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Date: **1 April 2021**

TRIAL CHAMBER IX

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

SITUATION IN UGANDA

IN THE CASE OF
THE PROSECUTOR v. DOMINIC ONGWEN

Public

Victims' Joint Submissions on sentencing

Source: **Office of Public Counsel for Victims**
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Document to be notified in accordance with regulation 31 of the Regulations of the Court to:

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I. INTRODUCTION

1. Counsel representing the Victims authorised to participate in the present case (the "Counsel") jointly file their submissions on sentencing on behalf of the 4,065 victims they represent.[1]

2. Counsel submit that, in accordance with the legal framework of the Court and its relevant practice, the determination and imposition of a sentence shall be based on the principles of retribution and deterrence and that the Trial Chamber (the "Chamber") will need to exercise its discretion in balancing all factors for determining an appropriate sentence. In this regard, according to article 78(1) of the Rome Statute (the "Statute"), the totality of the sentence must be proportionate and reflect the culpability of the convicted person and therefore should be tailored to the gravity of the crimes.

3. Indeed, gravity is the principal consideration in the imposition of a sentence. In the present case, Counsel submit that the nature of the crimes, the particular circumstances of the conduct constituting elements of the mode of liability recognised by the Chamber, and the factors under rule 145(1)(c) of the Rules of Procedure and Evidence (the "Rules") relating to the elements of the offence and mode(s) of liability are all elements militating for the extremely grave nature of the crimes committed.

4. Furthermore, Counsel argue that the following factors constitute aggravating circumstances: (i) the extreme cruelty and brutality in the commission of the crimes; (ii) the particular defencelessness of the victims; (iii) the high number of victims; and (iv) the abuse of power by and/or the official capacity of Mr Ongwen.

5. In light of the evidence presented at trial and the subsequent findings of the Chamber - namely in relation to the defence of duress and mental illness - Counsel

[1] On 12 March 2021, following requests by Counsel, the Defence and the Prosecution, the Chamber extended the page-limits for the sentencing submissions. See the email sent on 12 March 2021 at 12:10.

further posit that no mitigating circumstances apply in the present case. In particular, none of the mitigating circumstances contemplated by the Defence can be considered as established, and therefore none of them would warrant to reduce the length of the sentence that would be appropriate on the basis of the gravity of the crimes for which Mr Ongwen was convicted. Moreover, nothing in Mr Ongwen's individual circumstances appears to reduce the need for a high sentence.

6. Consequently, Counsel request that Mr Ongwen be sentenced to life imprisonment in accordance with articles 77(1)(b), 78(1) and (3) of the Statute and rule 145 of the Rules. Such a sentence appears to be the only appropriate punishment in light of the extreme gravity of the crimes which were marked by their infamous cruelty and inhumaneness, causing immeasurable harm to the victims, their families and their communities. Life imprisonment is the only adequate response to the incurable pain inflicted to the more than 4,065 victims who still face, more than 15 years after the events, unprecedented challenges in recovering from the harm that they suffered as a result of the crimes committed.

7. During recent consultations following the issuance of the Judgment the vast majority of the Victims have indeed indicated that Mr Ongwen should be sentenced to life imprisonment. Victims highlighted that their sufferings and the long-lasting consequences of the crimes inflicted upon them, their families and their communities warrant a term of life-imprisonment for Mr Ongwen. Such a sentence fairly reflects Mr Ongwen's culpability for the harm that they suffered and relays the extreme gravity of the crimes he committed. By listening to their views and legitimate needs for truth and justice and sentencing Mr Ongwen to life imprisonment, the Chamber would revest the victims with their voices and therefore help in re-empowering them.[2]

[2] See the "Decision on Sentence pursuant to article 76 of the Statute" (Trial Chamber II), No. ICC-01/04-01/07-3484-tENG-Corr, 23 May 2014, para. 38 (the "Katanga Sentencing Decision"): "[w]*hen determining the sentence, the Chamber must also respond to the legitimate need for truth and justice voiced by the victims and their family members*".

8. Victims have relayed to Counsel that Mr Ongwen should be given "*a heavy sentence*" so that it deters others from committing similar crimes. Furthermore, many victims expressed their fears regarding Mr Ongwen's return to the community should he be sentenced for a period of time shorter than 50 years of imprisonment. They expressed that Mr Ongwen's return to Northern Uganda could have a destabilizing effect and cause tension between the different Acholi clans. Some victims also informed Counsel of their fears that Mr Ongwen would re-join the LRA should he be allowed to return prematurely and perpetrate crimes against the communities once again. Victims also expressed the view that Mr Ongwen and his clan should personally compensate them for the harm they suffered as a result of his actions.

9. Finally, Counsel do not find appropriate in the present case the additional imposition of a fine under article 77 of the Statute and rule 146 of the Rules, in light of the financial incapacity of the convicted person and the fact that the crimes committed by Mr Ongwen were not motivated by personal financial gain.

II. PROCEDURAL HISTORY

10. On 4 February 2021, the Chamber issued its Judgment, finding Mr Ongwen guilty of 62 charges of war crimes and crimes against humanity, including the attack against the civilian population and crimes committed in Pajule, Odek, Lukodi and Abok IDP camps; sexual and gender-based crimes directly and indirectly committed by Mr Ongwen; and the conscription and use of children under the age of 15 in hostilities.[3]

11. On the same day, the Chamber issued its "Decision scheduling a hearing on sentence and setting the related procedural calendar". In particular, the Chamber (i) ordered the filing of any submissions by the parties and participants concerning additional evidence relevant to the sentence by the 26 February 2021 and of any

[3] See the "Trial Judgment" (Trial Chamber IX), No. ICC-02/04-01/15-1762-Conf and No. ICC-02/04-01/15-1762-Red, 4 February 2021 (the "Judgment").

response thereto by the 10 March 2021; (ii) invited the parties and participants to file their written submissions on sentencing by 1 April 2021; (iii) and scheduled a hearing under article 76(2) of the Statute to be held in the week of 12-16 April 2021.[4] The Chamber specified in a further Order the dates of the 14 and 15 April 2021 for such hearing to be held.[5]

12. On 26 February 2021, the Defence filed a request to submit additional evidence for the purpose of the sentencing proceedings.[6] The same day, the Defence filed an *Addendum* to said Request.[7] On 10 March 2021, the CLRV,[8] the Prosecution[9] and the LRV[10] filed their respective responses, partially opposing the request. On 19 March 2021, the Chamber admitted the items submitted by the Defence.[11]

III. SUBMISSIONS ON SENTENCING

13. Counsel will address first the sentencing principles and case-law before the Court. They will examine gravity next, as the principal consideration in the imposition

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[4] See the "Decision scheduling a hearing on sentence and setting the related procedural calendar" (Trial Chamber IX), No. ICC-02/04-01/15-1763, 4 February 2021.
[5] See the "Order providing further details on the schedule of the hearing on sentence" (Trial Chamber IX), No. ICC-02/04-01/15-1802, 23 March 2021.
[6] See the "Defence request to submit additional evidence for Trial Chamber IX's determination of the sentence", No. ICC-02/04-01/15-1783-Conf and No. ICC-02/04-01/15-1783-AnxA, 26 February 2021; and the "Public Redacted Version of "Defence request to submit additional evidence for Trial Chamber IX's determination of the sentence", filed on 26 February 2021", No. ICC-02/04-01/15-1783-Red, 26 February 2021.
[7] See the "Defence Addendum to "Defence request to submit additional evidence for Trial Chamber IX's determination of the sentence", filed on 26 February 2021 as ICC-02/04-01/15-1783-Conf", No. ICC-02/04-01/15-1785-Conf and No. ICC-02/04-01/15-1785-Conf-AnxA, 26 February 2021. See also the "Defence Notification of the Disclosure of Rule 78 Material", No. ICC-02/04-01/15-1790 and No. ICC-02/04-01/15-1790-Conf-AnxA, Conf-AnxB and Conf-AnxC, 12 March 2021; and the "Defence Filing in the Record of the Case the Expert Report of UGA-D26-P-0114", No. ICC-02/04-01/15-1792 and No. ICC-02/04-01/15-1792-AnxA, 12 March 2021.
[8] See the "CLRV Response to the "Defence request to submit additional evidence for Trial Chamber IX's determination of the sentence"", No. ICC-02/04-01/15-1787-Conf, 10 March 2021.
[9] See the "Prosecution's response to the Defence request to submit additional evidence at sentencing", No. ICC-02/04-01/15-1788, 10 March 2021; see also the "Prosecution's response to the Defence request regarding the proposed report and testimony of D-0114", No. ICC-02/04-01/15-1795, 16 March 2021.
[10] See the "Victims' Response to the "Defence request to submit additional evidence for Trial Chamber IX's determination of the sentence"", No. ICC-02/04-01/15-1789-Conf, 10 March 2021.
[11] See the "Decision on the 'Defence request to submit additional evidence for Trial Chamber IX's determination of the sentence'" (Trial Chamber IX), No. ICC-02/04-01/15-1801, 19 March 2021.

of a sentence and will assess the factors that demonstrate that such criteria is met in the present case. Counsel will then turn to the aggravating circumstances to be taken into account by the Chamber in determining the appropriate sentence, the lack of relevant mitigating circumstances and the fact that the personal circumstances of the convicted person do not bear any weight in the present case for sentencing purposes. Finally, Counsel convey to the Chamber the views and concerns of the Victims as collected during their recent consultations in relation to sentencing.

1. The sentencing principles and case-law before the Court

a) Sentencing principles

14. The Appeals Chamber has recognised that articles 76, 77 and 78 of the Statute and rules 145, 146 and 147 of the Rules, read together with the underlying objectives of the Preamble of the Statute, form a comprehensive scheme for the determination and imposition of a sentence.[12] In particular, in the Preamble, the principles of retribution ("*not to be understood as fulfilling a desire for revenge, but as an expression of the international community's condemnation of the crimes*") and deterrence ("*a sentence should be adequate to discourage a convicted person from recidivism (specific deterrence), as well as to ensure that those who would consider committing similar crimes will be dissuaded from doing so (general deterrence)*") have been recognised as primary objectives of sentencing.[13]

15. Moreover, article 78(3) of the Statute provides that, when a person has been convicted of more than one crime, the trial chamber "*shall pronounce a sentence for each*

[12] See the "Public redacted version of Judgment on the appeal of Mr Bosco Ntaganda against the decision of Trial Chamber VI of 7 November 2019 entitled 'Sentencing judgment'" (Appeals Chamber), No. ICC-01/04-02/06-2667-Red, 30 March 2021, paras. 21, 26 ff and 31 (the "Bosco Appeal Judgment on Sentencing"). See also the "Judgment on the appeals of the Prosecutor and Mr Thomas Lubanga Dyilo against the "Decision on Sentence pursuant to Article 76 of the Statute"" (Appeals Chamber), No. ICC-01/04-01/06-3122, 1 December 2014, paras. 32 to 35 (the "Lubanga Appeal Judgment on Sentencing"); the "Sentencing judgment" (Trial Chamber VI), No. ICC-01/04-02/06-2442, 7 November 2019, paras. 8 to 10 (the "Bosco Sentencing Judgment"); and the "Judgment and Sentence" (Trial Chamber VIII), No. ICC-01/12-01/15-171, 27 September 2016, para. 70 (the "Al Mahdi Judgment and Sentence").

[13] See the "Decision on Sentence pursuant to Article 76 of the Statute", No. ICC-01/05-01/08-3399, 21 June 2016, paras. 10 to 12 (the "Bemba Decision on Sentence").

crime", as well as "*a joint sentence specifying the total period of imprisonment*", which cannot be less than the highest individual sentence. In this regard, Counsel note that the Chamber, in doing so, has the opportunity to reflect the nature, gravity and specificity of each of the crimes for which Mr Ongwen was recognised guilty, notably - for instance - the sexual and gender based crimes, while recognising their distinct consequences on victims. In addition, the Appeals Chamber noted that "*Rule 145(1)(a) of the Rules contains the overarching requirement that 'the totality of any sentence […] must reflect the culpability of the convicted person'*".[14]

16. Counsel further underline that the Court's legal framework does not contain sentence ranges depending on the crimes or the modes of liability recognised, nor mandatory minimum or maximum; and that the balancing exercise of all relevant factors lays at the core of the Chamber's exercise of discretion in determining the appropriate sentence.[15] Counsel observe, however, that the nature of the sentence is limitedly provided for in article 77 of the Statute stating that:

> "*Subject to article 110, the Court may impose one of the following penalties on a person convicted of a crime referred to in article 5 of the Statute:*
> *(a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or*
> *(b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.*
> *In addition to imprisonment, the Court may order:*
> *(a) A fine under the criteria provided for in the Rules of Procedure and Evidence;*
> *(b) A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties*".

17. As a result, only penalties provided for in the legal texts of the Court can be considered by the Chamber, in application of the fundamental principle of *nulla poena sine lege*, which, as recalled by Trial Chamber II, "*prevents arbitrary imposition of criminal sanctions, thereby ensuring legal certainty*".[16]

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[14] See the "Lubanga Appeal Judgment on Sentencing", *supra* note 12, para. 33.
[15] See the "Bosco Sentencing Judgment", *supra* note 12, para. 12.
[16] See the "Katanga Sentencing Decision", *supra* note 2, para. 39.

