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Court

Original: English

No.: **ICC-02/04-01/15**
Date: **31 August 2021**

APPEALS CHAMBER

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

SITUATION IN UGANDA

IN THE CASE OF
THE PROSECUTOR v. DOMINIC ONGWEN

PUBLIC
with Public Redacted Annex A

Public Redacted Version of 'Corrected Version of "Defence Document in Support of its Appeal against the Sentencing Decision", filed on 26 August 2021', filed on 30 August 2021 as ICC-02/04-01/15-1871-Conf-Corr

Source: **Defence for Dominic Ongwen**

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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I. INTRODUCTION

1. Pursuant to Article 82(1)(a) of the Rome Statute and Rule 150(1) of the Rules of Procedure and Evidence, the Defence for Dominic Ongwen ('Defence') hereby appeals Trial Chamber IX's "**Sentence**" ('Impugned Decision'),[1] Trial Chamber IX's "**Decision scheduling a hearing on sentence and setting the related procedural calendar**"[2] ('Impugned Order') and Trial Chamber IX's "**Decision on Defence request for leave to appeal the 'Decision scheduling a hearing on sentence and setting the related procedural calendar**' ('Impugned Decision 2').[3]

II. CONFIDENTIALITY

2. Pursuant to Regulation 23 *bis*(1) of the Regulations of the Court ('RoC'), the Defence files this appellate brief and annex as CONFIDENTIAL as it contains information with the same classification. Public redacted versions are filed contemporaneously.

III. APPLICABLE STANDARD

3. Article 81(2)(a) of the Rome Statute states that "[a] sentence may be appealed…by…the convicted person on the ground of disproportion between the crime and the sentence."

4. Article 83(2) of the Rome Statute states that:

> If the Appeals Chamber finds that the proceedings appealed from were unfair in a way that affected the reliability of the […] sentence, or that the […] sentence appealed from was materially affected by error of fact or law or procedural error, it may: (a) Reverse or amend the […] sentence […]. When the decision or sentence has been appealed only by the person convicted […], it cannot be amended to his or her detriment.

5. Article 83(3) of the Rome Statute states that "[i]f in an appeal against sentence the Appeals Chamber finds that the sentence is disproportionate to the crime, it may vary the sentence in accordance with Part 7."

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[1] Trial Chamber IX, *Sentence*, ICC-02/04-01/15-1819 and *Partially Dissenting Opinion of Judge Raul C. Pangalangan*, ICC-02/04-01/15-1819-Anx.
[2] Trial Chamber IX, *Decision scheduling a hearing on sentence and setting the related procedural calendar*, ICC-02/04-01/15-1763.
[3] Trial Chamber IX, *Decision on Defence request for leave to appeal the 'Decision scheduling a hearing on sentence and setting the related procedural calendar'*, ICC-02/04-01/15-1777.

6. Regulation 61 of the Regulations of the Court allows for the variation of grounds of the appeal to be filed after the notice of appeal has been filed.[4] The Defence makes this notation as the Appellant understands and speaks only Acholi and is mentally disabled, and a translation of the Impugned Decision cannot be expected until next year as LSS is working on the translation of the Trial Judgment. As such, the Defence may request a variation of the grounds once a full translation into Acholi of the Impugned Decision has been issued.

[4] *See* Regulation 61(1) of the Regulations of the Court.

IV. GROUNDS OF APPEAL

GROUND 1: The Chamber erred in law and in procedure by issuing the Impugned Order and Impugned Decision 2, thus disallowing the Appellant to participate meaningfully in the sentencing proceedings, thereby violating Appellant's fair trial rights under Articles 67(1)(a), (b), (e) and (f) of the Rome Statute and Rule 144(2)(b) of the Rules. The Chamber's errors negatively and materially impacted the Impugned Decision.

Cheap justice is no justice and leads to more costs in the end as well as to a lack of trust from both judges and citizens.[5]

i. Introduction

7. The Defence argument in this ground is that by not allowing or affording the Appellant to have a translated version the Impugned Judgment, the Appellant's fair trial rights under Articles 67(1)(a), (b), (e) and (f) of the Rome Statute and Rule 144(2)(b) of the Rules were violated and the errors negatively and materially affected the Impugned Decision.

8. Throughout the proceedings, the Defence has tirelessly complained to the Chamber about the Appellant's fair trial right of having translations and interpretations of important documents and in the field. The Defence, in one manner or another, lodge over two dozen complaints by the end of 2019, which includes answers that Counsel can speak the language of the Appellant in rejecting/ignoring the Defence requests.[6]

ii. Procedural History

9. On 4 February 2021, shortly after issuing the Trial Judgment,[7] Trial Chamber IX ('Chamber') issued the Impugned Order. The Impugned Order outlined key dates related to sentencing, including a hearing to be held sometime from 12-16 April 2021.[8] Both the Trial Judgment and Impugned Order were issued in English only.

[5] Viviane Adélaïde Reding (former European Commission for Justice, Fundamental Rights and Citizenship), debate on draft Directive on the Rights to Interpretation and Translation in Criminal Proceedings, Strasbourg, 14 June 2010.
[6] *See* Trial Chamber IX, *Defence Request to Change the Date of the Closing Statements*, ICC-02/04-01/15-1668, paras 4-32 (*noting* that the Confirmation Decision was not available to the Defence until early 2018 and the separate opinion of Judge de Brichambaut made available on 20 February 2018).
[7] Trial Chamber IX, *Trial Judgment*, ICC-02/04-01/15-1762-Conf (public redacted version available here) ('Trial Judgment').
[8] Impugned Order, para. 8.

10. On 5 February 2021, the Defence contacted the Language Services Section about the status of the Acholi translation of the Trial Judgment.[9] At that time, the Registry had not begun translating the Trial Judgment into Acholi.[10]

11. On 10 February 2021, the Defence sought leave to appeal the Impugned Order.[11] The Defence argued that the Appellant had the right to have a full Acholi translation of the Trial Judgment before the sentencing proceedings commenced, especially noting that the Appellant is mentally disabled.[12]

12. On 22 February 2021, the Chamber denied the Defence's request to appeal the Impugned Order.[13]

13. On 26 February 2021, the Defence requested the submission of 17 items into evidence for the purpose of the sentencing hearing and notified the Chamber, the Prosecution and Legal Representatives of one more possible piece of evidence for submission.[14] The Defence filed that request for the eighteenth piece of evidence on 12 March 2021.[15]

14. On 19 March 2021, the Chamber accepted the submission into evidence all 18 pieces of evidence, but denied the Defence from calling any of its proposed live witnesses.[16]

15. On 1 April 2021, the Defence,[17] Prosecution[18] and Legal Representatives[19] submitted briefs on sentencing.

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[9] Appeals Chamber, *Defence request for a suspension of its notice of its intent to appeal Trial Chamber IX's Trial Judgment*, ICC-02/04-01/15-1764-Conf, para. 18 and fn. 15.
[10] Appeals Chamber, *Defence request for a suspension of its notice of its intent to appeal Trial Chamber IX's Trial Judgment*, ICC-02/04-01/15-1764-Red, para.31.
[11] Trial Chamber IX, *Defence Request for Leave to Appeal 'Decision scheduling a hearing on sentence and setting related procedural calendar'*, ICC-02/04-01/15-1766-Conf (public redacted version available here).
[12] Trial Chamber IX, *Defence Request for Leave to Appeal 'Decision scheduling a hearing on sentence and setting related procedural calendar'*, ICC-02/04-01/15-1766-Conf, p. 3, para. 1(a) and p. 7, sub-heading V(A).
[13] *See* Impugned Decision 2.
[14] Trial Chamber IX, *Second Public Redacted Version of "Defence request to submit additional evidence for Trial Chamber IX's determination of the sentence", filed on 26 February 2021*, ICC-02/04-01/15-1783-Red2 and *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*, ICC-02/04-01/15-1785.
[15] Trial Chamber IX, *Defence Filing in the Record of the Case the Expert Report of UGA-D26-P-0114*, ICC-02/04-01/15-1792 and annex.
[16] Trial Chamber IX, *Decision on the 'Defence request to submit additional evidence for Trial Chamber IX's determination of the sentence'*, ICC-02/04-01/15-1801, paras 20 and 28.
[17] Trial Chamber IX, *Corrected Version of 'Defence Brief on Sentencing', filed on 1 April 2021*, ICC-02/04-01/15-1809-Conf-Corr (public redacted version available here).
[18] Trial Chamber IX, *Prosecution's Sentencing Brief*, ICC-02/04-01/15-1806.
[19] Trial Chamber IX, *Victims' Joint Submissions on sentencing*, ICC-02/04-01/15-1808.

16. On 14-15 April 2021, the Chamber held the hearing on sentencing.

17. On 6 May 2021, the Chamber issued the Impugned Decision,[20] sentencing the Appellant to a joint sentence of 25 years.

18. At the time of sentencing, the Appellant had not received an Acholi translation of the Trial Judgment.[21] The Appellant fully understands and speaks only one language, Acholi.

iii. ICC Statute, Rules of Procedure and Evidence and Regulations of the Court

19. Article 67(1)(a) of the Statute guarantees the Appellant "[t]o be informed promptly and in detail of the nature, cause and content of the charge, in a language which the [Appellant] fully understands and speaks."

