17-23 (P-233); T-191, p.36, ln. 24 to p.37, ln. 5 (D-26).
[1108] T-199-Conf, p. 35 ln. 15 to p. 36 ln. 2 (D-32); T-202-Conf, p. 24 ln. 21 to p.25, ln. 1 (D-27); T-208-Conf, p.34 lns 12-14 (D-92).
[1109] T-17-Conf, p. 65 lns 6-15 (P-235); T-113-Conf, p. 44 ln. 6 (P-172); T-121-Conf, p. 36 lns 12-18 (P-138); T-34-Conf, p. 78 lns 22-25 and p.80 lns 1-6 (P-16); T-194-Conf, p. 24 lns 14-24 (D-6); T-202-Conf, p. 23 ln. 18, p. 61 lns 15-18, p. 19 lns 1-19 (D-27); T-199-Conf, p. 41 ln. 8 (D-32); T-224-Conf; p. 44 ln. 22 to p. 45 ln. 2 (D-75); T-236-Conf, p. 16 lns 10-14 (D-19); T-226-Conf, p. 27 lns 18-24 (D-25); T-197, p. 41 ln. 25 to p. 42 ln. 4 (D-60).
[1110] UGA-D26-0015-0948, p. 0950 (*stating* that Dominic contacted Salim Saleh in a bid to escape but instead he was arrested and put in jail).
[1111] T-122-Conf, p. 61 ln. 14 to p. 62 ln. 18, p. 64 lns 10-14; T-123-Conf, p. 56, lns 9-25.
[1112] [redacted].
[1113] UGA-OTP-0255-0943, p. 0945.
[1114] T-203, pp 80-81.
[1115] T-185-Conf and T-186-Conf.
[1116] T-241-Conf, p. 20 lns 20-25 & p. 21 lns 1-9.

Prosecution relies upon the intercept evidence as incriminatory evidence. However, by its own concession, the communication system put in place by Kony was a mechanism of control and therefore duress. In its Pre-Trial Brief, the Prosecution states:

> Joseph Kony required senior LRA commanders to call in their location and to report on their activities since the previous communication time. He also used the radio to give orders and to enforce discipline.[1117]

688. P-0226 said that she never saw "any officer of a lower rank who was given orders and who disobeyed the orders [if they did] they are badly beaten or they kill them". Intercepted communications are replete with similar examples. On 18 December 2002, "Kony ordered that [… a] woman be beaten 50 strokes for defying his order". On 21 January 2004, "Lukwiya told Otti that he called Lagoga and solved the problem which his soldiers were complaining that he is too rude to them. But Kony said [the] ring leader of those soldiers who started misbehaving to Lagoga should be killed. […] Otti said if he comes back to Uganda, such p[eo]ple who misbehave to their com[man]d[e]rs, he will kill them all."[1118]

689. During the trial the Prosecution has depicted Mr Ongwen as an overzealous executioner of Kony's orders and requested the Court not to accept the duress defence. For instance, P-440, testified that a conversation in an intercept allegedly from the UPDF recorded around May 2004 was between Kony and Otti where the former was praising Mr Ongwen for being an exemplary commander in execution of tasks while at the same time lambasting commanders Odongo and Otto.[1119] During the cross-examination of [redacted] Kony was praising Mr Ongwen for being efficient in attacking government soldiers and defeating them in battle as opposed to the Prosecution inference of attacking civilians.[1120]

690. Imminent threats were also real and constant to the families and communities of the abductees, including Dominic. D-41 testified that they were told that, if they went back home, the LRA would either go and annihilate their whole village and the problem would bounce back to them or the state would execute them.[1121] D-157, in his testimony admitted through Rule 68(2)(b), testified how after escaping from the LRA under arduous and lucky circumstances during the charged period in 2002, the LRA came to [redacted]

[1117] PTB, para. 65.
[1118] PTB, para. 95.
[1119] T-40-Conf, p. 40 lns 1-20.
[1120] [redacted].
[1121] T-249-Conf, p. 19 lns 11-15.

[redacted] killed and abducted people, including the neighboring villages.[1122] Several witnesses, both Prosecution and Defence testified how such collective punishment meted out by the LRA against villages for escapees was widely known.[1123]

691. The imminence of severe harm or death was guaranteed in the LRA by three factors: 1) forcing abductees to witness or participate in brutality against those who violated rules or commands; 2) the omnipresent surveillance by selected individuals within the LRA, who reported to Kony; and 3) the belief that Kony could predict the future and read LRA abductees' minds.