18. What will constitute an "appropriate" sentence flows from the criteria mentioned in article 78(1) of the Statute and rule 145 of the Rules, which set out the legal requirements for its determination. According to article 78(1), the totality of the sentence must be proportionate and reflect the culpability of the convicted person and therefore, the penalties must be tailored to fit the gravity of the crimes.[17] Whereas rule 145(1)(b) and (c) reads as follows:

> "*In its determination of the sentence pursuant to article 78, paragraph 1, the Court shall:*
> *(b) Balance all the relevant factors, including any mitigating and aggravating factors and consider the circumstances both of the convicted person and of the crime;*
> *(c) In addition to the factors mentioned in article 78, paragraph 1, give consideration,* inter alia*, to the extent of the damage caused, in particular the harm caused to the victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime; the degree of participation of the convicted person; the degree of intent; the circumstances of manner, time and location; and the age, education, social and economic condition of the convicted person*".

19. In accordance with article 76(1) of the Statute, the Chamber ought to take into account the evidence presented at trial and the submissions made during the trial that are relevant to the sentence. The essential elements that will inform the Chamber are therefore contained in the Judgment and the assessment of all the factors to be considered is based on the Chamber's intimate knowledge of the case.[18] In this regard, Counsel underline that the evidence presented at trial pertaining especially to the harm suffered by the victims and the impact of the crimes on them, their families and their communities are of acute relevance in the context of the sentencing proceedings, as expressly dictated by the terms of rule 145(1)(c) of the Rules.[19]

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[17] See the "Bosco Sentencing Judgment", *supra* note 12, para. 11. Trial Chamber II also referred in this regard to the principle of an individualised sentencing. See the "Katanga Sentencing Decision", *supra* note 2, para. 39. In this regard, the Appeals Chamber of the Special Court for the Sierra Leone referred to the "*totality principle*": "*A Trial Chamber must ultimately impose a sentence that reflects the totality of the convicted person's culpable conduct*." See Special Court for Sierra Leone (the "SCSL"), Judgment, *Prosecutor against Charles Ghankay Taylor*, Case No. SCSL-03-01-A-1389, 26 September 2013, para. 662 (the "Taylor Judgment").

[18] See the "Lubanga Appeal Judgment on Sentencing", *supra* note 12, para. 34.

[19] See Rule 145(1)(c) of the Rules especially stating that the Chamber "*shall* […] *give consideration,* inter alia*, to the extent of the damage caused, in particular to the harm caused to the victims and their families*."

20. The Chamber must therefore first determine the gravity *in abstracto*, "*by assessing the constitutive elements of the crime and the mode of liability in general terms, and* in concreto, *by assessing the particular circumstances of the case looking at the degree of harm caused by the crime and the culpability of the perpetrator*";[20] then, balance all the relevant factors,[21] including any mitigating and aggravating circumstances which should reflect the individual circumstances of the convicted person and the gravity of the crimes, as well as the harm caused to the victims and their families and communities.

21. Furthermore, in light of the practice of the Court, Counsel underline that, although the factors identified and assessed may be considered under more than one category, the Chamber will not rely on the same factor more than once, and any factor assessed in relation to the gravity of the crime will not be considered as aggravating circumstances, and *vice versa*.[22] In this regard, Trial Chamber VI further stressed that the "*category in which a certain factor is placed is therefore of limited relevance*" and that it "*is more for the Chamber to identify all relevant factors, and to attach appropriate weight to them in its determination of the sentence*".[23]

22. Finally, *as per* the terms of article 78(2) of the Statute, any time that the convicted person spent in detention upon an order of the Court must be deducted to the sentence imposed.

[20] See the "Bosco Sentencing Judgment", *supra* note 12, paras. 11 and 12.
[21] See the "Lubanga Appeal Judgment on Sentencing", *supra* note 12, para. 34.
[22] See the "Bosco Sentencing Judgment", *supra* note 12, para. 13.
[23] *Idem*, para. 13. See also the "Judgment on the appeals of the Prosecutor, Mr Jean-Pierre Bemba Gombo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Decision on Sentence pursuant to Article 76 of the Statute"" (Appeals Chamber), No. ICC-01/05-01/13-2276-Red, 8 March 201, para. 112 (the "Bemba et al. Decision on Sentence").

b) The Court's sentencing case-law[24]

23. As stressed by Trial Chamber VIII in the *Al Mahdi* case, "*sentencing an individual for crimes he committed is a unique exercise for which comparison with different cases can be of very limited relevance only, if any*".[25] This appears to be all the more significant in light of the unique features recognised by the Chamber in the Judgment against Mr Ongwen.

24. However, Counsel observe that the practice of the Court on sentencing in other cases may be relevant in light of the similarities with the current case of some of the crimes committed and the ways of commission of said crimes.

25. In the most recent case in which a sentencing judgment was issued, Mr Ntaganda was convicted of 18 war crimes and crimes against humanity of murder and attempted murder, intentionally directing attacks against civilians, rape of civilians, rape of children under the age of 15 incorporated into the UPC/FPLC, sexual slavery of civilians, sexual slavery of children under the age of 15 incorporated into the UPC/FPLC, persecution, pillage, forcible transfer of the civilian population, ordering the displacement of the civilian population, conscripting and enlisting children under the age of 15 years into an armed group and using them to participate actively in hostilities, and intentionally directing attacks against protected objects and destroying the adversary's property. Mr Ntaganda was sentenced to thirty years of imprisonment.[26] The chamber did not consider that Mr Ntaganda made any sincere

[24] Counsel provide in this section the examples of the cases which led to convictions and sentencing upheld by the Appeals Chamber only. They do not include in this section article 70 proceedings. Counsel refer here to the Appeals Chamber's finding that: "*According to the Court's provisions, the sentence must be "appropriate" and must be based on all the relevant factors of the specific case. This makes it difficult, at the least, to infer from the sentence that was imposed in one case the appropriate sentence in another case. Further, the Appeals Chamber considers that the value of other sentencing practices is even lower when the reference is to the sentencing practices of another tribunal, as opposed to that of a Trial Chamber of the Court. This is because, even though there are similarities in the sentencing provisions of the Court and those of other international criminal courts and tribunals, the Court has to apply, in the first place, its own Statute and legal instruments*". See the "Lubanga Appeal Judgment on Sentencing", *supra* note 12, para. 77.

[25] See the "Al Mahdi Judgment and Sentence", *supra* note 12, para. 107.

[26] See the "Bosco Sentencing Judgment", *supra* note 12, paras. 246 to 251; as further confirmed in its totality by the "Bosco Appeal Judgment on Sentencing", *supra* note 12.

demonstrations of remorse, nor that his expressions of compassion expressed in his unsworn statements at the end of the sentencing hearing were sufficient to constitute a mitigating circumstance;[27] the same went with the delay associated to his surrender,[28] his commendable specific actions in detention[29] and his respectful and positive behaviour during trial, to which the chamber afforded no weight in mitigation.[30] Conversely, the chamber considered as aggravating circumstances the particular cruelty of murders and some attempted murders, which were preceded by beatings, sexual and other assaults or rapes; the fact that many of the victims were particularly defenceless, such as individuals who had been previously captured or detained, a pregnant woman, babies and very young children and sick and disabled persons unable to flee; the personal commission of a murder in the presence of his subordinates and bodyguards, sending a clear message that violence and the commission of crimes against Lendu civilians were tolerated and even encouraged by their leadership; the murders of some persons who did not constitute legitimate targets at the time of attacks intentionally launched at civilians; the fact that some victims of sexual violence were very young and therefore particularly defenceless; the repeated victimisation of some victims (the fact that some victims were raped more than once by the same perpetrator, or were raped by different perpetrators); the particular cruelty of some of the rapes; the young age of each female members of the UPC/FPLC victims of sexual violence crimes and their particular defencelessness resulting therefrom; the repeated nature of rapes of two specific female child-soldiers; the particular defenceless of several people unable to leave by themselves a medical centre under attack and thus left without medical care; and the particularly harsh treatment of some of the child-soldiers and the fact that at least one of them was very young.[31]

[27] See the "Bosco Sentencing Judgment", paras. 236 to 239.
[28] *Idem*, paras. 227 and 228.
[29] *Idem*, paras. 231 to 235.
[30] *Idem*, paras. 229 and 230.
[31] *Idem*, paras. 78 to 85; 121 to 127; 154 ; 193 to 196; and 202 to 206.

26. Mr Al-Mahdi,[32] who pleaded guilty, was recognised as having cooperated with the Court and having expressed genuine remorse for his acts and empathy for the victims. He was sentenced to nine years in prison in a case concerning exclusively offences against religious and historical property.

27. Mr Katanga, whose responsibility was recognised in relation to an attack against a single village carried out in the course of one day, was sentenced to twelve years of imprisonment "*for accessoryship in any other way to the commission of the crime of murder as a war crime and crime against humanity, the crime of attack against a civilian population as such or against individual civilians not taking direct part in hostilities, as a war crime, and the crime of destruction of enemy property as a war crime and the crime of pillaging as a war crime*".[33] By doing so, Trial Chamber II considered that a more severe penalty should be imposed for the crimes of murder and attack against a civilian population, amounting to violence to life, than for the crimes of destruction and pillaging, which, although significant, amount to damage to property.[34] It is also worth noting that the chamber did not take into account any aggravating circumstances against the convicted person, but recognised two mitigating circumstances related to his young age at the material time and to his family situation, both of which were considered likely to make rehabilitation and reintegration easier, and to his personal and active support to the process of disarming and demobilising child soldiers in Ituri which demonstrated his sense of responsibility in that respect.[35]

28. Finally, Mr Lubanga was sentenced to fourteen years in prison, for the joint commission with other persons of the crimes of conscripting, enlisting, and using children under the age of 15 to participate actively in hostilities.[36] Trial Chamber I

[32] See the "Al Mahdi Judgment and Sentence", *supra* note 12, paras. 98 to 111.
[33] See the "Judgment pursuant to article 74 of the Statute" (Trial Chamber II), No. ICC-01/04-01/07-3436-tENG, 7 March 2014, para. 146.
[34] *Idem*, para. 145.
[35] *Idem*, para. 144.
[36] See the "Decision on Sentence pursuant to Article 76 of the Statute" (Trial Chamber I), No. ICC-01/04-01/06-2901, 10 July 2012, paras. 97 to 99 (the "Lubanga Decision on Sentence").

reflected his notable and respectful cooperation with the Court as a mitigating circumstance and did not recognise any aggravating circumstances.[37]

2. The gravity of the crimes

29. Having underlined the principles and case-law relevant for sentencing purposes, Counsel turn to the evaluation of the criteria of the gravity of the crimes.

30. *As per* the jurisprudence of the Court, gravity is a principal consideration in the imposition of a sentence. It is "*generally measured* in abstracto, *by assessing the constitutive elements of the crime and the mode of liability in general terms, and* in concreto, *by assessing the particular circumstances of the case looking at the degree of harm caused by the crime and the culpability of the perpetrator*".[38]

31. Trial Chamber VI underlined that "[d]*espite being the most serious crimes of concern to the international community* in abstracto *not all crimes under the Statute are necessarily of equivalent gravity and the Chamber must weigh each of them, distinguishing, for example, between crimes against persons and crimes targeting property*".[39] With regards to the modes of liability, chambers agree that there is no hierarchy amongst them for the purposes of sentencing and that the assessment must be made on a case by case basis in light of the degree of participation and of intent of the convicted person.[40]

32. Arguably, Trial Chamber VI's most recent sentencing judgement (confirmed by the Appeals Chamber in its entirety) could be used as a guide to identify all the factors relevant to an assessment of gravity,[41] as it reflects the constant practice established by the Court so far. In such determination, the following elements must be taken into account: "*(i) the gravity of the crimes*, i.e. *the particular circumstances of the acts constituting*

[37] *Idem*, para. 91.
[38] See the "Bosco Sentencing Judgment", *supra* note 12, paras. 11 and 14 ff; see also the "Lubanga Appeal Judgment on Sentencing", *supra* note 12, paras. 40 and 62.
[39] See the "Bosco Sentencing Judgment", *idem*, paras. 14 ff.
[40] *Idem*, para. 15.
[41] *Idem*, para. 16. See also the "Bosco Appeal Judgment on Sentencing", *supra* note 12.

the elements of the offence; as well as (ii) the gravity of the culpable conduct, i.e. *the particular circumstances of the conduct constituting elements of the mode of liability*". The chamber specified that: "*As long as they relate to the elements of the offence and mode(s) of liability, the factors stipulated in Rule 145(1)(c) will be considered in the evaluation of gravity, including the extent of the damage caused, the harm caused to the victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime, and/or the circumstances of manner, time and location, as well as the nature and degree of participation of the convicted person in the commission of the crime and his or her degree of intent*", together with any other relevant elements the chamber may deem relevant.

a) Gravity assessment in the Ongwen case

33. Counsel posits that the number and diversity of crimes, the number of participating victims in this case, together with the cruelty and brutality in which the crimes were executed by Mr Ongwen and by his subordinates are highly illustrative of the grave nature of the crimes before the Chamber, whether assessed under the umbrella of gravity or as aggravating circumstances.

i. The gravity of the crimes, i.e. the particular circumstances of the acts constituting the elements of the offence

The concurrence of analogous crimes against humanity and war crimes

34. Counsel first recall the findings of the Chamber in relation to the concurrence of analogous crimes against humanity and war crimes, namely that: "*In these circumstances, neither of these two sets of crimes can thus be said to be subsumed or consumed in any way by the other. Accordingly, the Chamber finds that concurrence of analogous crimes against humanity and war crimes is permissible*".[42] In particular: "*as far as the charges in the present case are concerned, the Chamber observes that war crimes give protection in criminal law to persons in times of armed conflict, whereas crimes against humanity protect persons where there is a widespread and systematic attack on a civilian population. Thus, the two sets*

[42] See the "Judgment", *supra* note 3, paras. 2820 and 2821.

of crimes reflect (partly) different forms of criminality, in that they complement, in terms of protected interests, the incrimination of the individual 'specific' crimes – which, in turn, are therefore distinct depending (also) on the relevant contextual elements".[43]

35. Consequently, Counsel submit that the serious corresponding violations of these victims' distinct interests reflect on the gravity and should be acknowledge in the Chamber's assessment regarding sentencing.