20. Article 67(1)(b) of the Statute guarantees the Appellant "[t]o have adequate time and facilities for the preparation of the defence […]."

21. Article 67(1)(e) of the Statute guarantees the Appellant the right "[t]o examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute."

22. Article 67(1)(f) of the Statute guarantees the Appellant the right "[t]o have, free of any cost, such […] translations as are necessary to meet the requirements of fairness, if any of the […] documents presented to the Court are not in a language which the accused fully understands and speaks."

23. Rule 144(2)(b) of the Rules of Procedures and Evidence ('Rules') grants the Appellant the right to have a copy of the Trial Judgment "in a language he or she fully understands or speaks, if necessary to meet the requirements of fairness under article 67, paragraph 1 (f)."

24. Regulation 40(6) of the Regulations of the Court requires the Registrar to "ensure translation into the language of the accused […] [or] convicted […] person, if he or she does not fully

[20] *See* Impugned Decision.
[21] The Defence also notes that at the time of filing this appeal brief, the Appellant still has not received an Acholi translation of the Trial Judgment or Impugned Decision.

understand or speak any of the working languages, of all decisions or orders in his or her case. Counsel shall be responsible for informing that person of the other documents in his or her case."

iv. International Treaties, Covenants and Declarations

25. The International Covenant on Civil and Political Rights ('ICCPR') guarantees the rights of persons who have criminal charges levied against him or her.[22] These rights include:

a. To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;[23]
b. To have adequate time and facilities for the preparation of his defence […]'[24]
c. To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.[25]
d. To have the free assistance of an interpreter if he cannot understand or speak the language used in court.[26]

26. The ICCPR also guarantees that:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[27]

27. The Convention on the Rights of Persons with Disabilities ('CRPD') guarantees the rights of persons who have long-term disabilities which "in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others."[28]

28. The CRPD also guarantees that:

[22] International Covenant on Civil and Political Rights, entered into force on 23 March 1976.
[23] ICCPR, Article 14(3)(a).
[24] ICCPR, Article 14(3)(b).
[25] ICCPR, Article 14(3)(e).
[26] ICCPR, Article 14(3)(f).
[27] ICCPR, Article 26.
[28] CRPD, Article 1, entered into force on 3 May 2008 with 164 signatories and 184 state parties.

a. All persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law;[29]

b. The prohibition of all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds;[30]

c. To promote equality and eliminate discrimination, State Parties shall take all appropriate steps to ensure that reasonable accommodation is provided;[31]

d. State Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity;[32]

e. State Parties shall ensure that all measures that relate to the exercise of legal capacity provide for *appropriate and effective safeguards to prevent abuse in accordance with international human rights law*. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degrees to which such measures affect the person's rights and interests;[33] and

f. State Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provisions of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including witnesses, in all legal proceedings, including at investigative and other preliminary stages.[34]

v. European Convention on Human Rights

29. The European Convention on Human Rights ('ECHR') guarantees the rights of persons who have criminal charges levied against him or her.[35] These rights include:

[29] CRPD, Article 5(1).
[30] CRPD, Article 5(2).
[31] CRPD, Article 5(3).
[32] CRPD, Article 12(3).
[33] CRPD, Article 12(4). [Emphasis added].
[34] CRPD, Article 13(1).
[35] European Convention on Human Rights, entered into force on 3 September 1953.

a. To be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;[36]

b. To have adequate time and facilities for the preparation of his defence;[37]

c. To examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;[38]

d. To have the free assistance of an interpreter if he cannot understand or speak the language used in court.[39]

30. Article 14 of the ECHR also guarantees that:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.[40]

31. Article 1 of Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms guarantees:

> The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.[41]
>
> No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.[42]

vi. African Charter on Human and Peoples' Rights

32. Article 2 of the African Charter on Human and Peoples' Rights ('ACHPR')[43] guarantees that:

> Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status.[44]

[36] ECHR, Article 6(3)(a).
[37] ECHR, Article 6(3)(b).
[38] ECHR, Article 6(3)(d).
[39] ECHR, Article 6(3)(e).
[40] ECHR, Article 14.
[41] ECHR, Protocol No. 12, Article 1(1).
[42] ECHR, Protocol No. 12, Article 1(2).
[43] African Charter on Human and Peoples' Rights, entered into force on 21 October 1986.
[44] ACHPR, Article 2.

33. The Defence further notes that the *Malabo Protocol*, a treaty not yet in force, grants an accused the near identical rights outlined above in the Rome Statute.[45]

vii. American Convention on Human Rights

34. The American Convention on Human Rights ('ACHR') guarantees the rights of persons who have criminal charges levied against him or her.[46] The ACHR guarantees that states must:

> [R]espect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.[47]

35. The ACHR further defines the rights of a person accused of crimes within its jurisdiction, guaranteeing persons:

a. [T]he right […] to be assisted without charge by a translator or interpreter, if he does not understand or speak the language of the tribunal or court;[48]
b. [P]rior notification in detail […] of the charges against him;[49]
c. [A]dequate time and means for the preparation of his defense;[50] and
d. [T]he right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, or experts or other persons who may throw light on the facts;[51]

viii. European Union Directive 2010/64/EU

36. European Union Directive 2010/64/EU, *Directive on the Right to Interpretation and Translation in Criminal Proceedings* ('EU Directive'), guarantees basic minimum

[45] *See* Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, p. 38, section 46A (46A(a), (b), (e) and (f)).
[46] American Convention on Human Rights, adopted on 22 November 1969 and entered into force on 18 July 1978.
[47] ACHR, Article 1.
[48] ACHR, Article 8(2)(a).
[49] ACHR, Article 8(2)(b).
[50] ACHR, Article 8(2)(c).
[51] ACHR, Article 8(2)(f).

interpretation and translation rights of persons who have criminal charges levied against him or her.[52] The rights guaranteed by the EU Directive include that:

a. Member States shall ensure that suspected or accused persons who do not understand the language of the criminal proceedings concerned are, with a reasonable period of time, provided with a written translation of all documents which are essential to ensure that they are able to exercise their right of defence and to safeguard the fairness of the proceedings;[53]
b. Essential documents shall include any decision depriving a person of his liberty, any charge or indictment, and any **judgment**;[54]
c. The competent authorities shall, in any given case, decide whether **any other** document is essential. Suspected or accused persons or their legal counsel may submit a reasoned request to that effect;[55]
d. There shall be no requirement to translate passages of essential documents which are not relevant for the purposes of enabling suspected or accused persons to have knowledge of the case against them;[56]
e. As an exception to the general rules established in paragraphs 1, 2, 3 and 6, an oral translation or oral summary of essential documents may be provided instead of written translations on condition that such oral translation or oral summary does not prejudice the fairness of the proceedings;[57]
f. Any waiver of the right to translation of documents referred to in this Article shall be subject to the requirements that suspected or accused persons have received prior legal advice or have otherwise obtained full knowledge of the consequences of such a waiver, and that the waiver was unequivocal and given voluntarily;[58]
g. Translation provided under this Article shall be of a quality sufficient to safeguard the fairness of the proceedings, in particularly by ensuring that suspected or accused

[52] *See* Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, entered into force on 15 November 2010.
[53] EU Directive, Article 3(1).
[54] EU Directive, Article 3(2). [Emphasis added].
[55] EU Directive, Article 3(3). [Emphasis added].
[56] EU Directive, Article 3(4).
[57] EU Directive, Article 3(7).
[58] EU Directive, Article 3(8).

> persons have knowledge of the case against them and are able to exercise their right of defence.[59]

ix. The Appellant was not put on proper notice of the content of the Trial Judgment as it was not translated into Acholi for the Appellant

37. As a key document of the Court, the Registry is required to translate the Trial Judgment into the official languages of the Court.[60] The Appellant does not speak or understand any of the official languages of the Court. He speaks one language, Acholi. The Trial Judgment was released on 4 February 2021 in English only. Neither the Chamber nor the Registrar took concrete steps to have the Trial Judgment, or at least significant parts thereof, translated into Acholi for the benefit of the Appellant before the commencement of the sentencing proceedings. With respect, there should have been a mechanism in place to start translating the Trial Judgment *before* 4 February 2021[61] and to start translating the rest on the day of its issuance. The Registry is required to translate the Trial Judgment for the Appellant,[62] which was only begun after the Defence requested it to be done, which while being allowed by the controlling documents of the Court, is the duty of the Registrar.

38. The Appellant has a right to know the crimes for which he was convicted, and the facts used for said conviction. The Appellant has the right to work with his Defence team in preparation of the sentencing proceedings and to advise them on possible strategies and witnesses to call.[63] The Appellant cannot undertake such actions without being properly informed through a fully translated version of the Trial Judgment of the nature of the facts and circumstances the Chamber deemed proven in the Trial Judgment.

39. The Appeals Chamber has decided that:

> If a trial chamber relies upon facts in aggravation that were established in its decision on conviction under article 74 of the Statute, there is, barring exceptional circumstances, also no further notice required to the convicted person as these facts clearly form part of the context of the conviction. The convicted person must, therefore, expect that they may be taken into account by the trial chamber in

[59] EU Directive, Article 3(9).
[60] *See* Regulation 40(1) of the RoC.
[61] The Defence notes that the Chamber could have ordered, at the least, the summary of the trial translated before 4 February 2021 as this section does not reveal decisions made within the Trial Judgment.
[62] *See* Regulation 40(6) of the RoC.
[63] *See* Articles 67(1)(b) and 76(2) of the Rome Statute. *See also* Article 14(3)(b) of the ICCPR, Article 6(3)(b) of the ECHR, Article 46(A)(b) of the Malabo Protocol, Article 8(2)(c) of the ACHR and Article 13(1) of the CRPD.