2. Kony's use of spiritualism cemented the threat to Mr Ongwen's life and that of others

692. Prosecution witness Rwot Oywak, an Acholi Chief who has profound knowledge of Acholi cultural and spiritual beliefs, testified about the devastating effect on the mental and physical wellbeing of children abducted and subjected to cultural and spiritual perversion in the LRA[1124].

693. D-133 further testified that the spiritualism in the LRA was a "deliberate effort to remove the thinking capacity of the child and let them obey the commands of the LRA."[1125] The indoctrination of the children is what kept them there and caused the children to only mimic what they grew up seeing the adults do.[1126]

3. How Acholi spiritualism affected LRA returnees

694. Witness D-111 testified that she exorcised spirits from LRA returnees who came back with bad spirits because of their experiences.[1127] Such people act in strange ways; for instance, getting up and trying to hold a person as if strangling them or waking up in the night and acting like a possessed person.[1128] She testified that they created some rituals and performed

[1122] UGA-D-26-0026-0757, paras 27-35.
[1123] T-49-Conf, p. 12 lns 9-23 (P-205); T-118-Conf, p. 55 ln. 18 to p. 56 ln. 6 (P-81); T-72-Conf, p. 44 ln. 24 to p. 45 ln. 4 (P-142); T-106-Conf, p. 59 ln. 24 to p. 60 ln. 2 and p. 62 lns 19-24 (P-70); T-144-Conf, p. 7 lns 22-25 (P-145); T-184, p. 7 lns 4-19 (D-87); T-194-Conf, p.12 lns 1-7 (D-6); T-202-Conf, p. 18 lns 1-9 (D-27); T-224-Conf, p. 15 lns 17-21 (D-75); T-216-Conf, p. 18 ln. 21 to p. 19 ln. 3 (D-118).
[1124] T-83-Conf, pp 15-17.
[1125] T-203, p. 43, lns 8-9. *See also* T-177, p. 83 ln. 25 to p. 84 ln. 19 (PCV-3) (*stating* that Kony knew how to manipulate people psychologically and there was a cult-like indoctrination of the people in the LRA).
[1126] T-203, p. 62.
[1127] T-183, p. 12, ln. 25 to p. 13 ln. 5.
[1128] T-183, p. 13, lns 8-15.

"something to make everything better"[1129] There are rituals that are performed on those who returned from the bush to exorcize the spirits from them to return them to normal. Some of the people she has helped were abducted at early ages and grew up in captivity.[1130] Persons who were abducted at early ages, were often forced to do many bad things and those bad things "will effect (that person) for a longer time".[1131]

695. It is apparent that the traumatic experiences in the bush adversely affected persons, especially children. Those who have had the opportunity for cultural rituals to be performed on them have recovered. Unfortunately, children like Mr Ongwen, who never had the opportunity of being cleansed through these rituals, remain under the spirit spell and will continue to experience the traumatic ramifications associated with the spirits he encountered during his LRA days.

696. The belief system of the Acholi culture is based on and deeply entrenched with spiritualism. Suffice to note, Kony is a celebrated practitioner of the Acholi spiritualism with a heightened understanding and power over the ordinary practitioners. The way he used and referred to the Spirits was recognisable and relatable for the wider Luo society. In other words, it is highly likely that all members of the Luo community, including children, are aware of the existence and powers of the spirits. Anyone brought into the LRA, even children, knew that Spirits exist, even though they may not necessarily have experienced their powers.[1132]

697. According to D-42, Mr Ongwen was a son to a catechist and was particularly close to his paternal grandfather.[1133] By the age of 9, when he was abducted, Mr Ongwen would have received his first instructions about the Acholi culture. As a matter of fact, P-172 testified emphatically that in Acholi and Lango, people know about the spirits and the children grow up while knowing about the spirits.[1134] Hence, as he underwent indoctrination in the LRA upon being abducted, he undoubtedly knew the seriousness of the threat of Spirits and the potential harm it would cause to him in case he did not act as instructed.