36. Further, Counsel will address *infra* some of the crimes for which Mr Ongwen was recognised as guilty which bear a particular gravity in light of their current impact on the victims.

Conscription of children and use in hostilities

37. As recognised by the jurisprudence of the Court, the crimes committed against children and specifically their conscription and use in hostilities bear an intrinsic gravity related to the age and specific vulnerability of the individuals concerned. Trial Chamber I in the *Lubanga* Sentencing Decision stated:

> "*The crimes of conscripting and enlisting children under the age of fifteen and using them to participate actively in hostilities are undoubtedly very serious crimes that affect the international community as a whole. Additionally,* […] *the crime of conscription is distinguished by the added element of compulsion. The crime of using children to participate actively in hostilities involves exposing them to real danger as potential targets. The vulnerability of children mean that they need to be afforded particular protection that does not apply to the general population, as recognised in various international treaties.* […] *This includes not only protection from violence and fatal or non-fatal injuries during fighting, but also the potentially serious trauma that can accompany recruitment, including separating children from their families, interrupting or disrupting their schooling and exposing them to an environment of violence and fear*".[44]

38. This conclusion was reemphasised by Trial Chamber VI as follows : "*Conscripting and enlisting children under the age of 15 and using them to participate actively*

[43] *Ibid.* (we underline).
[44] See the "Lubanga Decision on Sentence", *supra* note 36, paras. 37-38 (we underline).

in hostilities is undoubtedly very serious; it subjects them to combat and the associated risks to the children's life and well-being entailed therein, including being wounded or killed".[45]

39. Counsel argue that the intrinsic gravity of the crimes committed against children due to their age and vulnerability is compounded by the severe impact that such crimes have on the victims' lives, their parents and families, and their communities of origin. As a result, these factors should be duly taken into consideration by the Chamber when assessing gravity.

Sexual and gender-based crimes

40. Echoing Trial Chamber VI's findings, Counsel emphasise that the "*Statute and the Rules accord a special status to sexual violence crimes, crimes against children, and the victims thereof. During the drafting process of the Rome Statute, the especially grave nature and consequences of sexual violence crimes, in particular against children, were recognised*".[46]

41. Furthermore, Trial Chamber VI agreed with the findings made by several International Criminal Tribunal for the Former Yugoslavia (the "ICTY") chambers in relation to rape in particular, according to which said crime "*is one of the worst sufferings a human being can inflict upon another*'"; and considering that "'[t]*he rape of any person* [is] *a despicable act which strikes at the very core of human dignity and physical integrity*'".[47]

42. Counsel submit that the scale of the acts of sexual violence committed by Mr Ongwen as a direct and indirect perpetrator warrants particular weighting by the Chamber in assessing the gravity for the purpose of sentencing.[48] Counsel also recall in this regard the acts of physical violence against the victims and the repeated and humiliating circumstances in which rape and sexual violence occurred,[49] often in the

[45] See the "Bosco Sentencing Judgment", *supra* note 12, para. 179.
[46] *Idem*, para. 95.
[47] *Idem*, para. 96, citing to International Criminal Tribunal for the Former Yugoslavia (the "ICTY"), *Kunarac et al.* Trial Judgment, para. 655; and ICTY, *Mucić et al.* Trial Judgment, para. 495.
[48] See the "Judgment", *supra* note 3, paras. 3021 to 3026, 3035 to 3043, 3044 ff, 3050 ff, 3056 ff and pp. 1054 to 1063.
[49] *Idem*, paras. 3028, 3030, 3033, 3045, 3063 ff and pp. 1054 to 1063.

presence of others, as a factor of particular importance when assessing the gravity of the crimes.

43. The particularly repugnant circumstances in which acts of rape; sexual slavery; torture, outrages upon person dignity and enslavement considered under the ambit of sexual violence; forced marriage; and forced pregnancy,[50] occurred lead to the same conclusion. These crimes as perpetrated by Mr Ongwen directly and indirectly, carry a specific high threshold of gravity that the Chamber ought to take into account in its assessment of the appropriate sentence. Counsel in particular refer to the specific elements constitutive of each of these crimes as recognised by the Chamber, notably the coercive and threatening environment in which the crimes were perpetrated;[51] and to the ample evidence in the record of the case illustrating the catastrophic physical,[52] psychological,[53] social and developmental[54] consequences of each of these crimes on the victims, their families and their communities.[55] Counsel also point out, as an additional consequence, the transgenerational trauma suffered by the victims and their families, which contributes to further harm suffered and impacts the gravity of the crimes perpetrated by Mr Ongwen in this case.[56]

44. Finally, Counsel underline the immensely challenging situation of the children born in the bush as a result of the sexual and gender-based crimes perpetrated against

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[50] *Ibid.*
[51] *Ibid*.
[52] *Idem*, paras. 483, 2309, 3073.
[53] *Idem*, paras. 417, 418, 483, 600, 601, 2309, 2748 ff, 3073.
[54] *Idem*, paras. 601, 602, 2748 ff.
[55] See the "Bemba Decision on Sentence", *supra* note 13, para. 40, where the chamber concluded to the utmost, serious gravity of the crimes of rapes perpetrated in equally horrific circumstances than in this case.
[56] See the "Common Legal Representative of Victims' Closing Brief", No. ICC-02/04-01/15-1720-Conf, 18 February 2020 and the "Public redacted version of Common Legal Representative of Victims' Closing Brief (ICC-02/04-01/15-1720-Conf)", No. ICC-02/04-01/15-1720-Red, 24 February 2020, paras. 87 to 91; and the "Corrected version of the "Victims' Closing Brief" filed on 24 February 2020, ICC-02/04-01/15-1721-Conf", No. ICC-02/04-01/15-1721-Conf-Corr, 27 March 2020 and the "Public Redacted Version of the 'Corrected version of the "Victims' Closing Brief"' filed on 24 February 2020, ICC-02/04-01/15-1721-Conf'", No. ICC-02/04-01/15-1721-Corr-Red, 31 March 2020, paras. 471-474.

their mothers by Mr Ongwen and his soldiers,[57] as well as the difficult situation their mothers are confronted with, facing rejection from their families and communities. Many of them have been without social support since they returned from the bush, in some cases more than 15 years ago, and now live on the margins of the society with all the associated psychological, material and financial difficulties.[58]

Murders and attempted murders

45. Counsel recall Trial Chamber III's relevant findings regarding gravity and murders: "*murder deprives the direct victim of life, the ultimate harm. Relatives and dependants left behind are not only deprived of the direct victim, an impact that cannot be underestimated, but may also be directly injured – physically and/or psychologically – as a result of the murder*. […] *Persons who relied on the direct victim for support, whether financial, physical, emotional, psychological, moral, or otherwise, were also affected. The impact rippled through the relevant communities*. […] *For some victims, the impact of the murders was chronic and severe*".[59]

46. Counsel further recall the terrible memories still vivid in the victims' mind about the loss of family members and the impossibility to bury them properly. Furthermore, the evidence presented in this case has demonstrated the traumatizing manner in which many of these murders took place and how many victims were even forced to participate in the murder of their families and other members of the community who had been forcibly abducted by the LRA.[60]

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[57] See the "Judgment", *supra* note 3, paras. 2748-2749.
[58] See the "Common Legal Representative of Victims' Closing Brief", *supra* note 56, paras. 87 to 91; and the "Corrected version of the "Victims' Closing Brief" filed on 24 February 2020, ICC-02/04-01/15-1721-Conf", *supra* note 56, paras. 420-428.
[59] See the "Bemba Decision on Sentence", *supra* note 13, paras. 29 to 32.
[60] See P-0252, No. ICC-02/04-01/15-T-87-CONF-ENG CT and No. ICC-02/04-01/15-T-87-Red2-ENG, pp. 67-68; P-0142 evidence; P-0274, UGA-OTP-0244-3375-R01, at 3381, para. 43; P-0275, UGA-OTP-0244-3398-R01, at 3402, para. 31. See also the Report of PCV-0003, "Expert Report on the Interplay of Acholi Culture with the Traumas meted out to the Acholi People of Uganda by the Lord's Resistance Army, LRA: the crimes, the harms suffered by the victims and the impacts of the crimes on the victims", UGA-PCV-0003-0046, p. 12.

47. In other cases, during the attacks on the IDP camps, civilians were killed or injured in the most painful ways. Many were shot, including people who were seeking shelter in huts, and children who were attempting to flee. Others were stabbed. Some were deliberately burned inside torched huts.[61]

Pillaging and destruction of property

48. Counsel refer to the findings of the Chamber regarding the extensive pillaging that occurred in Pajule,[62] Odek,[63] Lukodi[64] and Abok.[65] Such widespread pillaging covered literally anything that could be taken in the camps, from commercial and professional to private belongings and properties.

49. Counsel further refer to the findings of the Chamber with regard to the hundreds of civilian homes burnt during the attack on Lukodi[66] and Abok,[67] as well as the destructions underlined in Pajule;[68] and to the additional wholescale destruction of civilian goods, foodstuffs and cattle that had the result of depriving the victims of all their personal belongings.[69]

50. As mentioned in Counsel's respective Closing Briefs, these two crimes committed by Mr Ongwen and his subordinates have impacted victims to date, leaving them in a state of penury and forced to struggle to meet their needs on a daily basis, resulting in long-lasting material, economic, moral, psychological and physical impacts, as well on their families' and communities' structures.[70]

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[61] See the "Common Legal Representative of Victims' Closing Brief", *supra* note 56, *inter alia* paras. 50, 53, 73, 116, 117, 182, 204, 208 and 215; and the "Corrected version of the "Victims' Closing Brief" filed on 24 February 2020, ICC-02/04-01/15-1721-Conf", *supra* note 56, para. 334.
[62] See the "Judgment", *supra* note 3, paras. 2841 to 2843, 2853, 2866, 2871 and 2873.
[63] *Idem*, paras. 2897 to 2900, 2912 and 2926.
[64] *Idem*, paras. 2950 to 2953, 2972 and 2973.
[65] *Idem*, paras. 2996 to 2999, 3019 and 3020.
[66] *Idem*, paras. 1724, 1787, 1788, 2954 to 2957, 2970.
[67] *Idem*, paras. 1899, 1921 to 1925, 3000 to 3004, and 3017.
[68] *Idem*, para. 1260.
[69] *Idem*, paras. 1923-1924.
[70] See the "Common Legal Representative of Victims' Closing Brief", *supra* note 56, paras. 50, 213; and the "Corrected version of the "Victims' Closing Brief" filed on 24 February 2020, ICC-02/04-01/15-1721-Conf", *supra* note 56, paras. 429-474. See also the "Expert Report on the Interplay of Acholi Culture with

51. Such extended loss and damages not only robbed them of all their scarce resources, tools and living places, but also heavily impacted the future of their families. The already difficult economic situation in which the vast majority of the victims were living exponentially worsened; not only were they deprived of resources to live on a daily basis and a roof over their heads; but the brutality of the attacks and the loss they encountered resulted in profound fear and anxiety. Consequently, Counsel submit that the impact and consequences of the harm suffered as a result of the crimes of pillaging and destruction of which Mr Ongwen was found guilty should also be duly reflected in the assessment of the gravity when deciding on the appropriate sentence.

ii. The gravity of the culpable conduct, i.e. *the particular circumstances of the conduct constituting elements of the mode of liability*

52. Mr Ongwen's responsibility has been recognised under article 25(3)(a) of the Statute, depending on the crimes concerned, either as a *direct* perpetrator or as an *indirect* perpetrator.[71] In this regard, the Appeals Chamber held "*that the Statute differentiates between two principal forms of liability, namely liability as a perpetrator* [article 25(3)(a)] *and liability as an accessory* [article 25(3)(b) to (d)]. *In the view of the Appeals Chamber, this distinction is not merely terminological; making this distinction is important because, generally speaking and all other things being equal, a person who is found to commit a crime him - or herself bears more blameworthiness than a person who contributes to the crime of another person or persons*".[72]

53. Counsel, therefore, submit that the fact that Mr Ongwen was recognised guilty as a *perpetrator*, direct or indirect, emphasises the gravity of his criminal conduct. As a corollary, when acting as a direct perpetrator, Mr Ongwen not only personally carried

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the Traumas meted out to the Acholi People of Uganda by the Lord's Resistance Army, LRA: the crimes, the harms suffered by the victims and the impacts of the crimes on the victims", UGA-PCV-0003-0046, p. 10; the PCV-0002 Report, UGA-PCV-0002-0076, pp. 28-29 and his testimony (T-176, p. 26); P-0280 (T-84 and T-84-Red-ENG, p. 13, lines 7-24: about the lootings of his family belongings in Abok, the impacts on his family and the difficulties to start rebuilding).

[71] See the "Judgment", *supra* note 3, paras. 2780 to 2788.