> sentencing. If, on the other hand, the trial chamber wishes to reply upon facts in aggravation that could not reasonably be expected by the convicted person, it may only do so if proper notice has been provided – for instance in the submissions of the Prosecutor on sentencing – so as to allow the convicted person to defend him- or herself.[64]

40. Unlike the other four (4) indicted persons in the Ugandan Situation who were educated through their teenage years (and some with post-secondary education), the Appellant is an uneducated person who was stolen from his family at the age of nine (9) and can only speak and understand Acholi. The failure of the Chamber and Registry to provide the Appellant with the Trial Judgment in a language which the Appellant speaks and understands acts as a tool of discrimination based on language.[65]

41. The Appellant speaks and understands Acholi. The Appellant has the fundamental fair trial right and human right to have the document with judgment against him in a language he understands and speaks.[66] While the Defence understands that there are limitations to one's right to have translations, the Trial Judgment is not one of them.[67] As the Appeals Chamber declared, potential facts "established in its decision on conviction under article 74 of the Statute" need not be proven in the sentence judgment under Article 76 of the Statute as the convicted persons is put on notice by the Article 74 judgment.[68] In the case of the Appellant, this is not true. The Appellant cannot be put on notice of the potential use of aggravating facts proven in the Trial Judgment against him in the Impugned Decision as the Appellant cannot read the Trial Judgment.

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[64] Appeals Chamber, *Judgment on the appeals of the Prosecutor, Mr Jean-Pierre Bemba Gombo, Mf 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"*, ICC-01/05-01/13-2276-Red, para. 116.
[65] *See* Article 14 of the ECHR, Article 1 of Protocol No. 12 to the ECHR, Article 26 of the ICCPR, Article 2 of the ACHPR, Article 1 of the ACHR and Article 21(1) of the Charter of Fundamental Rights of the European Union, 2012/C 326/02, European Commission, published 26 October 2012.
[66] *See* Rule 144(2)(b) of the Rules and Regulation 40(6) of the RoC. *See also* Articles 67(1)(a) and (f) of the Rome Statute, Article 14(3)(a) of the ICCPR, Article 6(3)(a) of the ECHR, Articles 46(A)(a) and (f) of the Malabo Protocol and Articles 8(2)(a) and (b) of the ACHR. *See generally* Article 14(3)(f) of the ICCPR and Article 6(3)(e) of the ECHR.
[67] *See* Rule 144(2)(b) and Regulation 40(6) of the RoC (*noting* that the Trial Judgment is one of the main documents which are required to be translated into a language which the accused/convicted person speaks and understands if required for fairness). *See also* Articles 3(7) and (8) of the EU Directive (*noting* that the Appellant did not waive his right to a translation and no substantive oral translation was given).
[68] Appeals Chamber, *Judgment on the appeals of the Prosecutor, Mr Jean-Pierre Bemba Gombo, Mf 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"*, ICC-01/05-01/13-2276-Red, para. 116.

42. The Appellant has the fundamental fair trial and human rights to adequate time to prepare his defence and aid in the determination of witnesses for sentencing.[69] There were 22 days between the issuance of the Trial Judgment and the day when evidence in mitigation on behalf of the Appellant was due.[70] Because the Appellant can only speak and understand Acholi, he was not apprised properly of potential aggravating circumstances in the Trial Judgment, or the ability to aid in finding evidence in mitigation for the sentencing proceedings. This problem was compounded by the limited access to the ICC Detention Centre because of COVID-19 restrictions.[71]

43. As noted above, the Trial Judgment was issued in one language, English. The Appellant could not aid in his defence for the sentencing proceedings as he was not given an Acholi translation of the Trial Judgment. The Trial Judgment is 1,077 pages long, and the Appellant had no chance to go through the Trial Judgment with an interpreter – even if one was present and provided, which was not the case – when one considers visitation hours at the ICC Detention Centre and the restrictions because of the SARS-CoV-2/COVID-19 Pandemic. The only conceivable manner for the Appellant to get through the longest Article 74 judgment in history would be to afford him enough time to read it in a language he speaks and understands, Acholi. This was made impossible for lack of a translation in Acholi.

44. Issues such as this have come before the European Parliament and Council.[72] When the EU Directive was enacted, the European Parliament and Council understood that problems may arise in producing a full translation within a reasonable time for an accused/convicted person.[73] The EU Directive allows for a derivation from the rule of written translation if oral translations are provided, but this is the exception and not the rule.[74] In the situation at bar, such a derivation would have significantly affected the fairness of the sentencing proceedings, noting especially that the Chamber gave the Appellant and Defence 22 days to collect material in mitigation.

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[69] Articles 67(1)(b) and (e) of the Rome Statute. *See also* Articles 14(3)(b) and (e) of the ICCPR, Articles 6(3)(b) and (d) of the ECHR, Articles 46(A)(b) and (e) of the Malabo Protocol, Articles 8(2)(c) and (f) of the ACHR and Article 13(1) of the CRPD.
[70] Impugned Order, para. 6.
[71] The Defence notes that while it could visit the Appellant in the ICC-DC at this time, it was limit and each visit was required to be justifiable as necessary.
[72] *See* Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, entered into force on 15 November 2010.
[73] *See* EU Directive, Articles 3(7)-(9).
[74] *See* EU Directive, Article 3(7). *See also* Baroness Sarah Ludford (former Member of the European Parliament), debate on draft Directive on the Rights to Interpretation and Translation in Criminal Proceedings, Strasbourg, 14 June 2010.

45. The Defence requested leave to appeal the Impugned Order.[75] On 22 February 2021, the Chamber denied the Defence's request for leave to appeal.[76] The Chamber determined that it may pronounce the sentence pursuant to Article 76 at the same time as the judgment pursuant to Article 74[77] and that the summary given in court on 4 February 2021 suffices as an oral summary of the Trial Judgment.[78] The Defence disputes both interpretations given by the Chamber.

46. Firstly, Article 76(2) grants a person convicted pursuant to an Article 74 judgment the right to have "a further hearing to hear any additional evidence or submissions relevant to the sentence, in accordance with the Rules of Procedure and Evidence."[79] Rule 143 of the Rules further bolsters the concept that the ICC is a bifurcated system between a trial judgment and sentencing, stating:

> Pursuant to article 76, paragraphs 2 and 3, for the purpose of holding a further hearing on matters related to sentence […], the Presiding Judge shall set the date of the further hearing [on sentencing]. This hearing can be postponed, in exceptional circumstances, by the Trial Chamber, on its own motion or at the request of the Prosecutor [or] […] the defence […].[80]

47. Article 76(2) and Rule 143 both use the word "shall". A trial chamber must hold a hearing for additional evidence or submissions on sentencing if either Party requests it. At the case at bar, the Chamber, on its own motion, decided to hold the hearing before asking the Parties whether either Party wished to hold a hearing. The Chamber also set the dates for the hearing without asking for representations from the Parties. With respect, the Chamber was wrong about the nature of the hearing.

48. Secondly, the oral pronouncement of the Trial Judgment was not an "extensive summary of the main findings and underlying reasons of the Trial Judgment"[81] as the Chamber deems it to be. The Trial Judgment is 1,077 pages. The "extensive summary" allegedly delivered by the Chamber starts on page 4, line 16 and ends at page 31, line 15 of transcript T-259.[82] That is 27 pages of a transcript to summarise the longest trial judgment in the history of the ICC. This

[75] Trial Chamber IX, *Defence Request for Leave to Appeal 'Decision scheduling a hearing on sentence and setting related procedural calendar'*, ICC-02/04-01/15-1766-Conf.
[76] Impugned Decision 2.
[77] Impugned Decision 2, para. 9.
[78] Impugned Decision 2, para. 10.
[79] Article 76(2) of the Rome Statute.
[80] Rule 143 of the Rules.
[81] Impugned Decision 2, para. 10.
[82] *See* ICC-02/04-01/15-T-259. Transcripts of the case may be shortened to "T" plus the transcript number.

alleged summary would fall tremendously short of the exceptional circumstances for an oral summary in the European Union pursuant to Article 3(7) of the EU Directive. This is a fundamental right, and more attention needs to be given to it than 27 pages.