698. Witness D-60 emphatically testified that the LRA was "a very tightly regulated movement in which there was a wide range of rules and regulations. […] Rituals played an important role

[1129] T-183, p. 25, lns 5-6.
[1130] T-183, p. 15, lns 15-22.
[1131] T-183, pp 15-16, lns 25-5.
[1132] UGA-D26-0018-3901, pp 3902-04.
[1133] T-250-Conf, p. 45, lns 7-9.
[1134] T-114, p. 15, lns 24-25.

in enforcing and applying these rules and regulations. Soon after abduction, abductees had to go through a ritual which involves a range of symbolic elements in Acholi culture, for instance the smearing of shea butter."[1135]

699. Most of the witnesses who were abducted as children categorically testified that they were smeared with shea butter (typical in Acholi culture) with a sign of a cross on their foreheads, hands, legs and at the back. The main purpose of this was to make them forget about home and prevent them from escaping.[1136] Abductees would also be smeared with camoplast (white clay or sand).[1137]

700. Expert Witness D-60 commented about this; he testified that the rationale of smearing shea butter has been proven extensively in the general and specific literature on the LRA.[1138] In their report, Tim Allen and Maveike Schomerus argue that the frequent performance of rituals greatly affects what people come to believe is true "and this is very much the case for children."[1139]

701. For many ex-combatants with whom the witness spoke during his 14 years of research, they believed that the "moo yaa" (shea butter) allowed the Spirits to find them wherever they went and that if they would try to escape, Kony and the Spirt would know their location.[1140] Different fact witnesses testified how upon being smeared with shea butter, if they attempted to escape, they would walk and come back to the same place where they had been.[1141]

[1135] T-197, p. 25, lns 3-9.

[1136] T-34-Conf, p. 32, lns 5-6 (P-16); T-53-Conf, p. 6, lns 19-21 (P-330); T-57-Conf, p. 48, ln. 18 to p. 49, ln. 5 (P-379); T-64-Conf, p. 24, lns 14-25 (P-264); T-67-Conf, p. 57, lns 15-18 (P-352); T-69-Conf, p. 38, lns 17-20 (P-18); T-84-Conf, p. 47, lns 8-12 (P-280); T-89-Conf, p. 32, lns 7-11 and p. 33, lns 1-6 (P-252); T-98-Conf, p. 8, lns 16-22 (P-245); T-112-Conf, p. 8, lns 11-23 (P-233); T-192-Conf, p. 7, lns 9-18 (D-24); T-191-Conf, p. 7, lns 8-19 (D-26); T-189-Conf, p. 10, lns 20-25 (D-79).

[1137] T-215-Conf, p. 13, lns 15-18 (D-117); T-216-Conf, pp 10-11 (D-118); T-224-Conf, p. 13, ln. 18 to p. 14, ln. 22 (D-75); T-187, p. 47, lns 10-15 (D-74); T-191, p. 7, lns 7-23 (D-26); T-192-Conf, p. 8, ln. 3 to p. 9, ln. 8 (D-24); T-194-Conf, p. 17, ln. 17 to p. 18, ln. 10 (D-6); T-199-Conf, p. 27, lns 5-15 (D-32); T-228-Conf, p. 15, lns 20-25 (D-56); T-244-Conf, p. 15, lns 13-25 (D-13); T-202-Conf, p. 13, lns 14-19 (D-27); T-226-Conf, p. 8, ln. 24, to p. 10, ln. 20 (D-25); T-243, p. 13, ln. 10 to p. 14, ln. 9 (D-49); T-208-Conf, pp 20-21 (D-92); and T-222-Conf, p. 22, lns 11-22 (D-68).

[1138] T-197, p. 39, lns 15-18 (D-60).

[1139] T-197, p. 39, lns 19-22 (D-60).

[1140] T-197, p. 40, lns 5-10 (D-60).

[1141] T-53-Conf, p. 6, lns 17-21 (P-330) (*testifying* about how a young girl was killed after she attempted to escape and that it was the shea oil and the water that she was anointed with that actually brought her back to position); T-64-Conf, p. 24, ln. 25 to p. 25, ln. 14 (P-264) (*noting* that the witness believed that the shea oil anointing would make those who attempted to escape confused and keep rotating until you returned where you left); and T-89-Conf, p. 33, lns 1-6 (P-252).

4. How the victims of the LRA were made to believe

702. Witness D-74, who was close to Kony, stated the Ten Commandments[1142] was the most important law in the LRA, and that all other rules, regulations and instructions on policy matters were established and issued by the Spirits[1143] through Kony as the medium.