[72] See the "Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction" (Appeals Chamber), No. ICC-01/04-01/06-3121-Red, paras. 456 to 473, and in particular para. 462 (we underline); see also the "Al Mahdi Judgment and Sentence", *supra* note 12, para. 58.

out the material elements of the crimes, but also had the requisite intent and knowledge pursuant to article 30 of the Statute.[73] When acting as an indirect perpetrator, Mr Ongwen not only controlled the person(s) who executed the material elements of the crime by subjugating his/her will to such a degree that the determination of that person(s) became irrelevant (denoting a greater degree of influence), but also was proven to have the requisite intent and knowledge pursuant to article 30 of the Statute.[74] When committing the crimes jointly with another person, Mr Ongwen not only had control over the crime by virtue of his essential contribution to it (agreement or common plan to commit the crimes) and the resulting power to frustrate its commissions (control over the person(s) who executed the material element by subjugating their will), but also was proven to have the requisite intent and knowledge pursuant to article 30 of the Statute.[75] This element further strengthens the gravity of the crimes because it indicates Mr Ongwen's authority and ability to influence others in committing the crimes.

54. Consequently, Counsel posit that the mode of liability recognised by the Chamber and under which Mr Ongwen was convicted constitutes a relevant factor to be taken into account in the assessment of the gravity.

iii. The factors under rule 145(1)(c) relating to the elements of the offence and mode(s) of liability

The extent of the damages caused

55. Considering the limited number of pages, Counsel recall in full their submissions at trial about the extent of the damages caused by the crimes and especially the evidence they presented.[76]

[73] See the "Judgment", *supra* note 3, paras. 205-211, 395 ff, 1294, 2009 ff, 2666-2667 and pp. 1042 to 1054.
[74] *Idem*, paras. 212-221, 1296, 2094 ff, 2850 ff, 2909 ff, 2962 ff, 3009 ff, 3088 ff, 3105 ff and pp. 1054 to 1063.
[75] *Idem*, paras. 2850 ff, 2909 ff, 3088 ff, 3105 ff.
[76] See, *inter alia,* the "Common Legal Representative of Victims' Closing Brief", *supra* note 56, paras. 201 ff; and the "Corrected version of the "Victims' Closing Brief" filed on 24 February 2020, ICC-02/04-01/15-1721-Conf", *supra* note 56, Section 8.

56. As underlined by the Chamber in the Judgment, the extent of the harm suffered by victims living in the four IDP camps attacked by Mr Ongwen and his soldiers and further abducted was tremendous. Not only did people lose their lives[77] or were gravely injured,[78] but they also lost their scarce resources to stay alive and support their families. Indeed, as also noted *supra*, the victims' houses were either burnt or destroyed[79] and the belongings of the victims were systematically either destroyed or pillaged.[80] From the appalling situation in which the victims found themselves by living in the IDP camps, they were suddenly propelled to a deeper level of poverty and dispossession as a result of Mr Ongwen's actions.[81]

57. Additionally, the extent of the damage caused by the crimes committed by Mr Ongwen is also notable both physically and psychologically for victims.[82]

58. Finally, the extent of the damages caused by the crimes went beyond each and every victim to reach entire communities in Northern Uganda, unsettling traditions, ways of life and family cohesion.[83] Traditional rituals could not be fulfilled in many cases. For instance, many victims have informed Counsel of the difficulties they face in being unable to carry out the proper burial rituals for their loved ones. This prevents them from going through the normal processes of mourning and healing.[84]

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[77] See the "Judgment", *supra* note 3, paras. 150, 152, 197, 1289-1300, 1308-1325, 1926-1962.
[78] *Idem*, paras. 182, 186-187, 201, 1725-1779, 1796-1818.
[79] *Idem*, paras. 186, 1785-1795, 1915 ("*It is clear from the evidence that the scale of the damage to homes in Abok was enormous*.")
[80] *Idem*, paras. 150, 161, 165, 185, 186, 196, 1289-1300, 1393-1408, 1458-1470, 1780-1795, 1910-1925.
[81] See the assessment of gravity in the *Bemba* case, in relation to the large scale and the grave consequences for the victims of the crime of pillage which: "*were far-reaching, impacting various aspects of their personal and professional lives, often leaving victims with nothing*", "*leaving them without basic necessities*". See the "Bemba Decision on Sentence", *supra* note 13, paras. 49 to 57.
[82] See the "Judgment", *supra* note 3, *inter alia,* paras. 1758, 1760, 1777, 2091, 2093, 2749, 2750. See *inter alia* the "Common Legal Representative of Victims' Closing Brief", *supra* note 56, paras. 201 ff; and the "Corrected version of the "Victims' Closing Brief" filed on 24 February 2020, ICC-02/04-01/15-1721-Conf", *supra* note 56, paras. 429-474.
[83] See the "Judgment", *supra* note 3, *inter alia* paras. 602, 2040.
[84] *Idem, inter alia* paras. 484; 1750, 1752 and 1753 citing to the testimonies of P-0187 and P-0024; and paras. 1832 and 1836.

The harms caused to the Victims and their families

59. Counsel recall their submissions on the extent of the victimisation and note that this category of factors is subsumed in their arguments regarding the particular circumstances of the acts constituting the elements of the offences[85] and of the extent of the harm caused,[86] as developed *supra*, as well as their submissions attached to the aggravating circumstances identified, as developed *infra*.[87]

The nature of the unlawful behaviour and the means employed to execute the crime and/or the circumstances of manner, time and location

60. Recalling the findings of the Chamber about the *modus operandi* of the attacks,[88] Counsel submit that this factor should also be taken into account in order to assess the gravity. In particular, they refer to the extreme violence of the attacks not only characterised by the acts committed by Mr Ongwen and his soldiers, but also illustrated by the weapons used by the latter against the civilian population, including SPG-9, AK-47s, a 12.7 mm anti-aircraft gun, RPGs, a PKM machine gun, pangas/machetes and knives, a mortar and a B-10 gun.[89] As recognised by Trial Chamber II, "[t]*hese particularly cruel acts caused extreme physical suffering to those who were subjected to them before being killed and to those who somehow survived the injuries inflicted. The use of machetes caused serious and persistent trauma both to the survivors who had to have a limb amputated and to people who witnessed the suffering of their relatives*".[90]

61. Furthermore, the acts of murders were committed in multiple locations, over an extended period of time, inside the victims' homes (but also once abducted, tortured, enslaved - including sexual violence), and in the presence of others, including

[85] See *supra*, paras. 34 to 51.
[86] See *supra*, paras. 55 to 58.
[87] See *infra*, paras. 68 to 82.
[88] See the "Judgment", *supra* note 3, paras. 526, 1111, 1219, 1222, 1471, 1588, 1762, 1987, and pp. 52 to 71 and pp. 318 to 867.
[89] *Idem*, paras. 147 and 2824 regarding the Pajule IDP Camp attack; paras. 163 and 2876 regarding the Odek IDP Camp attack; paras. 182 ff and 2929 for the attack on Lukodi IDP Camps; and paras. 194 ff and 2975 for the attack on Abok IDP Camp.
[90] See the "Katanga Sentencing Decision", *supra* note 2, para. 49.

family members, and were preceded by acts of pillaging and other acts of violence and abuse during the same series of events and against the same direct and indirect victims. In light of these circumstances of time, manner, and location, the nature of the unlawful behaviour, the means employed to execute the crimes, and the extent of the damage caused, the Chamber should find that the crimes were of serious gravity.[91]

The nature and degree of participation of the convicted person in the commission of the crime and his or her degree of intent

62. Counsel refer to their submissions *supra*.[92] Additionally, they underline that the Chamber's findings in relation to the sexual and gender based crimes directly committed by Mr Ongwen are of particular relevance to the gravity[93] and should be taken into account in its related assessment. Finally, they contend that his rank in the LRA as Commander of the Sinia brigade and the fact that he was part of the Control Altar are also factors to be taken into account when assessing the gravity, notably because said position allowed him to share the purpose of the LRA and fully contribute to it by executing and ordering the commission of the crimes.

Any other relevant factors the Chamber deem relevant

63. The other additional factors identified by Counsel will be examined as aggravating circumstances *infra*.

3. Aggravating circumstances

64. Rule 145(2)(b) of the Rules provides a not exhaustive list of circumstances that could be considered as aggravating :[94]

> "*In addition to the factors mentioned above, the Court shall take into account, as appropriate:* […]
> (i) *Any relevant prior criminal convictions for crimes under the jurisdiction of the Court or of a similar nature;*

[91] See the "Bemba Decision on Sentence", *supra* note 13, para. 32.
[92] See *supra*, paras. 52 to 54.
[93] See the "Judgment", *supra* note 3, pp. 66 to 69 and pp. 738 to 772.
[94] See Rule 145(2)(b) of the Rules.

(ii) Abuse of power or official capacity;
(iii) Commission of the crime where the victim is particularly defenceless;
(iv) Commission of the crime with particular cruelty or where there were multiple victims;
(v) Commission of the crime for any motive involving discrimination on any of the grounds referred to in article 21, paragraph 3;
(vi) Other circumstances which, although not enumerated above, by virtue of their nature are similar to those mentioned".

65. The lists of aggravating factors established by other international tribunals may also be of relevance, in as much as said factors fulfil the criteria established by the Court. For instance, the Appeals Chamber of the Special Court for the Sierra Leone indicated:

> "*(i) the position of the accused, that is, his position of leadership, his level in the command structure, or his role in the broader context of the conflict [...];*
> *(ii) the discriminatory intent or the discriminatory state of mind for crimes for which such a state of mind is not an element or ingredient of the crime;*
> *(iii) the length of time during which the crime continued;*
> *(iv) active and direct criminal participation, if linked to a high-rank position of command, the accused's role as fellow perpetrator, and the active participation of a superior in the criminal acts of subordinates;*
> *(v) the informed, willing or enthusiastic participation in crime;*
> *(vi) premeditation and motive;*
> *(vii) the sexual, violent, and humiliating nature of the acts and the vulnerability of the victims;*
> *(viii) the status of the victims, their youthful age and number, and the effect of the crimes on them;*
> *(ix) the character of the accused; and*
> *(x) the circumstances of the offences generally*".[95]

66. The Supreme Court Chamber of the Extraordinary Chambers in the Courts of Cambodia also cited the "*shocking and heinous character of the offences*", which were perpetrated against at least 12,273 victims over a prolonged period.[96]

[95] See the "Taylor Judgment", *supra* note 17, para. 677, ft. 1975 (we underline).
[96] See ECCC, *KAING Guek Eav alias Duch*, Appeal Judgement, Supreme Court Chamber, Case File No. 001/18-07-2007-ECCC/SC, 3 February 2012, para. 361, referring to the Trial Judgment (the "Duch Appeal Judgement").

67. In turn, the jurisprudence of the Court has identified as criteria to determine whether a factor can be considered as an aggravating circumstance: (i) its necessary relation to the crimes on which the conviction is based or to the convicted person; and (ii) the existence of a sufficient proximate link with the crimes that form the basis of the conviction. In limited circumstances and following the same link, criminal conduct that occurred after the offences on which the conviction is based could also be considered as aggravating circumstance;[97] and in any case, the Chamber must be convinced of the existence of any such factor beyond reasonable doubt.[98] The Appeals Chamber further specified that, although "*considerations of procedural fairness and the rights of the defence require that the convicted person be sufficiently put on notice of the facts that are taken into account to aggravate the sentence*", a convicted person must expect that any facts established in the decision on conviction may be taken into account by the trial chamber in sentencing, together with any facts mentioned in the parties and participants submissions on sentencing.[99]

a) The aggravating circumstances in the Ongwen case

68. Pursuant to rule 145 of the Rules, Counsel request that the Chamber take into account the following aggravating circumstances: (i) the extreme cruelty and brutality in the commission of the crimes; (ii) the particular defencelessness of the victims; (iii) the high number of victims; and (iv) the abuse of power by and/or the official capacity of Mr Ongwen in the commission of the crimes.[100] At this juncture, Counsel underline

[97] See the "Bemba et al. Decision on Sentence", *supra* note 23, para. 114.
[98] See the "Bosco Sentencing Judgment", *supra* note 12, para. 17. See also the "Katanga Sentencing Decision", *supra* note 2, para. 34, referring to the conclusions of Trial Chamber I in *Lubanga*, and endorsed by the Appeals Chamber. See the "Lubanga Appeal Judgment on Sentencing", *supra* note 12, paras. 88 to 93.
[99] See the "Bemba et al. Decision on Sentence", *supra* note 23, para. 116.
[100] Regarding cases where the particular cruelty or zeal in the commission of the crimes by the convicted person led to sentence of life imprisonment, see the "Duch Appeal Judgement", *supra* note 96, paras. 375 to 383; in particular ft 801 referring to the corresponding jurisprudence of the ICTY and International Criminal Tribunal for Rwanda (the "ICTR,") i.e. *Lukic and Lukic Trial Judgement*, paras. 1060-1069 (considering the convicted person's particular cruelty in savagely beating prisoners, burning victims alive and in one instance laughing as he shot a woman twice); *Bagosora Trial Judgement and Sentence*, paras. 2265-2267 (considering the convicted person's particular brutality in cutting off limbs and mutilating sexual organs of his victims); *Kayishema and Ruzindana Appeal Judgement*, para. 361

that elements presented *supra* under the gravity factor in relation to the extent of the victimisation in this case and its far-reaching consequences on the lives of the victims, their families and their communities could also be addressed as aggravating circumstances.