49. Thirdly, the Appellant's mental disabilities place him at a significant disadvantage. He requires extra time to read material in Acholi because of issues related to said mental disabilities. As noted in Ground 7, the medical doctors at the ICC-DC [REDACTED].[83] The Appellant cannot concentrate and read all day as a non-disabled person; he has flashbacks while reading that cause him to stop and interrupt his reading, meaning that he must pace himself while reading anything dealing with the facts of the case. To date, the Appellant does not have the full translation of the Trial Judgment, a fair trial right violation, a prejudice the Appeals Chamber addressed by acknowledging the possibility of a variation of the Trial Judgment appeal pursuant to Regulation 61 of the RoC.[84]

50. The Defence avers that the Chamber's failure to accommodate the Appellant's known mental disabilities constitutes reversible error and violates the Appellant's rights under the CRPD. The Chamber failed to accommodate the Appellant's mental disabilities by not providing the Appellant with an Acholi translation of the Trial Judgment and granting the Appellant enough time to participate meaningfully in his defence.[85]

51. Finally, the Defence seizes this opportunity to reiterate its continued discontent with the Court "passing the buck" off on Counsel to translate decisions and judgments to the Appellant. Counsel is not an interpreter; he is an attorney. His duties are outlined in the different legal texts of the Court, and while he does have the obligation to explain to the Appellant certain documents, the Trial Judgment is not one of them. In any event, Counsel speaks Langi, not Acholi, which are similar languages, but not the same. Regulation 40(6) of the RoC places the duty and obligation to translate decisions for the Appellant upon the Registrar, and Rule 144(2)(b) of the Rules requires the Registrar to order the translation of the Trial Judgment. While it is the duty of Counsel to ensure that one is being produced, and to discuss with the Appellant the nature of the Trial Judgment and how it affects him, he should never be

[83] *See* paras 166-167 below.
[84] Appeals Chamber, *Decision on Mr Ongwen's request for time extension for the notice of appeal and on translation*, ICC-02/04-01/15-1781, para. 11.
[85] *See* Article 67(1)(b) of the Rome Statute in conjunction with Articles 5(2), 5(3), 12(3), 12(4) and 13(1) of the CRPD.

expected to spend weeks, or even months, to translate the Trial Judgment instead of organising the Appellant's defence strategies.

52. The Defence distinguishes this instance from the one outlined to prepare the appeal brief against the Trial Judgment and the Impugned Decision. In that case, the Appeals Chamber used a specific safeguard available to it to ensure a proper balance between the Appellant's rights to a speedy trial and to a translation. When the Defence sought a suspension of the time limits to file a notice of appeal and appeal brief against the Trial Judgment,[86] the Appeals Chamber noted that the Appellant could "seek a variation of the grounds of appeal once he has received a translation of the sections" of the Trial Judgment pursuant to Regulation 61 of the RoC.[87] This safeguard is also notable as it lessens the prejudice of the appeals process due to his disability. Once he has a full translations and time to read the Impugned Decision and the Trial Judgment, a variation can be sought by the Appellant through his Defence. No such safeguard was available to the Appellant in the Impugned Order or Impugned Decision 2, and in fact, an Acholi translation had not been started.[88]

53. For the abovementioned reasons, the Chamber erred in law and procedure by issuing the Impugned Order, Impugned Decision and Impugned Decision 2 before an Acholi translation of the Trial Judgment had been provided for the Appellant. When the Chamber issued the order and decisions, the Chamber violated the Appellant's fair trial rights under Article 67(1) of the Rome Statute, Rule 144(2)(b) of the Rules, and the fundamental trial and human rights outlined in the section above. The Defence requests the Appeals Chamber to find that the Chamber violated the Appellant's rights in law and procedure.

x. The Chamber's decision to advance with the sentencing proceedings before a translation of the Trial Judgment caused reversible error to the Appellant

54. The Appellant has the fundamental fair trial right to call witnesses on his behalf.[89] There should be no distinction between the proceedings with the presentation of evidence during the trial and the presentation of evidence for sentencing. The Rome Statute and Rules provide the

[86] Appeals Chamber, *Defence request for a suspension of its notice of its intent to appeal Trial Chamber IX's Trial Judgment*, ICC-02/04-01/15-1764-Conf (public redacted version here).
[87] Appeals Chamber, *Decision on Mr Ongwen's request for time extension for the notice of appeal and on translation*, ICC-02/04-01/15-1781, para. 11.
[88] Appeals Chamber, *Defence request for a suspension of its notice of its intent to appeal Trial Chamber IX's Trial Judgment*, ICC-02/04-01/15-1764-Red, para.31.
[89] Article 67(1)(e) of the Rome Statute. *See also* Article 14(3)(e) of the ICCPR, Article 6(3)(d) of the ECHR, Article 46(A)(e) of the Malabo Protocol and Article 8(2)(f) of the ACHR.

Appellant with the right to call witnesses on his behalf for sentencing.[90] Similar to the decision on the confirmation of charges hearing, the Appellant must be allowed to know the facts proven in the Trial Judgment[91] to afford him his fundamental rights to prepare his defence with Counsel,[92] assist with deciding evidence/witnesses to call in mitigation[93] and his right to documents presented by the Court.[94]

55. The Defence submits that such violations of the Appellant's fundamental fair trial rights are *de facto* reversible errors. These violations touch on and concern the basic and fundamental fair trial and human rights championed by supranational government organisations for over 50 years.[95] These treaties and covenants represent the bare minimum protections which governments and supranational governmental organisations should hold sacred.

56. The Appellant was abducted in November 1987 into an organisation which would eventually be called the LRA. The Appellant is the person best suited to aid the Defence team as the Chamber decided that the Appellant committed specific actions which resulted in the convictions. Without proper notice of the facts used to convict the Appellant, he was unable to participate effectively in his defence. The Rules contain non-exhaustive lists for mitigating, aggravating and personal circumstances,[96] and the Appellant was deprived of effective participation to determine the best actions to take in the short 22-day period between the Trial Judgment and the date which evidence in mitigation was due.

xi. Conclusion

57. Based on the above arguments, the Defence submits that the Chamber committed a grave violation of the Appellant's fair trial and human rights by not providing the Appellant with a fully translated version of the Impugned Decision, as provided under Articles 67(1)(a), (b), (e) and (f) of the Rome Statute and Rule 144(2)(b) of the Rules and that the errors resulting from

[90] Article 76(2) of the Rome Statute. *See generally* Rule 143 of the Rules (*noting* that Article 76(2) provides for the presentation of further evidence and that Rule 143 requires the additional hearing on sentencing).
[91] *See* Rule 144(2)(a) of the Rules and Regulation 40(6) of the RoC.
[92] Article 67(1)(b) of the Rome Statute. *See also* Article 14(3)(b) of the ICCPR, Article 6(3)(b) of the ECHR, Article 46(A)(b) of the Malabo Protocol, Article 8(2)(c) of the ACHR and Article 13(1) of the CRPD.
[93] Articles 76(2) and 67(1)(e) of the Rome Statute. *See also* Article 14(3)(e) of the ICCPR, Article 6(3)(d) of the ECHR, Article 46(A)(e) of the Malabo Protocol and Article 8(2)(f) of the ACHR.
[94] Article 67(1)(f) of the Rome Statute, Rule 144(2)(b) of the Rules and Regulation 40(6) of the RoC. *See also* Article 3 of the EU Directive and Article 8(2)(a) of the ACHR. *See generally* Article 14(3)(f) of the ICCPR, Article 6(3)(e) of the ECHR and Article 46(A)(f) of the Malabo Protocol.
[95] The Defence notes that the international treaties described above started in 1966 with the ICCPR.
[96] *See* Rule 145 of the Rules.

this violation negatively and materially affected the Impugned decision. In addition, this violation seriously imperils the integrity of the Impugned Decision. As the Chamber committed the violations of the Appellant's fundamental fair trial and human rights, the Defence respectfully requests the Appeals Chamber to vacate the Impugned Decision and order a new sentencing proceeding[97] which would guarantee that the Appellant be able to participate fully and meaningfully in his defence.

[97] A draft translation of the Trial Judgment is expected in December 2021 or January 2022. By the time the judgment on this appeal is decided, the draft translation will have been in the hands of the Appellant long enough to read through the Trial Judgment.

GROUND 2: The Chamber erred in law and in procedure by rejecting the Defence's objections to the Legal Representatives' submission of evidence from the bar in the "Victims' Joint submissions on sentencing" and during their respective arguments during the sentencing hearing. The Chamber's error negatively and materially impacted the Impugned Decision as it relied upon testimonial evidence not submitted through the official mechanisms authorised by the Statute, Rules and procedures which govern the Court.

i. Introduction

58. The Chamber unlawfully admitted and used testimonial evidence submitted by the Common Legal Representatives for Victims and Legal Representatives for Victims (jointly 'Legal Representatives') from the bar and entertained their arguments as such during the sentencing hearing; and that the admission was prejudicial to the Appellant and negatively affected the Impugned Decision. It was prejudicial to the Appellant for the Chamber to allow the Legal Representatives to submit the testimonial evidence in violation of the Rome Statute and Rules and to conduct themselves during the sentencing hearing as though they were part of the Prosecution.

ii. Procedural History

59. On 4 February 2021, shortly after issuing the Trial Judgment,[98] the Chamber issued the Impugned Order. The Impugned Order outlined key dates related to sentencing. The Impugned Order set the date of 26 February 2021 for the submission of any additional evidence to be considered by the Chamber for the purpose of sentencing.[99]

60. On 24 February 2021, the Common Legal Representative for Victims ('CLRV') notified the Chamber that she did not intend to present additional evidence to the Chamber for sentencing.,[100] but that she would share the views and concerns of her clients with the Chamber.[101] The following day, the Legal Representatives for Victims ('LRV') notified the

[98] Trial Chamber IX, *Trial Judgment*, ICC-02/04-01/15-1762-Conf (public redacted version available here).
[99] Impugned Order, para. 6.
[100] Trial Chamber IX, *CLRV's notification Regarding Presentation of Additional Evidence On Sentencing*, ICC-02/04-01/15-1780, paras 1-2.
[101] Trial Chamber IX, *CLRV's notification Regarding Presentation of Additional Evidence On Sentencing*, ICC-02/04-01/15-1780, para. 2.