703. From the testimonies on record, Kony viewed himself as an Acholi nationalist who was sent by God to save Acholi.[1144] According to the testimonies of the Ajwaka witnesses, Kony's spiritualism was no different from any other experienced under the Acholi cultural beliefs.[1145]

704. It was widely believed that the appointment or promotions in the LRA and policy formulations and pronouncements were the preserve of Kony, allegedly on the orders that came directly from the Spirits.[1146] As a matter of fact, Kony is quoted to have said that the LRA was not his army, but belongs to the Holy Spirit and that he was only the messenger. There was a widespread and firm belief that the orders of the Spirits that Kony gave were mystical, and following them was a must for survival on the battlefield, while disregarding them would have dire consequences on the persons.[1147] Witness D-74 testified how one Commander called Arop violated spiritual rules by sleeping with a woman out of the order of the covenant and as a result, he was shot in the genitals.[1148] Witness D-74 himself lost his leg for violating an operational covenant of not having sexual intercourse before battle.[1149] These rules thus played the role of giving the fighters a sense of belonging and protection against harm, and in doing so tied the individual further into the movement.[1150]

705. According to D-60 and the testimonies of many other witnesses,[1151] the only way to survive in the bush was to follow the spiritual rules.[1152] The thought of escaping was dangerous because

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[1142] T-187, p. 38, lns 11-20.
[1143] T-187, p. 39, ln. 18.
[1144] T-187, p. 11.
[1145] T-183, pp 20-22 (D-111) and T-184, pp 24-26 (D-87).
[1146] *E.g.* T-187, p. 35, lns 14-18 (D-74) (*testifying* how Raska Lukwiya was promoted from a battalion and was sent to command Gilva Division) and T-202-Conf, p. 25, lns 22-24 (D-27).
[1147] UGA-D26-0018-3901, p. 3904 (D-60).
[1148] T-187, p. 55, lns 10-12 (D-74).
[1149] T-187, p. 55, lns 12-15 (D-74).
[1150] UGA-D26-0018-3901, p. 3904 (D-60).
[1151] T-17-Conf, p. 65, lns 6-15 (P-235); T-113-Conf, p. 44, ln. 6 (P-172); T-121-Conf, p. 36, lns 12-18 (P-138); T-34-Conf, p. 78, lns 22-25 and p. 80, lns 1-6 (P-16); T-194-Conf, p. 24 lns 14-24 (D-6); T-202-Conf, p. 23, ln. 18, p. 61 lns 15-18, p. 19 lns 1-19 (D-27); T-199-Conf, p. 41 ln. 8 (D-32); T-224-Conf; p. 44, lns 22-25 and p. 45 lns 1-2 (D-75); T-236-Conf, p. 16 lns 10-14 (D-19); T-226-Conf, p. 27 lns 18-24 (D-25); T-197, p. 41 ln 25 & p. 42 lns 1-4 (D-60).
[1152] UGA-D26-0018-3901, p. 3904 (D-60).

people in the LRA believed that Kony had the power to read their minds and know who was planning to escape. This prevented escape because some of them would be punished in advance for contemplating escape since it was believed that as soon as a person was initiated into the ranks of the LRA, Kony could peep into their minds and discern who was planning to escape.[1153] Everybody in the LRA believed Kony's spiritual attributes as a messenger of the omnipotent and omnipresent God.[1154] Every commander - brigade, division, coy and unit - knew that he had no choice but to implement the Spirit and letter of Kony's orders.[1155]

706. As it turned out, the Ten Commandments were to be administered in accordance with how Kony interpreted them, not in accordance with the interpretation of the Ten Commandments according to Christianity. Kony claimed that he received orders from the Spirit world on how to manage the LRA through a Council of Spirits with human names, and from as far afield as places such as the USA, Korea, Tanzania, DRC, who spoke through him whenever he was possessed.

707. According to the testimony of D-74, Kony had Juma Oris Debohr (Chairman of the Spirits), Selindi **(**Operations Commander), Who Are You (Chief Intelligence Officer), Wil-Ing Nsu (miracle performer), Major Bianca (Yard Commander), King Bruce (Support Weapon Commander), etc. among others,[1156] which formed the Council of Spirits responsible for instructing him on what to do.[1157] This could be equated to an Army Council of a regular army. Instead of summoning the LRA army council of his top commanders to plan the execution of wars and other operations, that role was performed by the Council of Spirits.[1158] Kony only relayed them to his commanders, in the form of orders, which were unquestionable and immutable.[1159]

708. The testimonies of several witnesses indicate that there were so many mind-boggling episodes that Kony used to ingrain in the minds the abducted children, that he was of the Spirit world.[1160] D-74 testified that as soon he joined Holy Spirit Mobile Forces, he knew Kony had

[1153] UGA-D26-0018-3901, p. 3904 (D-60).
[1154] T-188, p. 19, lns 9-15 (D-74).
[1155] T-112-Conf, p. 35, lns 3-6 (P-233).
[1156] T-187, pp 17-23. *See also* UGA-D26-0022-0001.
[1157] T-185-Conf, p. 61 ln. 19 to p. 62 ln. 2.
[1158] T-185-Conf, p. 61 ln. 19 to p. 62 ln. 2.
[1159] T-187, p. 34, lns 20-24 (D-74).
[1160] T-113-Conf, p. 54, lns 10-14 (P-172); T-177, pp 84-86 (PCV-3); T-247, p. 57, lns 1-7 (D-114); T-249-Conf, p. 9 (D-41).