i. The extreme cruelty and brutality in the commission of the crimes

69. Counsel refer to the findings of the Chamber underlining the extreme cruelty and brutality in which the crimes were committed by Mr Ongwen and his soldiers. Regarding the crimes of murder and attempted murder, victims were not only shot but also burned alive or beaten to death, both during the attacks[101] and once abducted in the LRA ranks.[102] Mr Ongwen and his soldiers targeted their victims regardless of the age, gender or social status,[103] and equally killed babies, young children, adults,

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(considering the convicted person's zeal in committing his crimes and the degree of harm caused, especially the irreparable damage of mutilation); *Nchamihigo Trial Judgement and Sentence*, para. 391 (considering the convicted person's particular cruelty in looting a house as its victims burned, as well as his zeal displayed in travelling large distances to numerous locations to intervene in killings); *Muhimana Trial Judgement and Sentence*, para. 612 (considering the particular heinous nature of the convicted person's crimes including one instance of mutilating a pregnant woman); ft 805 referring to the corresponding additional jurisprudence, i.e. *Akayesu Appeal Judgement* (sentencing the convicted person to life imprisonment for the totality of his criminal conduct, including charges of genocide, crimes against humanity, incitement to commit genocide, torture, rape, and the murder of at least 2,000 Tutsis in the town where he served as bourgmestre); *Karera Appeal Judgement*, paras, 393 and 398 (sentencing the convicted person to life imprisonment for the crimes of genocide, extermination, and murder as crimes against humanity, including an attack at a church which killed hundreds of Tutsi refugees); *Kayishema and Ruzindana Appeal Judgement*, paras. 299, 371 and 372 (sentencing one of the two convicted persons to life imprisonment for contributing to four massacres that resulted in thousands of deaths); *Bagosora Trial Judgement and Sentence*, paras. 41 and 2259 (sentencing three of the four convicted persons to life imprisonment for crimes of genocide, crimes against humanity and war crimes, including killings of thousands of Tutsi civilians); *Renzaho Appeal Judgement*, paras. 621 and 622 (sentencing the convicted person to life imprisonment for genocide, murder, including ordering the killing of hundreds of Tutsi refugees, as well as crimes against humanity); and ft 805 referring to the corresponding additional jurisprudence, i.e. *Gacumbitsi v. Prosecutor*, ICTR-2001-64-A, "Judgement", Appeals Chamber, 7 July 2006, paras. 204 and 206 (in sentencing the convicted person to life imprisonment for crimes which included an attack where thousands of people were killed, attaching weight to his *"central role in planning, instigating, ordering, committing, and aiding and abetting"* the crimes committed*); Prosecutor v. Kajelijeli*, ICTR-98-44A-A, "Judgement", Appeals Chamber, 23 May 2005, para. 324 (sentencing the convicted person to life imprisonment based on the gravity of the crimes, though ultimately reducing the sentence to 45 years as a remedy for violating the convicted person's fundamental rights during his unlawful pre-trial detention).

[101] See the "Judgement", *supra* note 3, paras. 197, 2977 and 2981 (Abok); 182 and 2931 (Lukodi).

[102] *Idem*, paras. 188 and 7545 (after the Lukodi attack).

[103] See the "Bemba Decision on Sentence", *supra* note 13, paras. 44, 47 and 57.

elderly and handicapped or ill people.[104] Regarding the crime of enslavement, the abductees were under constant threat of beating and death;[105] and the acts of torture committed on child-soldiers and other abductees were of unspeakable brutality.[106]

70. In its findings the Chamber refers notably to the testimony of P-0301, who saw "*bodies hacked in a barbaric way*", the bodies of "*old persons that could not run away*" and the body of a girl as young as three, when arriving at the Lukodi IDP Camp the morning after the attack.[107] "*Civilians, including children, were thrown into burning houses*".[108] "*Some abductees were carrying their babies when the LRA took them. Mothers were forced to abandon their children in the bush. LRA fighters threw small children, including babies, into the bush because the children were crying and making it difficult for their mothers to carry looted goods*".[109]

71. During the attack on the Abok IDP Camp, "[o]*ne of Dominic Ongwen's subordinate commanders intruded into a house with over 10 inhabitants, forced several to carry looted goods and then closed the door and set fire to the house with the remaining inhabitants inside*".[110] […] "*LRA fighters beat abductees as a means of punishment for not being able to continue walking and to intimidate other abductees to continue without stopping or resisting. In the course of the retreat, LRA fighters forced an abductee to kill another abductee with a club, as a lesson to others who were thinking of escaping*".[111]

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[104] See the "Judgement", *supra* note 3, notably paras. 187, 202 ("*The LRA attempted to kill abductee Gwentorina Akite, an elderly woman. They had abducted her from the camp and forced her to carry heavy loads, including at one point two goats. When she could no longer bear the weight, an LRA fighter beat and strangled her and cut her with a machete. LRA fighters passing her on the road hit her. She was left for dead but managed to crawl back home to the camp*"), 1513, 1516, 1521 ("*P'Oyoo Lakoch testified that an elderly couple was shot dead inside their home*"), 1567, 1579, 1767 ("*P-0187 testified that the LRA burnt 'Georgina' Angom. P-0187 testified that Georgina Angom was an elderly sickly woman who could not run*."), 1773, 1821, 1827 ("*P-0187 also testified that the LRA fighters would just pick up the babies and throw them away because the babies were crying and the LRA were concerned that the babies would be heard and they would be followed*"), 1954, 1955, 1990, 2938.

[105] *Idem*, notably paras. 2711 ff, 2839.

[106] *Idem*, paras. 321, 2840, 2896, 2949, 2995, 3053, 3083.

[107] *Idem*, para. 1751.

[108] *Idem*, para. 184.

[109] *Idem*, paras. 187, 1819-1830.

[110] *Idem*, paras. 197, 1926-1962.

[111] *Idem*, paras. 201, 1972-1993.

72. During the attack on the Odek IDP Camp, "*a female LRA attacker raped* […], *a civilian resident of the camp, with a comb and a stick used for cooking, while the victim's husband was forced to watch. The rape was committed with such force that* […] *started to bleed*".[112] "*Under orders to shoot civilians in the chest and head to ensure that they died, LRA fighters fired their weapons at civilians during the attack. At least 52 civilians died as a result of the injuries sustained in the camp or in the course of the retreat, while at least ten were the victims of attempted killings. Many civilians were shot as they ran away from the LRA. Among the victims were elderly civilians, children, a pregnant woman as well as women carrying babies tied to their back. The bodies of the dead were scattered everywhere across the camp. LRA also fighters set at least one hut on fire with civilians inside*".[113] […] "*One deceased was beaten so badly that his brain was exposed. LRA fighters killed a young abductee because his feet were too swollen and he was unable to walk any further*".[114]

73. Concerning sexual and gender based crimes directly and indirectly perpetrated by Mr Ongwen, Counsel cite but two highly illustrative examples of extreme cruelty and brutality amongst all the Chamber's findings:

> *"On 1 July 2002, Dominic Ongwen forced P-0226 to beat to death a captured UPDF soldier near Patongo, Northern Uganda. P-0226 hit him once, as did other girls. She had blood splattered on her clothes. P-0226 had never killed anyone before, and this was part of the reason given by Dominic Ongwen on why he selected her to do this. This experience caused her severe anguish.*"[115] […] "*In late 2002 or early 2003 in Northern Uganda, soon after P-0235's abduction, Dominic Ongwen ordered her to, along with other abductees, beat people to death until their blood splashed on the abductees. Although she eventually did not have to carry out the killings, this experience caused her severe anguish*".[116]
>
> *"While in Sudan during 2001, Dominic Ongwen asked P-0226 – his ting ting at that time – to bring him some water in his bedroom. When she brought it, Dominic Ongwen grabbed P-0226's arm and said he did not want the water. He said he wanted to have sex with her. P-0226 dropped the water, which then fell onto the bed as she ran outside. P-0226 said she felt disgusted because 'every time I saw the ladies or girls coming out of his house, they were always crying. So I was frightened and I was – I was scared'.*

[112] *Idem*, paras. 166, 1471-1472.
[113] *Idem*, paras. 167, 1473-1550.
[114] *Idem*, paras. 172-174, 1594-1608.
[115] *Idem*, paras. 209, 2083-2084.
[116] *Idem*, paras. 210 and 2085 (we underline).

Dominic Ongwen then called his escorts to get sticks and beat her. The escorts beat P-0226 with bamboo sticks as she was on the ground of Dominic Ongwen's residence as Dominic Ongwen watched. He then ordered the escorts to stop, but in the week that followed P-0226 was beaten other times for continuing to refuse to have sex with Dominic Ongwen. Her hands and buttocks became swollen and she could not sit properly – the beatings still cause P-0226 chest problems as of her 2015 testimony. After this week, P-0226 could not take the beatings anymore and yielded to Dominic Ongwen. She came to his house and was asked to undress. P-0226 refused, at which point Dominic Ongwen ripped off her clothes. Dominic Ongwen then lifted P-0226 onto his bed, spread open her legs and put his penis into her vagina. Dominic Ongwen told her if she cried he would kill her. P-0226 stopped herself from crying by putting her hand over her mouth. Afterwards, Dominic Ongwen told P-0226 to go back to the house where she was sleeping. P-0226 could not get up. When she came back, one of the women asked her why she was crying and she did not respond. P-0226 bled a lot and had to rest for a week following this incident. She was around 10 years old".[117]

ii. The particular defencelessness of the victims

74. Counsel highlight the very young age of many of the victims of the crimes for which Mr Ongwen has been convicted and submit that this factor represents in itself a distinct element of defencelessness not yet taken into consideration under the specific nature of the sexual and gender based crimes and the crimes concerning child-soldiers as illustrated *supra*. Moreover, the fact that all the victims were unarmed and in many occasions, not only in the bush but also during the attacks, unprotected is another feature illustrative of their defencelessness;[118] the fact that in many instances, one or two single victims were attacked by several of Mr Ongwen's soldiers together, or by Mr Ongwen directly but in the heavily armed presence of some of his soldiers is another. Similar circumstances were assessed by Trial Chamber III as aggravating circumstance under rule 145(2)(b)(iii).[119]

75. In addition, with particular regard to the sexual and gender based crimes and to the conscription and use of children in hostilities, Counsel refer to the following

[117] *Idem*, paras. 2051 to 2054 (we underline).
[118] *Idem*, *inter alia* para. 181 (in relation to the attack on the Lukodi camp).
[119] See the "Bemba Decision on Sentence", *supra* note 13, paras. 41 to 43. Counsel note that Trial Chamber III concentrated its assessment on the crime of rape and underline that the defencelessness of victims in the case of Mr Ongwen equally applies to all the other crimes of which the latter was recognised guilty.

findings by the Chamber (as additional and separate factors distinct from the one relating to the young age of the victims):

> **Sexual and gender based violence directly perpetrated by Dominic Ongwen** [S]*even women 'distributed' to Dominic Ongwen were not allowed to leave. Dominic Ongwen placed them under heavy guard. They were told or came to understand that if they tried to escape they would be killed.*[120] *P-0099, P-0101, P-0214, P-0226 and P-0227 were considered Dominic Ongwen's so-called 'wives' and had to maintain an exclusive conjugal relationship with him. Being Dominic Ongwen's so-called 'wife' did not cease until they escaped or were released from the LRA.*[121] […] *The seven women were subjected to beating at Dominic Ongwen's command at any time. They were hit with canes and sticks. Some beatings knocked them unconscious, left them unable to walk and left permanent scars*".[122]
>
> **Sexual and gender based violence not directly perpetrated by Dominic Ongwen** […] Younger abducted girls were used as household servants, referred to as *ting tings*, until they were considered mature enough to become so-called 'wives'.[123]
>
> **Conscription and use of children in armed hostilities**
> *Dominic Ongwen, Joseph Kony and the Sinia brigade leadership ordered Sinia soldiers to abduct children to serve as Sinia soldiers. Sinia soldiers, in execution of orders of Joseph Kony, Dominic Ongwen and the Sinia brigade leadership, abducted a large number of children under 15 years of age in Northern Uganda between 1 July 2002 and 31 December 2005. Children under the age of 15 were also abducted during the four attacks relevant to the charges. Dominic Ongwen also abducted children himself.*[124]
> *Children under 15 years of age serving as soldiers in Sinia brigade took part in fighting. They further facilitated LRA attacks by raising alarms, burning and pillaging civilian houses, collecting and carrying pillaged goods from attack sites and serving as scouts. During all four attacks relevant to the charges, children under the age of 15 participated in the hostilities".*[125]

iii. The high number of victims

76. Victims of the crimes committed by Mr Ongwen and his soldiers are extremely numerous, and counts reach several thousands of individuals and families harmed

[120] See the "Judgement", *supra* note 3, paras. 2011 to 2033.
[121] *Idem*, paras. 206, 2034-2040.
[122] *Idem*, paras. 208, 2071-2081.
[123] *Idem*, paras. 2248-2255.
[124] *Idem*, paras. 223, 2329-2365.
[125] *Idem*, paras. 225, 2415-2447.

directly by the crimes Mr Ongwen committed. They were targeted and affected during the attacks (through murder, attempted murder, torture, enslavement, outrages upon personal dignity, pillaging, destruction of property and persecution).[126] Likewise, the high number of victims of sexual and gender based crimes[127] and of the crime of conscripting children under the age of 15 into the Sinia brigade and using them to participate actively in hostilities is particularly notable.[128]

77. Incidentally, Counsel note in this regard that the number of victims participating in this proceedings is merely indicative of the extent of the victimisation suffered by people in Northern Uganda as a result of the crimes for which Mr Ongwen was convicted. Indeed, a large number of victims were unable to apply to participate in the proceedings as per the deadline set by the Chamber to file victim application forms.