Chamber that they did not intend to present additional evidence to the Chamber for sentencing,[102] but that it would share the views and concerns of its clients.[103]

61. On 26 February 2021, the Defence requested the submission of 17 items into evidence for the purpose of the sentencing hearing and notified the Chamber, the Prosecution and the Legal Representatives of one more piece of evidence for submission.[104] The Defence filed that request for the eighteenth piece of evidence on 12 March 2021.[105]

62. On 19 March 2021, the Chamber accepted the submission into evidence all 18 pieces of evidence, but denied the Defence from calling any of its proposed live witnesses.[106]

63. On 1 April 2021, the Defence, Prosecution and Legal Representatives[107] submitted briefs on sentencing.

64. On 14-15 April 2021, the Chamber held the hearing on sentencing. The Defence objected to the Legal Representatives submissions and the use of testimonial evidence which required submission into evidence instead of being submitted through the bar and requested that parts of the brief and oral submission be expunged from the record.[108]

65. On 6 May 2021, the Chamber issued the Impugned Decision. The Chamber rejected the Defence's request to expunge from the record the specified submissions from the Legal Representatives[109] and used the submissions in the Impugned Decision to the detriment of the Appellant.

iii. ICC Statute and Rules of Procedure and Evidence

66. Article 64 of the Statute:

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[102] Trial Chamber IX, *Victims' Notification regarding Presentation of Additional Evidence at the Sentencing Stage of Proceedings*, ICC-02/04-01/15-1782, para. 1.
[103] Trial Chamber IX, *Victims' Notification regarding Presentation of Additional Evidence at the Sentencing Stage of Proceedings*, ICC-02/04-01/15-1782, para. 2.
[104] Trial Chamber IX, *Second Public Redacted Version of "Defence request to submit additional evidence for Trial Chamber IX's determination of the sentence", filed on 26 February 2021*, ICC-02/04-01/15-1783-Red2 and *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*, ICC-02/04-01/15-1785.
[105] Trial Chamber IX, *Defence Filing in the Record of the Case the Expert Report of UGA-D26-P-0114*, ICC-02/04-01/15-1792 and annex.
[106] Trial Chamber IX, *Decision on the 'Defence request to submit additional evidence for Trial Chamber IX's determination of the sentence'*, ICC-02/04-01/15-1801, paras 20 and 28.
[107] *See* para. 15 above and fns 17-19 above.
[108] ICC-02/04-01/15-T-261-ENG, p. 38, l. 7 to p. 39, l. 10.
[109] *See* Impugned Decision, paras 13-14.

a. Requires the Chamber to "ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused […];"[110]

b. Gives the Chamber the power to "[o]rder the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties",[111] and

c. Gives the Chamber the power to "[r]ule on the admissibility or relevance of evidence;[112] and [t]ake all necessary steps to maintain order in the course of a hearing."[113]

67. Article 67(1)(e) of the Statute guarantees the Appellant the right "[t]o examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her."[114]

68. Article 69 of the Statute:

a. Requires witnesses to "give an undertaking as to the truthfulness of the evidence to be given by the witness";[115]

b. Allows for the procurement of testimony through means outlined in Rule 68 of the Rules and mandates that measures taken to secure testimony must "not be prejudicial or inconsistent with the rights of the accused";[116]

c. Allows the Parties to "submit evidence relevant to the case" and grants the Chamber "the authority to request the submission of all evidence that it considers necessary for the determination of the truth […]";[117] and

d. Grants the Chamber the authority to "rule on the relevance or admissibility of evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness[…] [.]"[118]

[110] Article 64(2) of the Rome Statute.
[111] Article 64(6)(d) of the Rome Statute. *See also* Article 69(3) of the Rome Statute.
[112] Article 64(9)(a) of the Rome Statute.
[113] Article 64(9)(b) of the Rome Statute.
[114] Article 67(1)(e) of the Rome Statute.
[115] Article 69(1) of the Rome Statute.
[116] Article 69(2) of the Rome Statute.
[117] Article 69(3) of the Rome Statute.
[118] Article 69(4) of the Rome Statute.

69. Rule 64 of the Rules states that "[a]n issue relating to […] admissibility must be raised at the time when the evidence is submitted to a Chamber."[119] The Chamber must give an reasoned explanation for a ruling on admissibility on the record.[120]

70. Rule 66 of the Rules requires that persons testifying before the Court given a solemn undertaking[121] and "be informed of the offence defined in article 70, paragraph 1 (a)."[122]

71. Rule 68 of the Rules allows for the introduction of testimonial evidence so long as specific procedural safeguards are met, including, but not limited to:

a. Both the Prosecutor and the Defence had the opportunity to examine the witness during the recording;[123] or
b. The testimonial evidence be accompanied by a solemn declaration taken before someone designated by the Chamber or through the laws of the State.[124]

iv. International and Supranational Treaties and Conventions

72. The Defence incorporates by reference fundamental trial and human rights law outlined above in paragraphs 25(c), 28(f), 29(c), 33 and 35(d).

v. The Chamber erred by not expunging testimonial evidence submitted from the bar and using said material to dismiss Defence requests for mitigating circumstances

73. The Chamber erred by not expunging the testimonial evidence submitted from the bar and using said material to dismiss the Defence submissions for mitigating circumstances. The Chamber set deadlines, granted an extension to the Defence, and then proceeded to neglect its own rules and the safeguards in place pursuant to the Rome Statute and Rules by allowing the LRV to submit testimonial evidence in its brief and through its submissions and using said evidence in the Impugned Decision.

74. The testimonial evidence proffered by the LRVs consisted of anonymous testimonial evidence.[125] While the victim numbers are known, the Defence does not have access to the

[119] Rule 64(1) of the Rules.
[120] Rule 64(2) of the Rules.
[121] Rule 66(1) of the Rules.
[122] Rule 66(3) of the Rules.
[123] Rule 68(2)(a) of the Rules.
[124] *See* Rules 68(2)(b)(ii) and (iii) and (d)(ii) and (iii) of the Rules.

names of persons unless they or their family members testified. The proffering of such testimonial evidence violates the Appellant's rights under the Rome Statute, the Rules and orders issued by the Chamber.[126] The Appellant has the right to know persons who give evidence against him and to cross-examine said persons.[127] The Defence cites as an example one person who alleges to sit on the *Ker Kwaro Acholi*.[128] This person's testimony runs counter to the words of the *Ker Kwaro Acholi*, a testimony given to the Defence under oath by the institution[129] and by its Prime Minister.[130] The testimonial evidence submitted from the bar by the LRVs was used against an expert report[131] and written submissions[132] by the *Ker Kwaro Acholi* and its legal representative.[133]

75. The Chamber stripped the Appellant of his right to challenge testimonial evidence by allowing the LRVs to tender said evidence through the bar and not through the legal channels required by the Court.[134] The witness described above did not have to follow the procedures outlined under Rule 68 of the Rules either.[135] The testimonial evidence from the witness, given by the LRVs, should not be allowed to be submitted into the record and used against the Appellant in the Impugned Decision without following the strict safeguards of the Rome Statute and Rules, which it did not do.

76. Like the Chamber, the Defence does not doubt the accurate reporting of the LRVs.[136] The Defence objects to the manner in which the Chamber accepted the testimonial evidence from the LRVs in its totality.[137] The Rome Statute and Rules require a witness – not the attorney representing a witness – to confirm that a witness understands that he or she must speak the truth and that knowingly giving false testimonial evidence is a crime punishable by the

[125] *For example see* ICC-02/04-01/15-T-260-ENG, p. 48, l. 9 (Victim a/05207/15), l. 14 ((Victim a/05270/15) and p. 49, l. 4 (Victim a/06667/15), l. 10 (Victim a/06308/15), l. 20 (Victim a/06134/15). *See also* Trial Chamber IX, *Victims' Joint Submission on sentencing* [sic], ICC-02/04-01/15-1808, paras 112-114.
[126] *See* Impugned Order.
[127] If a statement is given pursuant to Rule 68(2) of the Rules, the Appellant still has the right to have proper time to prepare evidence against a statement given pursuant to this rule, something which he was not afforded by the Chamber.
[128] ICC-02/04-01/15-T-260-ENG, p. 48, lns 14-25.
[129] *See* UGA-D26-0015-1901 and ICC-02/04-01/15-1805-AnxD.
[130] *See* UGA-D26-0015-1812 and ICC-02/04-01/15-1805-AnxB.
[131] UGA-D26-0015-1812.
[132] UGA-D26-0015-1901.
[133] *See* ICC-02/04-01/15-T-260-ENG, p. 48, lns 14-25.
[134] *See* Articles 67(1)(e), 64(2) and Article 69 of the Rome Statute.
[135] *See* Rule 68(2)(b)(ii) and (iii) of the Rules.
[136] Impugned Decision, para. 14.
[137] *See* ICC-02/04-01/15-T-261-ENG, p. 38, l. 7 to p. 39, l. 10.

Court.[138] For the issue at bar, this did not happen. This distinguishes the testimonial evidence given by the LRVs and that submitted by the Defence.