Spirits, because whatever he said came to pass.[1161] He could tell the number of enemies coming, the kind of guns that they have, the direction they are taking, and how they will be deployed. And all this would happen exactly as he has said.[1162] Witness P-205 confirmed this.[1163]

709. Witness D-74 further testified that when he was conscripted into the LRA, he was appointed a technician and the technicians belonged to the Yard.[1164] He told the Court about Air Stiblis, which is one of the elements of control in the Yard and that its smoke has the power to expel evil spirits and to contain the movement of the enemies.[1165] Various witnesses also testified about how the spirits turned stones into bombs.[1166]

710. Different witnesses, both Prosecution and Defence, testified about how Kony was a medium of different Spirits which would possess him. These included, but not limited to: P-205, P-264, P-142, P-218, P-144, P-245, P-45, P-70, P-233, P-172, D-79, D-24, D-7, D-32, D-92, D-75, D-25, D-74 and D-49.[1167] A number of witnesses - both Prosecution and Defence - further testified about how Kony made predictions that came to pass.[1168] These included military operations by the UPDF against them[1169] and those who would escape and come back to fight the LRA.[1170] Kony predicted the outbreak of Ebola virus,[1171] Operation Iron Fist,[1172] and the trial of a young LRA person who would be apprehended by the ICC, [1173] which all came to

[1161] T-187, p. 16, lns 4-9 (D-74).
[1162] T-187, p. 16, lns 4-9 (D-74).
[1163] T-49-Conf, pp 23-24 (P-205).
[1164] T-187, p. 12 lns 9-14
[1165] T-188, p. 7, lns 8-15. *See also* T-113-Conf, p. 56, lns 21-25 (P-172) and T-123-Conf, p. 42, lns 3-24 (P-231).
[1166] T-100-Conf, p. 22, lns 19-22 (P-245); T-193, p. 6, lns 21-23, p. 11, lns 2-6 (D-7); T-195-Conf, p. 26, lns 1-3 (D-6); T-197-Conf, p. 68, ln. 21 to p. 69, ln. 7, p. 70, lns 3-10, p. 78, lns 16-19 (D-60); T-203, p. 44, lns 1-20, p. 49, lns 17-23, p. 50, lns 6-9 (D-133); T-206-Conf, p. 11, lns 16-22 (D-131); T-248-Conf, p. 99, lns 5-21; T-249-Conf, p. 107, lns 17-21 (D-42); T-250-Conf, p. 79, lns 1-4 (D-41).
[1167] T-49-Conf, pp 16-19 (P-205); T-65-Conf, p. 73, lns 8-10 (P-264); T-69-Conf, p. 38, lns 17-20 (P-142); T-90-Conf, pp 37-38 (P-218); T-92-Conf, p. 23, lns 1-5 (P-144); T-100-Conf, pp 18-20 (P-245); T-104-Conf, p. 43 (P-45); T-107-Conf, p. 24, lns 14-22 (P-70); T-112-Conf, p. 9, lns 5-9 and p. 10, lns 3-6 (P-233); T-113-Conf, p. 57-61 (P-172); T-189-Conf, p. 18, lns 18-16 and p. 63, lns 16-18 (D-79); T-192-Conf, pp 16-17 (D-24); T-194-Conf, p. 24, lns 1-11 and p. 35, lns 18-24 (D-7); T-199-Conf, pp 58-59 (D-32); T-208-Conf, p. 42, lns 1-24 (D-92); T-224-Conf, p. 50, lns 18-25 (D-75); T-226-Conf, pp 34-35 (D-25); T-187, p. 16 lns 4-9 (D-74); T-243, p. 21, lns 9-23 (D-49).
[1168] *See* UGA-D26-0022-0001, pp 0007-0008. *E.g.* T-114-Conf, p. 4 (P-172) (Kony predicted that Muzee Banya would be captured by the UPDF and that the Khatoum Government would turn against them and start fighting against them).
[1169] T-49-Conf, pp 23-24 (P-205) and T-82-Conf, p. 21, lns 5-8 (P-9).
[1170] T-72-Conf, p. 19, lns 12-25 (P-142) and T-76-Conf, p. 27, lns 4-5 (P-314) (*stating* I was told that Kony can predict the future. I was also told that if you are planning to escape, he will be the first person to know.).
[1171] T-100-Conf, p. 17, lns 5-9 (P-245) and T-104-Conf, p. 45, lns 3-17 (P-45).
[1172] T-100-Conf, p. 16, lns 6-11 (P-245) and T-104-Conf, p. 45, lns 3-17 (P-45).
[1173] T-208-Conf, p. 43, lns 2-9 (D-92).