78. Counsel refer to the jurisprudence of international courts and tribunals considering the high number of victims as an aggravating circumstance, and consequently submit that the high number of victims of the crimes of Mr Ongwen should be considered as an aggravating factor by the Chamber in its assessment of the appropriate sentence.[129]

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[126] *Idem*, paras. 153, 190, 1160, 1174, 1325, 1355: "*Estimates of the number of persons abducted by the LRA attackers from Pajule IDP camp on 10 October 2003 range from 100 to 1,210*"; paras. 1550, 1558, 1644, 1777, 1799, 1830, 1858, 1916, 1960, 1999, 2084, 2141, 2352, 2798, 2805 ("*The Chamber found that Dominic Ongwen knew that throughout the period of charges, in Northern Uganda, the LRA killed and injured a large number of civilians in numerous attacks on individual civilians, IDP camps and other civilian locations, and that it abducted and enslaved, and used as sexual slaves and so-called 'wives', and as domestic servants, a large number of civilians*"); and paras. 2829, 2839.

[127] *Idem*, paras. 427 2108, 2154, 2591, 2803, 2804.

[128] *Idem*, paras. 223, 2340 ff, 2412, 3102 ("*The Chamber found that Sinia soldiers, in execution of orders of Joseph Kony, Dominic Ongwen and the Sinia brigade leadership, abducted a large number of children under 15 years of age in Northern Uganda between 1 July 2002 and 31 December 2005*"); and para. 3070 ("*At any time during this period, there were over one hundred abducted women and girls in Sinia brigade*").

[129] See ICTR, *The Prosecutor v.* NDAHIMANA Grégoire, Case No. ICTR-01-68-A, Appeal Judgement, 16 December 2013, para. 231; ICTR, *The Prosecutor v. Rugambarara*, Case No. ICTR-00-59-T, Sentencing Judgement, 16 November 2007, paras. 21 to 24.

iv. The abuse of power by and/or official capacity of Mr Ongwen

79. Counsel refer to the following findings of the Chamber:

> ***Dominic Ongwen's position within the LRA***
> "*At the beginning of the period relevant for the charges, on 1 July 2002, Dominic Ongwen was battalion commander, in charge of the Oka battalion of Sinia brigade. Dominic Ongwen was promoted to the rank of major on 1 July 2002.*[130] […] *In October or November 2002 Dominic Ongwen was injured and placed in sickbay until around mid-2003. From at least December 2002 onwards, he again exercised his authority as battalion commander. In April 2003, Dominic Ongwen was briefly arrested by Vincent Otti. The arrest did not interrupt the exercise of his authority for any significant period.*[131] […] *On 17 September 2003, Joseph Kony appointed Dominic Ongwen as second-in command of the Sinia brigade. On 15 November 2003, Joseph Kony promoted Dominic Ongwen to the rank of lieutenant colonel.*[132] […] *On 4 March 2004, Joseph Kony officially appointed Dominic Ongwen as brigade commander of Sinia brigade.*[133] […] *Dominic Ongwen remained Sinia commander until 31 December 2005, and further. On 30 May 2004, Joseph Kony promoted him to the rank of colonel, and sometime in late 2004 to the rank of brigadier*".[134]
>
> ***Dominic Ongwen's status in the LRA hierarchy and the applicability of LRA disciplinary regime to him***
> "*Dominic Ongwen's situation in the LRA was not analogous to that of any low-level member or recent abductee. Those persons were, as the evidence demonstrates, frequently placed in situations where they had to perform certain actions under threat of imminent death or physical punishment. Dominic Ongwen was also personally the source of such threats, including the specific instance in which he explicitly threatened P-0226 and a number of other girls with death in order to make them beat a captured government soldier to death*".[135]
>
> ***Dominic Ongwen's personal loyalty to Joseph Kony and his career advancement***
> "[The evidence shows that*] shows both that Dominic Ongwen's performance was highly valued by Joseph Kony* [who] *praised Dominic Ongwen for having 'good plans' shortly before the attack on Pajule IDP camp, and eventually appointed Dominic Ongwen as Sinia brigade commander on 5 March 2004.*[136] […] *The Chamber also makes reference to the radio communication after the attack on Odek IDP camp, analysed above, wherein Joseph Kony specifically praised Dominic Ongwen's performance,*

[130] See the "Judgment", *supra* note 3, paras. 134, 1013-1016.
[131] *Idem*, paras. 135, 1017-1070.
[132] *Idem*, paras. 136, 1071-1074.
[133] *Idem*, paras. 137, 1075-1077.
[134] *Idem*, paras. 138, 1078-1083.
[135] *Idem*, para. 2591.
[136] *Idem*, para. 2660.

> *stating, inter alia, 'This guy has pleased me very much'*.[137] […] [A]*fter the attack on Lukodi IDP camp, in particular to the fact that the intercept evidence reveals that Dominic Ongwen's report was met with approval*.[138] […] [E]*vidence demonstrates a clear link between Dominic Ongwen's actions on the ground, including the commission of charged crimes, and the praise received from Joseph Kony. There is also a temporal overlap with some of the promotions conferred on Dominic Ongwen by Joseph Kony*.[139] […] [Evidence demonstrates that Dominic Ongwen being] *a commander in control of his unit, directing its organisation and its actions according to his own planning. Whereas some of Dominic Ongwen's conduct in relation to the crimes was undertaken directly upon orders originating from Joseph Kony, much of his relevant conduct resulted instead from his own initiative. This is the case entirely with the attacks on Lukodi and Abok IDP camps, which were conceived and set in motion by Dominic Ongwen completely independently"*.[140]

80. In light of Mr Ongwen's actions, decisions, roles, influences, control of and example given to his soldiers while being in a clear position of authority and of his concordant appalling behaviours towards them and towards his victims, Counsel submit that Mr Ongwen's abuse of authority should be taken into consideration as an aggravating circumstance for sentencing.

81. In this regard, the Appeals Chamber endorsed the approach laid down by the ICTY and ICTR when determining that "[a] *high rank in the military or political field does not, in itself, merit a harsher sentence. But a person who abuses or wrongly exercises power deserves a harsher sentence. Consequently, what matters is not the position of authority taken alone, <u>but that position coupled with the manner in which the authority is exercised</u>*".[141]

82. Finally, Counsel further submit that the outstanding aggravating circumstances identified *supra* are proven beyond any reasonable doubt based on the evidence assessed at trial and argue that the exceptional magnitude of the crimes of which Mr Ongwen was recognised guilty neutralise any limited impact that the Defence is

[137] *Idem*, para. 2661.
[138] *Idem*, para. 2662.
[139] *Idem*, para. 2664.
[140] *Idem*, para. 2665.
[141] See the "Lubanga Appeal Judgment on Sentencing", *supra* note 12, para. 82 (we underline).

portraying as mitigating factors. As a consequence, Counsel posit that these elements strongly militate for a sentence of life imprisonment.[142]

4. Inapplicability of mitigating circumstances in the case of Mr Ongwen

83. *As per* the jurisprudence of the Court, the Chamber has a considerable degree of discretion in assessing factors that could constitute a mitigating circumstance in accordance with rule 145(2)(a) of the Rules, and in deciding how much weight, if any, has to be accorded to any of them.[143] Such assessment is made on a balance of probabilities (the Defence ought to establish the existence of such a circumstance),[144] and the following criteria apply to the factor under consideration: (i) it must relate directly to the convicted person; (ii) it needs not directly relate to the crimes that the person is convicted of;[145] and (ii) it is not limited by the scope of the Chamber's findings in the Judgment.[146]

84. Counsel submit that no pertinent mitigating circumstances apply in the case of Mr Ongwen. Indeed, while recognising that the mere existence of mitigating circumstances by no means does lessen the gravity of the offences,[147] in light of the very circumstances of this case and of factors relating to the convicted person, none of the mitigating circumstances contemplated by the Defence can be considered as established, and therefore none of them would warrant any reduction of the length of the sentence that would be appropriate on the basis of the gravity of the crimes for which Mr Ongwen was convicted.[148]

85. Pending the Defence submission on sentencing, Counsel have already been able to identify through various references in previous submissions and throughout trial

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[142] See the "Duch Appeal Judgement", *supra* note 96, para. 371.
[143] See the "Lubanga Appeal Judgment on Sentencing", *supra* note 12, paras. 43 and ft 73 and 111.
[144] See the "Katanga Sentencing Decision", *supra* note 2, para. 34.
[145] *Idem*, para. 32.
[146] See the "Bosco Sentencing Judgment", *supra* note 12, paras. 22 to 24.
[147] See the "Katanga Sentencing Decision", *supra* note 2, para. 77.
[148] See the "Bosco Sentencing Judgment", *supra* note 12, paras. 22 to 24.

some factors that the former appears to be considering as potential mitigating circumstances. Mainly, the fact that Mr Ongwen has been abducted into the LRA as a child, the rejected allegations relating to duress, the rejected allegations relating to mental illness, the fact that he voluntarily surrendered to the Court, his alleged expression of regret towards victims, and his family situation.

86. In the current submissions, Counsel are however not going to anticipate the arguments of the Defence and will limit themselves to laying down their considerations with regard the above mentioned elements, in light of the jurisprudence of the Court. Counsel reserve their right to further develop on these specific issues during the oral hearing on sentencing to be held on 14 and 15 April 2021.

87. In light of the evidence put forward at trial and of the findings in the Judgment, the position of the victims is that no mitigating circumstances exist in the case of Mr Ongwen.

88. Counsel do not intend to deny or at any point downplay the fact that Mr Ongwen was abducted into the LRA at an early age. However, they contend that the crimes for which Mr Ongwen was convicted correspond to acts he chose to commit as an adult, after rising through the ranks of the LRA and becoming commander of the Sinia Brigade as recognised by the Chamber.[149] While the strong traumatic impacts of

[149] See the "Judgment", *supra* note 3, paras. 2588 ff. In this regard, Counsel note that neither the Statute, nor the Rules, nor the provisions of any international criminal tribunal explicitly state that being a former child soldier is an exonerating or mitigating circumstance. Furthermore, there is no case law on this issue as most international criminal tribunals have not tried former child soldiers, nor have they dealt with defendants requesting to consider such circumstance as an exonerating or mitigating factor. Counsel further refer to the limited case-law somewhat related to this issue. See the "Decision on the confirmation of charges against Dominic Ongwen" (Pre-Trial Chamber II), No. ICC-02/04-01/15-422-Conf and No. ICC-02/04-01/15-422-Red, 23 March 2016, para. 150: "*The Defence has raised several times an argument that circumstances exist that exclude Dominic Ongwen's individual criminal responsibility for the crimes that he may otherwise have committed. One side of this argument is that Dominic Ongwen, who was abducted into the LRA in 1987 at a young age and made a child soldier, should benefit from the international legal protection as child soldier up to the moment of his leaving of the LRA in January 2015, almost 30 years after his abduction, and that such protection should include, as a matter of law, an exclusion of individual criminal responsibility for the crimes under the Statute that he may have committed. However, this argument is entirely without legal basis, and the Chamber will not entertain it further*". See also SCSL, *The Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Trial Chamber I, *Sentencing Judgement*, April 8, 2009,

being recruited as a child in the LRA have been largely demonstrated throughout trial,[150] the assessment of such trauma and its impacts on the agency of a child-soldier has to be done on a case by case basis. Concerning the convicted person, this assessment was carefully done at trial by the Chamber through experts' testimonies which demonstrated that Mr Ongwen was able to distinguish between right and wrong, was capable of controlling his conduct so that it conformed to the requirements of the law and was not devoid of agency.[151]

89. **Regarding duress and mental disability**, Counsel underline that not only the arguments put forward by the Defence to have these factors considered as full defences were fully rejected by the Chamber,[152] but also, *as per* the terms of the Rules, said factors were at no point considered to be circumstances falling short of constituting grounds for exclusion of criminal responsibility that could therefore amount to mitigating circumstances.[153] Contrary to what the Defence averts in relation to Mr Ongwen's mental development, agency and ability to distinguish right from wrong, based on

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Case No. SCSL-04-15-T-1251, paras. 220 and 250: "*The Chamber is of the opinion that Kallen's forced recruitment into the RUF cannot mitigate the crimes which Kallori later omitted, since in our opinion he could instead have chosen another path*".

[150] See the "Judgment", *supra* note 3, paras. 321, 437, 488, 600, 2472, 2749, 2750.

[151] *Idem*, paras. 2474, 2480, 2481 ("*Dr Abbo evaluated the moral development attained by Dominic Ongwen and concluded that he attained the highest level of moral development, the post conventional level. Dr Abbo's report explained that this level of moral development is 'characterized by the pursuance of impartial interests for each member in society as well as the establishing of self-chosen moral principles*"), 2485, 2490, 2602 ("*On the contrary, what results clearly from the above witness testimonies is that Dominic Ongwen was a self-confident commander who took his own decisions on the basis of what he thought right or wrong*"). See also Evidence No. UGA-D26-0015-0046-R01, 7 January 2017, p. 14 (confidential evidence). See also the "Common Legal Representative of Victims' Closing Brief", *supra* note 56, paras. 162 and 196-198; and the "Corrected version of the "Victims' Closing Brief" filed on 24 February 2020, ICC-02/04-01/15-1721-Conf", *supra* note 56, paras. 290-304.