77. Furthermore, using the testimonial evidence submitted by the LRVs violates the Appellant's right to a fair trial.[139] The Chamber set deadlines for the submission of additional evidence for use at trial.[140] The LRVs stated it would not submit additional evidence for sentencing,[141] and argued against the submission into evidence of many of the items submitted by the Defence.[142] The LRVs were given the unfair advantage of reading through the Defence's additional evidence, reading the Defence's brief on sentencing, and then utilised the opportunity to collect and present testimonial evidence against the Appellant during the hearing on sentencing and in its brief.

78. Finally, the Defence understands the use and reasons for the views and concerns of the victims. The instances outlined above, the use of testimonial evidence against specific mitigating circumstances advanced by Defence evidence submitted into the record of the case, require that the testimonial evidence be submitted into evidence. The LRVs used the testimonial evidence not to advance the views and concerns of the victims, but to argue against the standard of proof required to justify mitigating circumstances.[143] The LRVs argued, with testimonial evidence, directly to the proof of the matter of the proposed mitigating circumstance of the Acholi Traditional Justice Mechanisms like *Mato Oput*.[144]

79. With respect, the Appeals Chamber cannot let this obvious violation of the Rome Statute and Rules go unchecked. The Chamber has the power, pursuant to the Rome Statute and Rules, to accept evidence within the confines of the procedures set forth within those documents. It cannot accept evidence which is testimonial in nature without following those procedures.[145]

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[138] *See* Article 69(1) of the Rome Statute and Rule 69(2)(b)(ii) and (iii) of the Rules.
[139] *See* Article 67(1) of the Rome Statute.
[140] Impugned Order, para. 6.
[141] Trial Chamber IX, *Victims' Notification regarding Presentation of Additional Evidence at the Sentencing Stage of Proceedings*, ICC-02/04-01/15-1782, paras 1-2.
[142] Trial Chamber IX, *Victims' Response to the "Defence request to submit additional evidence for Trial Chamber IX's determination of the sentence"*, ICC-02/04-01/15-1789-Conf, paras 10-20 and 22.
[143] *See* Trial Chamber IX, *Public Redacted Version of "Corrected Version of 'Defence Brief on Sentencing', filed on 1 April 2021"*, ICC-02/04-01/15-1809-Corr-Red, paras 6-8.
[144] *Eee* ICC-02/04-01/15-T-260-ENG, p. 48, l. 9 (Victim a/05207/15), l. 14 ((Victim a/05270/15) and p. 49, l. 4 (Victim a/06667/15), l. 10 (Victim a/06308/15), l. 20 (Victim a/06134/15). *See also* Trial Chamber IX, *Victims' Joint Submission on sentencing* [sic], ICC-02/04-01/15-1808, paras 112-114.
[145] *See* Trial Chamber IX, *Decision on the Prosecution's Applications for Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules*, ICC-02/04-01/15-596-Red, para. 5 and *Decision on Prosecution's Request to Submit 1006 Items of Evidence*, ICC-02/04-01/15-795, paras 18-21.

Furthermore, fairness demands that the procedures set forth by the Chamber for the submission of additional evidence for sentencing be applicable to all those who proffer it, not just the Defence.

80. The Defence requests that the Appeals Chamber rule that the Chamber violated the Appellant's rights pursuant to Article 67(1)(e) of the Rome Statute by accepting testimonial evidence from the LRVs during the sentencing hearing and in its sentencing brief. The evidence given by the LRVs was testimonial in nature and made in anticipation of legal proceedings,[146] negating its inclusion without a sworn statement from witnesses.

vi. The Chamber's decision not to expunge the testimonial evidence submitted through the bar caused reversible error to the Appellant

81. The Defence advanced that certain Traditional Justice Mechanisms found in Acholi culture should stand as a mitigating circumstance for the Appellant.[147] The Defence submitted three (3) expert reports which discussed this issue[148] and one (1) from the *Ker Kwaro Acholi*.[149] As will be discussed later in this brief, the Acholi rituals are not a reason to mitigate an entire sentence, but something for the Court to see as a reason to lessen a sentence through the complementarity principle enshrined in the Rome Statute.[150]

82. The Chamber committed reversible error by not expunging the testimonial evidence produced from the bar. The Chamber relied upon said material when determining the applicability of undergoing Acholi Culture Rituals (like *Mato Oput*).[151] The testimonial evidence – which was not submitted into evidence properly or at all – guided the Chamber in its determination that the Traditional Justice Mechanisms of Acholi culture should not be considered as a mitigating factor.

83. The inclusion of the Traditional Justice Mechanisms as a mitigating factor would have led to a shorter sentence. The fact that the LRV's evidence was used and relied upon by the

[146] *See* Trial Chamber IX, *Decision on Prosecution's Request to Submit 1006 Items of Evidence*, ICC-02/04-01/15-795, para. 19 (*citing* Trial Chamber VII, *Decision on Prosecution Rule 68(2) and (3) Requests*, ICC-01/05-01/13-1478-Red-Corr, para. 32).
[147] Trial Chamber IX, *Public Redacted Version of "Corrected Version of 'Defence Brief on Sentencing', filed on 1 April 2021"*, ICC-02/04-01/15-1809-Corr-Red, paras 35-39 and 52-55.
[148] *See* UGA-D26-0015-1812, pp 1819-1822; UGA-D26-0015-1889, pp 1896-1898 (section 4); and UGA-D26-0015-1878, p. 1886 (sub-paragraph b).
[149] *See* UGA-D26-0015-1901.
[150] *See* para. 1 of the Preamble to the Rome Statute and Article 1 of the Rome Statute.
[151] Impugned Decision, paras 21-23, 30, and 37-39. *See generally* Impugned Decision, paras 15-43.

Chamber demonstrates its necessity for the Chamber's decision not to include the Traditional Justice Mechanisms of Acholi culture. For the abovementioned reasons, the Defence requests the Appeals Chamber to order the Chamber to expunge the testimonial evidence and remand the question of the mitigating circumstances of the Traditional Justice System of Acholi culture back to the Chamber.

vii. Conclusion

84. The Chamber unlawfully admitted and used testimonial evidence submitted by the Legal Representatives from the bar for the purpose of the Impugned Decision, thus violating the Rome Statute, Rules and judicial rulings made by the Chamber.[152] Some of said testimonial evidence was used directly against mitigating factors advanced by the Defence, further violating the Appellant's fair trial rights. The Defence requests the Appeals Chamber to order the record expunged of all testimonial evidence advanced by the Legal Representatives and remand the issue of whether the Appellant qualified for a mitigating factor and/or personal circumstance relating to the Acholi Traditional Justice System and its rituals and to apply said factor/circumstance to the sentence.

[152] *See* Trial Chamber IX, *Decision on the Prosecution's Applications for Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules*, ICC-02/04-01/15-596-Red, para. 5 and *Decision on Prosecution's Request to Submit 1006 Items of Evidence*, ICC-02/04-01/15-795, paras 18-21 (*citing* Trial Chamber VII, *Decision on Prosecution Rule 68(2) and (3) Requests*, ICC-01/05-01/13-1478-Red-Corr, para. 32).

GROUND 3: The Chamber erred in fact in its conclusions about the Acholi Traditional Justice System in the Impugned Decision. The errors include, but are not limited to:

- **its failure to appreciate correctly the relevant cultural beliefs and practices that informed the conduct of the Appellant;**
- **applying "Western values" in the Impugned Decision;**
- **its refusal to allow one of the highest authorities on the Acholi Traditional Justice System to give oral testimony before the Chamber during the sentencing hearing,**
- **its failure to acknowledge that the Defence request was to assist the Chamber in its understanding of the Acholi cultural beliefs and practices in its assessment of the personal circumstances of the Appellant as a mitigating factor; and**
- **its failure to apply the principle of complementarity in the Impugned Decision in sentencing.**

The Defence asserts these errors negatively and materially affected and caused a disproportionate sentence against the Appellant.

i. Introduction

85. The Acholi Traditional Justice System and practices are replete with accountability and sanctions even after conviction and sentencing. Therefore, it is not over for the Appellant that he has been convicted and sentenced by the Chamber. He still must undergo the Acholi Traditional Justice System. As such, the Chamber committed an error of fact and an error of law when it rejected and failed to objectively consider in this case the Acholi Traditional Justice System and its practices. By ignoring this traditional justice system, the Chamber failed to apply the principle of complementarity enshrined in the Rome Statute; this negatively and materially affected the Impugned Decision.

ii. Complementarity

86. The principle of complementarity is enshrined both in paragraph 10 of the Preamble and Article 1 of the Rome Statute. The Court, and by extension the Chamber, is not restricted to Article 17 in the application of the complementarity principle in the Rome Statute. This guiding principle should have informed the Chamber on the proper use of *Mato Oput* as a mitigating circumstance, yet the Chamber failed to view *Mato Oput* from the lens of complementarity.

87. The Rome Statute and Rules do not limit a trial chamber in its determination of what is a mitigating factor and what weight to give said factors in mitigation. The Defence asserts that

such rituals of traditional justice shall give comfort and piece-of-mind to a significant number of persons affected by the crimes for which the Appellant was convicted. While not everyone shall be happy, many shall, and this should have been taken into consideration by the Chamber. The Defence avers that the inclusion of local customs and rituals in the foreground, will not only aid the Appellant and the victims to bring harmony to Northern Uganda, but it will also help the image of the Court in countries which have a negative image of the ICC.