pass. Such is the extraordinary effect of Kony, which left an indelible mark on his victims, including the accused.

711. As quoted in the opening statement; "Joseph Kony claimed to be the Messiah sent by God to cleanse and transform society to turn to God and be ruled by the Ten Commandments… Therefore, the cleansing process started with the LRA soldiers themselves who had to conform to the Ten Commandments as interpreted by Kony himself."[1174]

5. Effect of spirits on abducted children and in particular Mr Ongwen

712. As quoted in the Defence Opening Statement, "Joseph Kony viewed children are easily moulded into ruthless fighters that he needed to continue his policy of murder and persecution."[1175] Expert Witness D-60 testified that children were the preferred target for conscription into the LRA. He ascribes this to the ease with which children would be indoctrinated.[1176] Spirituality was much more prominent within the LRA between 1986 and before Operation Iron fist,[1177] a period within which Mr Ongwen was abducted. During this period the LRA established a new moral order, allegedly because they believed Acholi was no longer clean and pure.[1178] In order to do this, a new order was established involving a whole range of spiritual rules and practices.[1179] As such, children like Mr Ongwen had to adhere to the LRA's moral order, which within the environment of the LRA exposed one to violent acts.[1180]

713. Thus, Mr Ongwen, who was abducted as a child and grew up under the watch of such spiritual powers of Kony, could not have been spared the effects discussed above. He, like others, believed in the spiritual attributes of Kony, ingrained by the indoctrination he underwent upon abduction.

6. Escape was extremely dangerous due to the threat to life of Mr Ongwen and others

714. A central piece of the Prosecution evidence challenging the defence of duress is that Mr Ongwen was a willing participant in the alleged crimes, judging from the fact that he did not

[1174] T-179-Conf, p. 26, lns 8-16.
[1175] T-179-Conf, p. 45, lns 19-20.
[1176] T-197-Conf, p. 21, lns 12-14 (D-60).
[1177] T-197-Conf, p. 34, lns 1-2 (D-60).
[1178] T-197-Conf, p. 37, lns 7-13 (D-60)
[1179] T-197-Conf, p. 37, lns 7-13 (D-60).
[1180] UGA-D26-0018-3901, p. 3904 (D-60).

escape from the LRA and surrender, and from his alleged refusal to surrender when he was offered an opportunity by the UPDF to surrender with the forces under his command[1181]. This allegation is not supported by any evidence. As a matter of fact, even the Prosecution evidence on record contradicts this assertion. For example, Florence Ayot testified that Dominic tried to escape while in sickbay, but was found out by Kony and arrested.[1182]

715. The Prosecution evidence established that Mr Ongwen was a victim and not a wilful participant as alleged by the Prosecution. Prosecution witness Rwot Oywak provided an account of his observation of the mentally, culturally and physically ruined Mr Ongwen during the charged period.[1183] The witness presented a vivid and devastating picture of Mr Ongwen ruined by his abduction and subjugation to the life-threatening brutality and spiritual abuse by Kony in the LRA. Dominic is therefore a child victim and not a willing participant as alleged by the Prosecution.

716. Furthermore, a UPDF intelligence report, UGA-OTP-0255-0943, which was disclosed to the Prosecution by P-38, described internal wrangles in the LRA.[1184] The intelligence report described a life-threatening situation involving Mr Ongwen. It stated that, "Major Odomi is under surveillance following his involvement in peace talk contact with Lt General Salim Saleh. Commander Odomi narrowly escaped firing squad when he reportedly received some bags and money from Saleh."[1185]

717. Witness P-359 testified that when a ceasefire was declared to allow the Juba peace talks to held in 2006, Dominic wrote to him asking for safe passage with a group of about 80 people among whom were some LRA commanders, LRA soldiers, women and children. One of the commanders was Adjumani, about whom the witness testified: "[he] seemed to be responsible for organizing the group and pushing it away from the road and taking it away from the road to the bushes and later joined us at the meeting point."[1186] The evidence established that Adjumani and Acaye Doctor were part of Kony's personal security personnel that was