[152] See the "Judgment", *supra* note 3, paras. 2581 to 2672, in particular 2668 ("*It transpires from the above that there is no basis in the evidence to hold that Dominic Ongwen was subjected to a threat of imminent death or imminent or continuing serious bodily harm to himself or another person at the time of his conduct underlying the charged crimes. In fact, based on the above, the Chamber finds that Dominic Ongwen was not in a situation of complete subordination vis-à-vis Joseph Kony, but frequently acted independently and even contested orders received from Joseph Kony*"); and paras. 2450 to 2580 ("*In line with the above, based on the expert evidence of Professor Mezey, Dr Abbo and Professor Weierstall-Pust, who did not identify any mental disease or disorder in Dominic Ongwen during the period of the charges, further based on the corroborating evidence heard during the trial, which is incompatible with any such mental disease or disorder, and noting that the evidence of Professor Ovuga and Dr Akena cannot be relied upon, the Chamber finds that Dominic Ongwen did not suffer from a mental disease or defect at the time of the conduct relevant under the charges*").

[153] *Ibid*.

experts evidence heard at trial, the Chamber found that he "*did not suffer from a mental disease or defect at the time of the conduct relevant to the charges*".[154] The Chamber further concluded that the findings in relation to Mr Ongwen's conduct relevant to the charges indicate "*a commander in control of his unit, directing its organisation and its actions according to his own planning*"[155] and that "*such actions were entirely incompatible with a commander in fear for his life or similar*"[156] and therefore militate against a finding of duress.

90. **Concerning the fact that Mr Ongwen voluntarily surrendered**, Counsel refer to the jurisprudence of the Court in the *Ntaganda* case, according to which:

> "*While mindful of the considerable benefits for international courts and tribunals of voluntary surrender, and noting that a suspect voluntarily surrendering him - or herself to the Court upon learning of the existence of an arrest warrant against him or her could be a factor to take into account for substantial mitigation, the Chamber must consider the particular circumstances of Mr Ntaganda's surrender in the present case.* […] *The Chamber considers that the delay associated with Mr Ntaganda's surrender* [5 years] *reduces the value of its mitigating impact, and accordingly affords this factor no weight in mitigation*".[157] Moreover, the Chamber notes that "*the motivations for Mr Ntaganda's voluntary surrender are not clear. It observes that the Single Judge of Pre-Trial Chamber II noted that the material before her suggested that the surrender may have been prompted by a risk to be killed or by other external pressures*".[158]

91. Mr Ongwen surrendered in January 2015, almost ten years after the warrant of arrest against him was issued.[159] Counsel also underline the Chamber's conclusion with reference to his refusal to surrender in September 2006 when he was given the opportunity;[160] and note that it is unclear what motivated Mr Ongwen to finally surrender in 2015.

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[154] *Idem*, para. 2580.
[155] *Idem*, para. 2665.
[156] *Ibid.*
[157] See the "Bosco Sentencing Judgment", *supra* note 12, paras. 227 and 228.
[158] *Idem*, para. 228, ft 627.
[159] See the "Warrant of Arrest for Dominic Ongwen" (Pre-Trial Chamber II), No. ICC-02/04-01/15-6, 8 July 2005; see also the "Report of the Registry on the voluntary surrender of Dominic Ongwen and his transfer to the Court", No. ICC-02/04-01/15-189 (with ten annexes), 22 January 2015 (reclassified as public on 7 July 2015).
[160] See the "Judgment", *supra* note 3, paras. 2636, and 2638 to 2641.

92. **Furthermore, regarding the expression of any remorse for victims**, only a sincere statement of remorse may amount to mitigating circumstance. As underlined by Trial Chamber II, "*whereas the expression of sympathy or genuine compassion for the victims may also be taken into account in the determination of the sentence, it cannot be considered commensurate to a statement of remorse under any circumstance, and must in the mind of the Chamber, be accorded less weight*".[161] In this regard, the video of Mr Ongwen questioned by the UPDF as put forward by the Defence as a possible expression of regret did not find any consensus as to the proper interpretation and significance to be given to the declaration.[162] Moreover, during the proceedings, Mr Ongwen made no statement that can be interpreted as an expression of deep and genuine remorse and rather showed that he found it very difficult to acknowledge the crimes committed and his responsibility in this regard.[163]

93. **Finally regarding his family situation**, the jurisprudence of the Court has clearly established that family circumstances are accorded little, if any weight, in sentencing, unless exceptional.[164] In this regard, Mr Ongwen's circumstances are common to many convicted persons and are not exceptional so as to constitute a mitigating circumstance. To the contrary, the fact that his marital situation stems out situations of forced marriages he enforced while in the bush and that his children were born out of rape of his forced wives while in the LRA would rather plead to the contrary, if at all.

94. In any case, Counsel underline that whether or not the Chamber would be minded to follow the Defence's arguments on the existence of possible mitigating circumstances, none of the above-mentioned factors should be accorded any weight.[165]

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[161] See the "Katanga Sentencing Decision", *supra* note 2, para. 117.
[162] See Testimony of Tim Allen, No. ICC-02/04-01/15-T-29-ENG ET WT, 17 January 2017, pp. 109-110.
[163] See the "Katanga Sentencing Decision", *supra* note 2, paras. 118 and 119.
[164] See the "Bemba Decision on Sentence", *supra* note 13, paras. 77 and 78 and ft. 243.
[165] See ICTR, *The Prosecutor v. Rugambarara*, Case No. ICTR-00-59-T, Sentencing Judgement, 16 November 2007, para. 57: "*Nonetheless, while Rugambarara's personal circumstances are relevant in the mitigation of the sentence, the Chamber is of the view that such factors cannot play a significant role in mitigating international crimes and therefore the weight to be accorded to them is limited*". See the "Katanga Sentencing Decision", *supra* note 2, para. 88: "*The Chamber therefore considers Germain Katanga's young age, the fact that*

95. Moreover, Counsel posit that life imprisonment as pleaded by the victims can stand in spite of any mitigating circumstances, where the gravity of the crimes so dictates, which, Counsel strongly suggest, is undoubtedly the case in the current instance.[166]

5. The individual circumstances of Mr Ongwen

96. Counsel submit that nothing in Mr Ongwen's individual circumstances appear to reduce the need for the high sentence herewith requested; to the contrary, in accordance with the terms of article 77(1)(b) of the Statute and rule 145(3) of the Rules, the extreme gravity of the crimes for which he was convicted warrants the sentence of life imprisonment.

97. *As per* the jurisprudence of the Court, individual circumstances which could be considered include those not directly related to the crimes for which Mr Ongwen was convicted or to his culpable conduct, notably his age, education, social and economic condition.[167] The Appeals Chamber ultimately underlined that whichever factors are taken into consideration under the label of individual circumstances, "*the issue is*

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he is now the father of six children, and his kindly and protective disposition towards the civilians in his community as relevant factors in mitigation which may be taken into account in sentencing. However, in this respect, they cannot play a determinant role considering the nature of the crimes of which he was convicted and which were committed against the majority Hema civilians of Bogoro. The Chamber therefore will accord them very limited weight" (we underline). See also ICTR, *Prosecutor v. Jean Kambanda*, Case No. ICTR-97-23-S, Trial Chamber, Judgement and Sentence, 4 September 1998, para. 36: "[t]*he principle must always remain that the reduction of the penalty stemming from the application of mitigating circumstances must not in any way diminish the gravity of the offence*".

[166] See the "Duch Appeal Judgement", *supra* note 96, paras. 372, ft 794 and 373: "*The Supreme Court Chamber therefore finds that the Trial Chamber attached undue weight to mitigating circumstances and insufficient weight to the gravity of the crimes and aggravating circumstances in this case. Consequently, the Trial Chamber imposed a sentence that does not reflect the gravity of the crimes committed. This failure of the Trial Chamber constitutes an error of law invalidating the sentence in the Trial Judgement pursuant to Internal Rule 104(1)(a) and is an abuse of the Trial Chamber's discretion*". See also ICTY, *Galic Appeal Judgement*, paras. 453-456 (finding that the Trial Chamber abused its discretion in imposing a sentence of only twenty years, despite the Trial Chamber's undisputed finding concerning the existence of a mitigating factor, on account of the level of gravity of the crimes committed and the convicted person's degree of participation, and ultimately sentencing the convicted person to life imprisonment).

[167] See the "Bemba et al. Decision on Sentence", *supra* note 23, para. 283 ; see also the "Bemba Decision on Sentence", *supra* note 13, paras. 68 ff; and the "Lubanga Appeal Judgment on Sentencing", *supra* note 12, para. 64.

whether the Trial Chamber considered all the relevant factors and made no error in the weighing and balancing exercise of these factors in arriving at the sentence".[168]

98. In this regard, Counsel do not consider that the age of Mr Ongwen (currently approximately 43 years old and approximately 24 to 27 years old during the period of the charges against him),[169] nor his education or social and economic condition warrant any specific weighing in the assessment made by the Chamber in relation to sentencing.

IV. VIEWS AND CONCERNS EXPRESSED BY THE VICTIMS

99. After the issuance of the Judgment, Counsel consulted with the victims they represent on the appropriate sentence to be imposed on Mr Ongwen. To this effect, Counsel undertook missions in the field to all the locations where victims live. This section summarises the views and concerns expressed by the victims during said consultation process.

100. The vast majority of the victims consulted have expressed the view that Mr Ongwen should be sentenced to life imprisonment. A minority expressed their wish for him to be sentenced to 30, 40 or 50 years of imprisonment. Some victims also wanted Mr Ongwen to be sentenced to death.[170] They justified their views by referring to the harm they suffered as a result of Mr Ongwen's actions and the long-lasting consequences of the crimes on them, their families and their communities. They have

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[168] See the "Lubanga Appeal Judgment on Sentencing, *idem*, para. 66.

[169] See the "Judgment", *supra* note 3, para. 30: "*the Chamber concludes that Dominic Ongwen was born in or around 1978*".

[170] a/05702/15 represented by the LRV stated: "*If Ongwen was my son and he committed those crimes, they are not mine. And he did that to everyone. He killed my nephew who was helping me. I am more of an orphan than the children whose parents were killed. He should die for his crimes. He is a killer and he spilled blood. He should pay with his flesh. He should be killed. Even if he were my son, I would maintain that he should be killed. If death penalty isn't an option the he should get life imprisonment which similar to death*". a/00001/16 represented by the LRV said: "[E]*ven if he were my son, I would recommend that he should be killed after everything he has done like rape. If death penalty isn't an option then he should get life imprisonment*". a/01515/16, a/30001/13, a/01604/16, a/01949/16, a/01998/16 and a/01932/16 represented by the CLRV stated that victims do respect international law and therefore would not demand for a death sentence for Ongwen, but that he should get life in jail instead.

underlined that no mercy was shown to the victims by Mr Ongwen and, as a consequence, no mercy should be applied to him during sentencing.[171] To some, any such kindness from the judges would breed impunity.[172] One victim during a meeting with Counsel removed her blouse in anger exposing her rugged skin which was a result of the burns she suffered in the hands of Mr Ongwen.[173] Another argued that life imprisonment would be an appropriate punishment given that the crimes he committed "*were so bad that* [they] *destroyed peace, affected education and our elders have died*".[174] Others stated that they knew first-hand how ruthless and heartless he was in the bush.[175] They underlined that Mr Ongwen was an adult and a father when he committed the crimes for which he has been found guilty.[176] Furthermore, victims indicated that if Mr Ongwen was remorseful, he would have sought forgiveness and would not be harbouring intentions to appeal the verdict.[177]

101. Some victims informed Counsel that in their views, Mr Ongwen should be sentenced for at least 50 years imprisonment as, if he were to return, he would possibility re-join the LRA. A victim stated that he could not forgive or reconcile with Dominic Ongwen as many members of the LRA were given the chance to return to the community, but Mr Ongwen did not take amnesty when it was offered.[178]

102. For others, a light sentence coupled with Mr Ongwen's return to the community would result in tensions between members of Ongwen's clan and other Acholi clans.

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[171] Views expressed by many victims including a/06020/15, a/01449/16, a/01984/16, a/01982/16, a/01942/16, a/01593/16 and a/00977/16, represented by the CLRV.
[172] a/3077/10, represented by the CLRV.
[173] a/01013/16, represented by the CLRV.
[174] a/00449/16, represented by the LRV.
[175] a/01054/16, represented by the CLRV.
[176] a/05482/15, represented by the CLRV. a/01449/16, a/01984/16, a/01982/16 and a/01942/16 represented by the CLRV also stated that Ongwen was not the only child abducted by the LRA; others were even younger than him but they saw that it was right to escape and return home. For these victims, Ongwen chose to remain with the rebels and to follow their ways.
[177] Views expressed by many victims including a/06020/15, represented by the CLRV.
[178] a/00105/16, represented by the LRV. a/00058/16 represented by the LRV also stated: "[E]*ven if it were my child that committed the crimes* [that Ongwen did*], I would allow for them to be imprisoned*".