88. The Defence requests the Appeals Chamber to remand this ground to the Chamber and order it to review properly all of the material submitted to the Chamber by D-0042, D-0060, D-0114 and D-0133. By doing this, the Court will give attention to the culture of those who are from the region. This includes calling as live witnesses those persons proposed by the Defence for the sentencing hearing to determine the applicability of the Traditional Justice Mechanisms of Acholi as a mitigating factor and to determine the weight to give this in mitigation.

89. The Chamber erred in fact in its conclusions regarding the Acholi Traditional Justice System in the Impugned Decision. These errors negatively and materially affected and caused a disproportionate sentence against the Appellant. The errors regarding the Acholi Traditional Justice System include, but are not limited to, the following reasons delineated below.

iii. The Chamber's failure to appreciate correctly the relevant cultural beliefs and practices negatively and materially affected the Impugned Decision

90. The Chamber erred by failing to appreciate correctly the relevant cultural beliefs and practices of the Appellant.[153] Failure to appreciate the relevant cultural beliefs and practices of the Appellant negatively and materially impacted the Appellant in two ways. First, the Chamber disregarded submissions on social rehabilitation and reintegration when determining a sentence. Second, the Chamber failed to consider the relevant cultural beliefs and practices as a personal circumstance of the Appellant.

91. In the Impugned Decision, the Chamber disregarded submissions on social rehabilitation and reintegration when determining a sentence.[154] The Chamber described the Defence submissions as advocating for a "so-called Acholi Traditional Justice System."[155] The

[153] Appeals Chamber, *Defence Notice of Appeal of the Sentencing Decision*, ICC-02/04-01/15-1862, Ground 3.
[154] Impugned Decision, paras 16-43.
[155] Impugned Decision, para. 16.

purpose of the submissions, as acknowledged by the Chamber, was to "[demonstrate] the merits of traditional mechanisms of justice."[156] The purpose of the submissions was also to remind the Chamber that the Appellant's culture, including the Acholi Traditional Justice System, is a piece of the world's "shared heritage"[157] and the "delicate mosaic that may be shattered at any time."[158]

92. As stated in the *Defence Submissions on Sentencing*, the traditional justice system of *Mato Oput* will help the Appellant reintegrate into Acholi society.[159] The principles of restorative justice are the foundation of *Mato Oput* and are deeply embedded in Acholi society.[160] For example, truthfulness is the guiding principle "in the pursuit for justice and accountability in Acholi [which] transcends human conception."[161] The pursuit of justice and accountability includes "dialogues, rites and rituals and communion."[162] The Acholi people believe that a person "is given a second chance to become a useful member of the community," "regardless of the breaches to society one commits."[163] Rather than attempting to understand and consider the statements, reports and letters submitted by the Defence to demonstrate the merits of traditional mechanisms of justice, the Chamber evaluated the material to "[dispose] of the Defence arguments concerning the mechanisms of traditional justice."[164] Failure to appreciate the relevant cultural beliefs and practices of the Appellant negatively and materially impacted the Appellant in two ways. First, the Chamber disregarded submissions on social rehabilitation and reintegration when determining a sentence. Second, the Chamber failed to consider the relevant cultural beliefs and practices as a personal circumstance of the Appellant.

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[156] Impugned Decision, para. 16.
[157] Preamble of the Rome Statute, para. 1.
[158] Preamble of the Rome Statute, para. 1.
[159] Trial Chamber IX, *Public Redacted Version of "Corrected Version of 'Defence Submissions on Sentencing', filed on 1 April 2021"*, ICC-02/04-01/15-1809-Corr-Red, para. 52.
[160] Trial Chamber IX, *Public Redacted Version of "Corrected Version of 'Defence Submissions on Sentencing', filed on 1 April 2021"*, ICC-02/04-01/15-1809-Corr-Red, para. 52. *See also* D-0160, *Where does conviction and sentencing Dominic Ongwen Leave the Acholi Society?*, UGA-D26-0015-1812, pp 1820-1824. *See also* Ker Kwaro Acholi, *Ker Kwaro Acholi (KKA) submission to the ICC following the judgement on the Dominic Ongwen case on Feb/4/2021*, UGA-D26-0015-1901, p. 1904-1906 and Acholi Religious Leaders Peace Initiative, UGA-D26-0015-1832.
[161] Trial grou IX, *Public Redacted Version of "Corrected Version of 'Defence Submissions on Sentencing', filed on 1 April 2021"*, ICC-02/04-01/15-1809-Corr-Red, para. 52; D-0160, *Where does conviction and sentencing Dominic Ongwen Leave the Acholi Society?*, UGA-D26-0015-1812, p. 1823.
[162] Trial Chamber IX, *Public Redacted Version of "Corrected Version of 'Defence Submissions on Sentencing', filed on 1 April 2021"*, ICC-02/04-01/15-1809-Corr-Red, para. 52 and D-0160, *Where does conviction and sentencing Dominic Ongwen Leave the Acholi Society?*, UGA-D26-0015-1812, p. 1821.
[163] Trial Chamber IX, *Public Redacted Version of "Corrected Version of 'Defence Submissions on Sentencing', filed on 1 April 2021"*, ICC-02/04-01/15-1809-Corr-Red, para. 52 and D-0160, *Where does conviction and sentencing Dominic Ongwen Leave the Acholi Society?*, UGA-D26-0015-1812, p. 1821.
[164] Impugned Decision, para. 16.

93. Firstly, the Chamber's failure to appreciate correctly the relevant cultural beliefs and practices caused the Chamber to disregard submissions on social rehabilitation and reintegration through the Acholi Traditional Justice Systems, including *Mato Oput*. The Chamber should have considered the social rehabilitation and reintegration of the Appellant when determining a sentence for the Appellant.[165] According to Resolution 69/172, the social rehabilitation and reintegration of a person deprived of their liberty is an "essential aim of the criminal justice system."[166]

94. As discussed in the Defence Brief on Sentencing, *Mato Oput* will help the Appellant reintegrate into Acholi society.[167] Also, the Appellant has demonstrated his willingness to participate in activities that facilitate social rehabilitation and reintegration.[168] The cultural beliefs and practices outlined in the Defence submissions demonstrate the importance of social rehabilitation and reintegration through traditional justice mechanisms in Acholi society.[169] By disposing of these arguments concerning traditional mechanisms of justice, the Chamber failed to appreciate correctly the relevant cultural beliefs and practices that informed the conduct of the Appellant. This failure negatively and materially affected the Impugned Decision because the Chamber did not consider social rehabilitation and reintegration in the determination of a sentence, which may have impacted the length of the imposed sentence.

95. Secondly, the Chamber's failure to appreciate correctly the relevant cultural beliefs and practices of the Appellant resulted in the Chamber's inability to fully assess the personal circumstances of the Appellant as a mitigating factor. According to Rule 145 of the Rules, when deciding a sentence, the Chamber should take into account any mitigating factors and the personal circumstances of the person.

96. The Chamber did not take into account all personal circumstances of the Appellant because it did not appreciate the relevant cultural beliefs and practices of the Appellant. For example,

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[165] *See*, Trial Chamber IX, *Public Redacted Version of "Corrected Version of 'Defence Brief on Sentencing', filed on 1 April 2021"*, ICC-02/04-01/15-1809-Corr-Red, paras 43-55.
[166] Resolution 69/172 Human Rights in the Administration of Justice. *See also United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), citing* Resolution 69/172 of 18 December 2014 entitled "Human rights and the administration of justice."
[167] Trial Chamber IX, *Public Redacted Version of "Corrected Version of 'Defence Brief on Sentencing', filed on 1 April 2021"*, ICC-02/04-01/15-1809-Corr-Red, paras 52-55.
[168] Trial Chamber IX, *Public Redacted Version of "Corrected Version of 'Defence Brief on Sentencing', filed on 1 April 2021"*, ICC-02/04-01/15-1809-Corr-Red, paras 43-55.
[169] D-0160, *Where does conviction and sentencing Dominic Ongwen Leave the Acholi Society?*, UGA-D26-0015-1812, pp 1815-1816, 1821 and 1823. *See also* Ker Kwaro Acholi, *Ker Kwaro Acholi (KKA) submission to the ICC following the judgement on the Dominic Ongwen case on Feb/4/2021*, UGA-D26-0015-1901, p. 1904.

the Chamber failed to acknowledge that the purpose of the Defence request for three witnesses to testify before the Chamber[170] was to assist the Chamber in its understanding of the Acholi cultural beliefs and practices for its assessment of the personal circumstances of the Appellant as a mitigating factor. This failure resulted in the Chamber refusing to allow the witnesses to testify.[171] Refusing to allow the witnesses to testify resulted in a clear lack of understanding of Acholi cultural beliefs and practices. This lack of understanding further resulted in the Chamber being incapable of properly assessing the personal circumstances of the Appellant as a mitigating factor.

97. The Chamber also did not consider the role of *Mato Oput* in facilitating social rehabilitation and reintegration as a personal circumstance of the Appellant. As previously stated, social rehabilitation and reintegration through traditional justice mechanisms are important in Acholi society.[172] However, the Chamber disregarded submissions regarding social rehabilitation and reintegration through traditional mechanisms of justice.[173] This disregard resulted in the Chamber being incapable of properly assessing the personal circumstances of the Appellant.