[1181] T-26, pp 36-37.
[1182] T-244, pp 52-54.
[1183] T-83-Conf, pp 15-16, lines 23-25.
[1184] *See* UGA-OTP-0255-0943 metadata. *See also* T-116-Conf, pp 60-61 to see where P-38 denies transmitting the documents to the Prosecution.
[1185] UGA-OTP-0255-0943, p. 0945.
[1186] T-110-Conf, pp 54-55.

deployed to ensure compliance with Kony's orders during the safe passage.[1187]

718. The circumstances and context within which the alleged offer to Mr Ongwen to surrender or release the alleged child soldiers under his command and his refusal to do were recounted by P-359.[1188] The Defence submits this context and circumstances do not show that Mr Ongwen was a willing and zealous participant in the LRA alleged criminal activities. A senior UPDF intelligence officer transmitted a restricted military document which shows that the GoU was aware that Mr Ongwen was under surveillance both by the LRA and the UPDF, and that Mr Ongwen was aware too.[1189]

719. The decision about whether Mr Ongwen would surrender or release the soldiers or alleged children was not entirely up to Mr Ongwen. Apart from Adjumani, the special envoy of Kony and Otti, Vincent Otti was closely monitoring safe passage of the LRA convoy. On the initiation of journalist Lacambel of Mega-FM, Otti called Mr Ongwen by phone and sought to talk to P-359 and the District Chairman, Col. Walter Ocora. Otti specifically asked P-359 to allow Mr Ongwen to proceed with all the soldiers and persons under his command, upon which P-359 dropped his request and allowed Mr Ongwen to proceed unimpeded.[1190] The reasons why Lacambel subverted the pressure for Mr Ongwen to surrender or release the children by placing a phone call to Vincent Otti are not known.

720. Witness P-359 testified that Otti assured him on Lacambel's phone "that these peace talks are real, are real, please, please, please, don't do anything, let my commander come."[1191] In these circumstances, the decision not to surrender or to release the children was no longer that of Mr Ongwen, but that of P-359 and Vincent Otti.[1192]

721. The Defence submits that, given the actions of the journalist in notifying Otti about the pressure Mr Ongwen was subjected to, the security arrangement put in place by Kony to ensure compliance with his orders and telephone communication urging P-359 to allow Mr Ongwen to proceed with the LRA soldiers, any attempt by Mr Ongwen to defect or release the LRA soldiers would have been met with dire life-threatening consequences to the safety

[1187] T-225-Conf, p. 15 lns 11-22 (D-75). (*testifying* that he was part of the said meeting and that Kony had ordered Dominic that they should go back to Sudan making Dominic helpless with no option but to abide by the order).
[1188] T-110-Conf, pp 54-55.
[1189] UGA-OTP-0255-0943 at 0945.
[1190] T-109-Conf, p. 80 lns 1-20.
[1191] T-110-Conf, p. 66, lns 19-20.
[1192] *See* T-110-Conf, pp 64-66.

of Mr Ongwen, other persons and the peace process. The capitulation of the Prosecution witnesses to the request of Otti confirms the well-founded fears of Mr Ongwen if he surrendered.

722. The Prosecution establishes that Raska Lukwiya, who like Ongwen, Otti, Odhiambo and Kony, was subject of an ICC warrant, was ambushed and killed north of Kitgum by the UPDF as he progressed armless to the safe passage on the 12 August 2006 at 11h00.[1193] After this, it could not reasonably be expected for Mr Ongwen to surrender to P-359, the Operations Commander of the UPDF brigade that killed Raska Lukwiya, as they moved towards the safe passage during the peace talks. The environment was not favourable for his surrender without dire consequences to his safety, that of soldiers and persons under his command and that of every person present.

iii. The Prosecution failed to disprove that Mr Ongwen acted necessarily and reasonably to avoid the threat to life or serious bodily harm to himself or another

723. Mr Ongwen lived a life within the LRA without options. As described *supra*, escape was not a realistic choice and failure to comply with the commands and rules of Kony resulted in severe punishment or death against the abductee or his or her family and community. Prosecution witness P-440 testified that "people who were under his command and orders that he would issue, people who were actually afraid of the orders that he would issue. Sometimes they would respect it because they would not know exactly what he was going to do at any particular time… Kony told the new captured people, and he tells them not to escape and says that if you escape, you will be arrested and killed."[1194]