103. With regards to deterrence, one victim stated that "*a longer sentence would act as a deterrent and prevent those who have the intention of committing similar crimes to realise that there is punishment as a consequence*".[179] This view was reiterated by other victims who highlighted that a long sentence would deter others from forming or joining rebel groups and "*his punishment should be seen to be a punishment for the crimes he committed*"[180]. Another victim stated that: "[T]*he crimes Dominic Ongwen committed are painful so he deserves life imprisonment. If he is given a lighter sentence it will encourage other people to commit crimes. Even if he was my brother, I cannot change my mind, it will encourage people to commit crime. I personally lost 5 people to the attacks*".[181]

104. Some expressed the view that they were very satisfied and relieved that the crimes of forced pregnancy and forced marriage were recognised as they are very serious crimes worth of life imprisonment in light of the tremendous harm suffered by the victims, especially the harm suffered through the children born out of rape.[182]

105. Another victim stated: "*In my view he should be imprisoned for life because the people killed will not return, and if they cannot return, Ongwen shouldn't either. Secondly, children were abducted and when they were tired of walking, they were killed while those who lived remained lost in the bush so Dominic Ongwen should be given life imprisonment so that he doesn't ever return just as our people can't return*."[183]

106. A small minority of victims were of the view that Mr Ongwen should be imprisoned for a short while and then forgiven.[184] However, any expressed idea of

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[179] a/00005/16, represented by the LRV. This view is notably shared by a/01868/16, represented by the CLRV.
[180] a/00620/16, represented by the LRV.
[181] a/00449/16, represented by the LRV. The same was expressed by a/02101/16, a/02119/16, a/02105/16, a/02112/16, a/02115/16 and a/02149/16, represented by the CLRV.
[182] This view was notably expressed by a/02101/16, a/02119/16, a/02105/16, a/02112/16, a/02115/16 and a/02149/16, represented by the CLRV.
[183] a/06572/15, represented by the LRV. These views were also expressed by many other victims including a/06020/15, represented by the CLRV.
[184] a/02089/16 represented by the CLRV argued that Ongwen should be given a lenient sentence of not more than 30 years in jail because it was not him who started the war.

forgiveness was conditional on the provision of compensation by Mr Ongwen.[185] Furthermore, a few victims were of the view that forgiveness would only be possible if Mr Ongwen made an admission of guilt and apologized to victims for his actions. Similarly, a small number of victims were of the opinion that Mr Ongwen should be sentenced for a period of 30 years and provide victims with compensation for the harm that they suffered.

107. A shorter sentence was seen by a very small number of victims as a way of encouraging those who continue to remain in the LRA to defect and return home.

108. Yet for others, the fact that they were requesting a life sentence for Mr Ongwen and not a death sentence was a form of forgiveness. One victim asserted that: "[O]*ur forgiveness is the fact that we are not suggesting death but rather life imprisonment. Let him stay there and return as bones because we cannot bear seeing him around*".[186] Additionally, some were of the opinion that the time for forgiveness had passed and it was no longer something that should be asked of victims. Having no longer any interest in forgiving him or reconciling with him, many victims rather feel that "*God should give Ongwen good health to serve his time in jail*."[187]

109. Furthermore, victims wish to draw the attention of the Chamber on the Defence's attempts to either replace or supplant their voices, views and preoccupations by the opinions of some witnesses and organisations purporting to represent the voices of Northern Uganda, and by doing so, create misperceptions in the minds of the Judges and of persons following these proceedings.[188] Victims

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[185] a/00638/16 represented by the LRV stated: "*Dominic Ongwen should find a group of elders and using the Lango culture to ask for forgiveness. We can then do 'plea bargaining' and the punishment is lessened after compensation*". a/01980/16, a/01984/16, a/01839/16 and a/06941/15 represented by the CLRV agree that a reconciliation programme is needed not only among Acholi but between Acholi and Langi where Ongwen also carried out those atrocities. a/00977/16 represented by the CLRV added that people from Odek are stigmatized and always discriminated in many ways; in other places they are not given any job because they are from the home place of Joseph Kony.

[186] a/00689/16, represented by the LRV.

[187] Views expressed by many victims including a/06020/15, represented by the CLRV.

[188] See the "CLRV Response to the "Defence request to submit additional evidence for Trial Chamber IX's determination of the sentence"", *supra* note 8, para. 34; the "Defence request to submit additional

emphasise in the strongest terms that the position put forward by the Defence with regard to alleged culturally appropriated rituals and proceedings that should take place for the purpose of reintegration and reconciliation of the affected communities in Northern Uganda *in lieu* of punishment in the form of imprisonment does not correspond to their views. To the contrary, victims disagree with such a proposition. They wish to take this opportunity to inform the Chamber that the witnesses and organisations put forward by the Defence, while pretending to provide the views of people of Northern Uganda, have never consulted with the thousands of victims of the crimes committed by Mr Ongwen (who are also stakeholders in the social institution) and in no way represent their wishes and needs.[189]

110. As noted by one of the victims: "*Since the day we started having these meetings I have not spoken because I have had so much anger. My own child of 8 years was killed with a bayonet and my sorrow was strong. I was in that meeting and we were three women. The Rwodies did not speak well. Did they consult each and every victims and did they allow? Mat oput happens when there is small scale death but not mass killing. It is a shame…they say one loves theirs. I walked with the army to look for the bones of my daughter and I found them. My child was pulled from me....What that man deserves is to get life imprisonment.*"[190]

111. Indeed, victims find important that Mr Ongwen assumes the term of imprisonment that correspond to his culpability and responsibility in their sufferings and that such term adequately relays the extreme gravity of his crimes. Proceeding otherwise and not listening to their voices would amount to depriving them once again

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evidence for Trial Chamber IX's determination of the sentence", *supra* note 6, paras. 18 to 20 (evidence of D-133), 25 to 27 (evidence of Ker Kwaro Acholi), 28 to 31 (evidence of the Chief of the Pawel Clan), 47 to 53 (evidence of the ARLPI and of the Wang-oo Heritage of Acholi Elders); and the "Defence Addendum to "Defence request to submit additional evidence for Trial Chamber IX's determination of the sentence", filed on 26 February 2021 as ICC-02/04-01/15-1783-Conf"", *supra* note 7 (further evidence from Ker Kwaro Acholi).

[189] It is the fear of many victims that the local organisations which the Defence is trying to involve in the proceedings, as much as they are presumed to be composed by honest women and men, people who know about their own culture, nonetheless could be pursuing other interests aiming at putting them at the centre of claimed ceremonies and rituals, thereby putting their own needs before the needs of the victims.

[190] a/05117/15, represented by the LRV.

of their agency and to disempowering them.[191] Victims have chosen to be represented in the proceedings and to participate in the trial, thereby recognising the Court path and procedures as an adequate way to address their situations and the crimes they have been suffering from. In this regard, they recall that judicial proceedings are also occurring in Uganda in relation to the crimes committed by the LRA; that reconciliation mechanisms work in situations where the culprit confesses his or her crimes and wrong-doings, asks for forgiveness and thereby also choses traditional mechanisms as a way for reintegration. Further, victims observe that when faced with the chance to opt for such mechanisms while in the LRA, Mr Ongwen did not chose nor express any interest in such path;[192] they further note that considerable doubts exist as to the applicability of the *mato oput* ceremonies when so many victims and communities are concerned.

112. Additionally, in as much as victims obviously do attach importance to their own culture and local traditions and rituals and clearly have been thinking about how best reconciliation and peace could truly occur in Northern Uganda and in particular in their communities, they rather do envisage how their local cultural customs could come into play at the stage - and as part of - the reparations proceedings. In this regard, as indicted *supra*, some suggested that reconciliation may need to be organized between the people of Coorom, where Mr Ongwen hails from and the people of the various communities affected by the crimes he committed,[193] but only after reparations have been given to them[194] (as per the tradition of *mato oput* too). Victims further insist

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[191] See McEvoy, K., and K. McConnachie, "Victims and Transitional Justice: Voice, Agency and Blame", Social & Legal Studies 22.4 (2013), pp. 489–513, and in particular p. 493: "*A similar critique has been advanced with regard to restorative justice where, despite the vocal commitment of its advocates to empowering victims, the concurrent emphasis on offender shaming and reintegration may in some instances pressurise victims towards sympathy and even responsibility for the reform of an offender, which is at odds with their own feelings or indeed best interests (Acorn, 2005; Pemberton et al., 2007).*" This document was lastly consulted on 19 March 2021 and available at : https://www.academia.edu/12401648/Victims_and_Transitional_Justice_Voice_Agency_Blame?auto=download

[192] a/05791/15, a/05895/15 and a/01643/16, represented by the CLRV.

[193] a/06162/15, represented by the CLRV.

[194] a/01776/16, a/01759/16, a/01722/16, a/01646/16, a/01482/16, a/06890/15, a/02076/16 and a/40023/14, represented by the CLRV.

that the perpetrator should be the one to make the first move in seeking forgiveness and reconciliation.[195] However, they bitterly observe that Mr Ongwen's behaviour has shown until now the opposite of such intention.

113. In this regard, Counsel add that, contrary to the sentencing proceedings, the "*goal of reparations is not to punish the convicted person but to repair the harm caused to others*".[196] In fact, "[t]*rue reconciliation does not consist in merely forgetting the past … reconciliation is a spiritual process which requires more than just a legal framework. It has to happen in the hearts and minds of people*".[197] That is, it must happen at a time and in a way that speaks and corresponds in an essential part to the victims' paths.

114. Counsel also complement the views of the victims recalling that transitional justice "*is a range of processes and mechanisms associated with society's attempt to come to terms with a legacy of large – scale past abuses and human rights violations in order to ensure accountability, serve justice and achieve reconciliation. Transitional Justice consists of both judicial and non-judicial processes and mechanisms including prosecution initiatives, truth-seeking, reparations programmes, institutional reform or an appropriate combination thereof*".[198]

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[195] Views expressed by many victims including a/06020/15, represented by the CLRV.
[196] See "Reparations Order" (Trial Chamber VI), No. ICC-01/04-02/06-2659, 8 March 2021, para. 100; the "Public redacted Judgment on the appeals against the order of Trial Chamber II of 24 March 2017 entitled "Order for Reparations pursuant to Article 75 of the Statute"" (Appeals Chamber), No. ICC-01/04-01/07-3778-Red, 8 March 2018, paras. 184-185; and the "Judgment on the appeals against Trial Chamber II's 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable'" (Appeals Chamber), No. ICC-01/04-01/06-3466-Red, 18 July 2019, paras. 134-135.
[197] See Nelson Mandela and ANC Executive Committee, "Statement of the National Executive Committee on the occasion of the 84 anniversary of the African National Congress," 8 January 1996, lastly consulted on 19 March 2021 and available: https://www.sahistory.org.za/archive/january-8th-statements-statement-national-executive-committee-occasion-84th-anniversary-anc-. The former also stated: "*We recall our terrible past so that we can deal with it, forgiving where forgiveness is necessary - but not forgetting. By remembering, we can ensure that never again will such inhumanity tear us apart, and we can eradicate a dangerous legacy that still lurks as a threat to our democracy*". See Nelson Mandela, *We should forgive but not forget*, The Guardian, 3 July 1999, article appearing in the current issue of Civilization Magazine, guest edited by Kofi Annan, United Nations secretary general, lastly consulted on 19 March 2021 and available at: https://www.theguardian.com/world/1999/jul/03/guardianreview.books7.
[198] See Margaret Ajok, SPECIAL REPORT: The National Transitional Justice Policy, The Justice Law and Order Sector, Republic of Uganda, 3 July 2019, lastly consulted on 19th March 2021 and available at: https://www.jlos.go.ug/index.php/com-rsform-manage-directory-submissions/services-and-information/press-and-media/latest-news/item/698-special-report-the-national-transitional-justice-

115. Lastly, Counsel emphasise that some victims express their deep concerns in relation to the possibility of seeing Mr Ongwen coming back on the Ugandan territory.[199] Thinking of Mr Ongwen's return makes them angry, stressing that some of his victims will never come back.[200] Others are fearful of the painful memories this would revive, his presence serving as a constant reminder of the horrors he inflicted on them. They fear the ties the convicted person still has with some people who have stayed in the bush and that his coming back would quicken plans for revenge on his behalf. Some fear that, if allowed to come back, he would reunite with the rebels still at large, reigniting instability in the region and in the concerned communities.[201]

policy (we underline). See also The International Center for Transitional Justice, Sarah Kihika Kasande and Jesse Mugero, The Ongwen Verdict: A Step Closer to Acknowledgment and Justice for Victims in Northern Uganda, 8 February 2021, lastly consulted on 19th March 2021 and available at: https://www.ictj.org/news/ongwen-verdict-step-closer-acknowledgment-and-justice-victims-northern-uganda.

[199] a/00112/16 represented by the LRVstated that ever since Mr Ongwen's arrest, people have peace and are able to move freely without fear. A light sentence would jeopardise this fragile peace and he expressed his fears of Mr Ongwen's return to Uganda and possible reunion with Joseph Kony.

[200] Quote from a/05333/15, represented by the CLRV.

[201] a/00112/16 represented by the LRV noted that if Ongwen if given a light sentence then the Court must provide victims with protection "*so that he does not come out and terrorize us. We are even scared of his image on the screen*". a/00108/16 represented by LRVinformed that "*Ongwen shouldn't return because he made us fear for our lives*". a/02022/16 represented by the CLRV said that if by any chance the Judges decide to set him free at any point, Ongwen should be banished and never set foot in Uganda again.

V. CONCLUSION

116. For the foregoing reasons, Counsel respectfully request that Mr Ongwen be sentenced to life imprisonment in light of the extreme gravity of the crimes he was convicted of.

Paolina Massidda **Joseph Manoba** **Francisco Cox**

Dated this 1st day of April 2021

At The Hague (The Netherlands), Kampala (Uganda) and Santiago (Chile)