724. The Defence submits that what is reasonable and necessary must be viewed in the context of the LRA and control of Kony. What is necessary and reasonable must also be considered from the circumstances in which Mr Ongwen found himself as a child who was forcibly abducted and indoctrinated. Children abducted in the LRA were so indoctrinated and brutalized that, according to D-133, Mr Ongwen did not have a "mind of his own."[1195] In the circumstances in which Mr Ongwen existed, complying with all orders and commands from Kony were necessary and reasonable.[1196]

[1193] UGA-0TP-0196-0021, pp 0021-22.
[1194] T-40-Conf, p. 48; T-41, p. 13.
[1195] T-203, p. 64, lns 11-21, p. 75, ln. 25 to p. 76, ln. 10.
[1196] Arrest Warrant Request, paras 105, 110-111.

725. D-133 testified that the indoctrination of the LRA "in many cases it actually succeeded in removing the thinking mind of a child soldier. And therefore you wouldn't even think of trying to escape to go home."[1197] This is the same indoctrination Mr Ongwen began receiving when he was about eight or nine years old.

iv. The Prosecution failed to disprove that Mr Ongwen did not intend to cause a greater harm than the one sought to be avoided

726. Article 31(1)(d) contains a proportionality requirement between the harm caused and the harm to be avoided. This element is formulated as a determination of what the accused intended by his or her actions. As a result, it is not a purely objective element; instead, it is a subjective assessment of what the accused intended by his or her actions. The crucial question is: Was Mr Ongwen's intent not to cause a greater harm than the one avoided?

727. The Prosecution failed to disprove that Mr Ongwen did not intend to cause a greater harm than the one avoided for three reasons: 1) the actual harm for non-homicide crimes was less than the harm of death to Mr Ongwen or others; 2) the actual harm for homicide crimes, that would have occurred even if Mr Ongwen had not participated, was less than the harm of death to Mr Ongwen, his family and community; and 3) regardless of the objective assessment of the harm caused and the harm avoided, Mr Ongwen did not intend to cause a greater harm.

728. As described, imminent threats and collective punishments to the families and communities of the abductees were real and carried out. Mr Ongwen's ability to evaluate which harm was greater in this context was destroyed due to both his mental disorders and the coercive, brutal environment of the LRA. Consequently, the evidence is insufficient to refute beyond reasonable doubt that Mr Ongwen did not intend to cause a greater harm than the harm from the alleged crimes.

D. Mr Ongwen Should Be Acquitted on the Grounds of the Combined Defences of Mental Illness and Duress

729. The Defence met its obligation to adduce some evidence to raise the defences of mental illness and duress. As discussed *supra*, the Prosecution has failed to disprove the defences beyond reasonable doubt. Although the two defences are distinct, in this case there is also a cumulative effect from the combination of lack of capacity to appreciate the unlawfulness of the conduct or to conform the conduct to the law and the extensive threats and coercion under

[1197] T-203, p. 38, lns 7-9.

which Mr Ongwen lived and acted.

730. Affirmative defences excuse or justify what is otherwise considered criminal conduct. The Defence submits that this case presents a compelling situation in which Mr Ongwen's combined mental illness and duress should exclude him from criminal responsibility.

XI. REMEDIES REQUESTED

731. The Defence requests that – given Mr Ongwen's status as a victim and his forced separation from his family – that he be granted immediate release pending judgment on terms and conditions as the Court may deem fit, including but not limited to, placing him under the supervision of the Acholi Cultural Institution, which shall undertake to monitor him and guarantee his appearance in Court.

732. For the reasons stated above, the Defence respectfully requests that the Trial Chamber:

a. **ACQUIT** Mr Ongwen on all counts; or, in the alternative

b. **ORDER** an immediate permanent stay of the proceedings, based on the violations of fair trial from the inception of the proceedings in this case.

733. In the event that the Court finds Mr Ongwen guilty, that punishment be suspended and that the Court should:

a. **ORDER** Mr Ongwen to be placed under the authority of the Acholi justice system to undergo the Mato Oput process of Accountability and Reconciliation as the final sentence for the crimes for which he is convicted; and

b. That this remedy should be granted on condition that the Acholi Cultural Institution accepts and signs an undertaking that it will comply with the Order of the Court.

Respectfully submitted,

Hon. Krispus Ayena Odongo

Beth S. Lyons

Charles Achaleke Taku

On behalf of Mr Dominic Ongwen

Dated this 13th day of March, 2020
The Hague, Netherlands