98. Improperly assessing the personal circumstances of the Appellant as a mitigating factor directly contributed to a disproportionate sentence against the Appellant. Had the Chamber properly assessed the personal circumstances of the Appellant as a mitigating factor, the length of the sentence against the Appellant may have decreased. Thus, failing to consider all personal circumstances of the Appellant negatively and materially affected the Impugned Decision.

99. Therefore, failing to appreciate the relevant cultural beliefs and practices of the Appellant negatively and materially impacted the Impugned Decision because the Chamber disregarded submissions on social rehabilitation and reintegration when determining a sentence and the Chamber failed to consider the relevant cultural beliefs and practices as a personal circumstance of the Appellant.

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[170] Trial Chamber IX, *Decision on the 'Defence request to submit additional evidence for Trial Chamber IX's determination of the sentence'*, ICC-02/04-01/15-1801, paras 20 and 28.
[171] Trial Chamber IX, *Decision on the 'Defence request to submit additional evidence for Trial Chamber IX's determination of the sentence'*, ICC-02/04-01/15-1801, paras 20 and 28.
[172] D-0160, *Where does conviction and sentencing Dominic Ongwen Leave the Acholi Society?*, UGA-D26-0015-1812, pp 1815-1816, 1821 and 1823. *See also* Ker Kwaro Acholi, *Ker Kwaro Acholi (KKA) submission to the ICC following the judgement on the Dominic Ongwen case on Feb/4/2021*, UGA-D26-0015-1901, p. 1904.
[173] *See* para. 94 above.

iv. The Chamber's biased view of the Acholi Traditional Justice System negatively and materially affected the Impugned Decision

100. The Chamber erred in fact in its conclusions regarding the Acholi Traditional Justice System, including *Mato Oput*, because it held a biased view of traditional justice mechanisms. The Defence cautioned the Judges of the Chamber against drifting into judging the Appellant on whether they – the Judges – believed in the Acholi traditions, but on whether the Appellant believed them. The Chamber held a biased view because it 1) relied on non-Acholi persons to inform its conclusions and 2) refused to hear from witnesses well placed to inform conclusions on traditional justice mechanisms.

101. Firstly, the Chamber held a biased view of *Mato Oput* because it relied on non-Acholi persons to inform its conclusions of traditional mechanisms of justice. Specifically, the Chamber relied on the testimonies of Professor Tim Allen, an Englishman, and Professor Musisi, a non-Acholi Ugandan, in assessing the value of traditional justice mechanisms.[174]

102. According to the Chamber, it should be "[sensitive] to established cultural norms and processes."[175] Considering traditional justice mechanisms through the lens of two non-Acholi persons was insensitive to established Acholi cultural norms and processes. For example, the Chamber relied on these witnesses to conclude that traditional justice mechanisms are romanticised and "idealistic".[176] The Chamber accepted as fact Professor Allen's statements regarding his "concerns" about Acholi rituals.[177] This acceptance of Professor Allen's opinion as fact, despite his immediately prior statement expressing the importance and regularity of rituals and imprecise translation of Acholi terms into English terms,[178] is an error of fact. This error caused the Chamber to disregard the value of traditional justice mechanisms and negatively and materially affected the sentence against the Appellant.

103. The Chamber also relied on Professor Allen's and Professor Musisi's statements to seemingly conclude that *Mato Oput* holds no value in the Acholi community and that only Western ideas of retribution are sufficient to address the crimes for which the Appellant has been

[174] Impugned Decision, paras 32-33, 40.
[175] Impugned Decision, para. 27.
[176] Impugned Decision, paras 32-33.
[177] Impugned Decision, para. 32 (*citing* to Professor Allen's testimony at T-28-ENG, p. 75, l. 25 to p. 75, l. 5).
[178] T-28-ENG, p. 74, lns 17-24.

convicted.[179] This finding is in sharp contrast with evidence in the trial record showing that *Mato Oput* is deeply embedded Acholi society.[180]

104. This finding also assumes that Acholi traditional justice mechanisms would "stand in lieu of formal justice."[181] However, the Appellant has already spent more than six years in the custody of the ICC.[182] In the *Defence Brief on Sentencing*, the Defence suggested a maximum sentence of 10 years and completion of Acholi rituals by *Ker Kwaro Acholi*.[183] The Chamber's conclusion that *Mato Oput* holds no value in Acholi society is based on an error of fact that caused the Chamber to disregard and give no weight to the value of traditional justice mechanisms. This error negatively and materially affected the Impugned Decision.

105. The Chamber's reliance on non-Acholi persons to inform its conclusions regarding traditional justice mechanisms resulted in an error that negatively and materially affected and caused a disproportionate sentence against the Appellant. The Chamber disregarded and gave no weight to the value of Acholi Traditional Justice Mechanisms in Acholi culture. Had the Chamber considered and given proper weight to Acholi Traditional Justice Mechanisms, including *Mato Oput*, the length of the sentence against the Appellant may have decreased.

106. Secondly, the Chamber refused to hear from witnesses well placed to inform conclusions on traditional justice mechanisms, including one of the highest authorities in the Acholi Traditional Justice System. According to Article 76(1), the Chamber "shall take into account the evidence presented and submissions made during the trial that are relevant to the sentence." The Chamber may also hold a further hearing to "hear any additional evidence or submissions relevant to the sentence."[184]

107. Before the sentencing hearing, the Defence requested that three witnesses "be heard as live witnesses."[185] One of these witnesses was D-0160, Ambrose Olaa, who is the Prime Minister

[179] Impugned Decision, paras 32-33.
[180] D-0160, *Where does conviction and sentencing Dominic Ongwen Leave the Acholi Society?*, UGA-D26-0015-1812, pp 1820-1824. *See also* Ker Kwaro Acholi, *Ker Kwaro Acholi (KKA) submission to the ICC following the judgement on the Dominic Ongwen case on Feb/4/2021*, UGA-D26-0015-1901, pp 1904-1906 and Acholi Religious Leaders Peace Initiative, UGA-D26-0015-1832.
[181] Impugned Decision, para. 34.
[182] *See* Impugned Decision, p. 138(c), in which the Chamber orders that the time from 4 January 2015 to 6 May 2021 be deducted from the total sentence.
[183] Trial Chamber IX, *Public Redacted Version of "Corrected Version of 'Defence Brief on Sentencing', filed on 1 April 2021"*, ICC-02/04-01/15-1809-Corr-Red, paras 182-183.
[184] Article 76(2) of the Statute.
[185] Trial Chamber IX, *Decision on the 'Defence request to submit additional evidence for Trial Chamber IX's*

of Ker Kwaro Acholi.[186] As explained above, the Chamber did not acknowledge that the purpose of the Defence request for three witnesses to testify before the Chamber[187] was to assist the Chamber in its understanding of the Acholi cultural beliefs and practices for its assessment of the personal circumstances of the Appellant as a mitigating factor.[188] The Chamber decided that examinations of the witnesses, including Mr Olaa, were unnecessary[189] without appreciating its own limitations in the knowledge and appreciation of the Acholi Traditional Justice System.

108. Refusing to hear oral testimony from one of the highest authorities in the Acholi Traditional Justice System negatively and materially impacted the Impugned Decision because the Chamber blatantly chose not to hear a detailed explanation of *Mato Oput*. The need for additional information regarding *Mato Oput*, which would have been provided by Mr Olaa, is apparent in the Impugned Decision. In the Impugned Decision, the Chamber presented a number of unanswered questions. For example, the Chamber questioned 1) efficiency of traditional justice systems,[190] 2) the degree of acceptance of traditional justice systems in Northern Uganda,[191] 3) the "comprehensive definition" of traditional justice systems,[192] and 4) whether there is a traditional justice mechanism or rituals that include non-Acholi ethnic groups.[193]

109. Had the Chamber heard testimony from Mr Olaa, the Prime Minister of *Ker Kwaro Acholi*, the Chamber could have questioned the witness about *Mato Oput* and traditional justice mechanisms and its relevance and aid to the Impugned Decision. The Chamber could have developed a clear understanding of the process of *Mato Oput* and become fully informed of the views and concerns of the Acholi community as a whole. Refusal to hear from the witness resulted in a lack of information regarding *Mato Oput* and unjustified, exclusive reliance on the views and concerns of victims.

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determination of the sentence', ICC-02/04-01/15-1801, paras 20 and 28.
[186] Trial Chamber IX, *Decision on the 'Defence request to submit additional evidence for Trial Chamber IX's determination of the sentence'*, ICC-02/04-01/15-1801, para. 17(iii).
[187] Trial Chamber IX, *Decision on the 'Defence request to submit additional evidence for Trial Chamber IX's determination of the sentence'*, ICC-02/04-01/15-1801, paras 20 and 28.
[188] *See* paras 90-99 above.
[189] Trial Chamber IX, *Decision on the 'Defence request to submit additional evidence for Trial Chamber IX's determination of the sentence'*, ICC-02/04-01/15-1801, paras 20 and 28.
[190] Impugned Decision, para. 28.
[191] Impugned Decision, para. 28.
[192] Impugned Decision, para. 28.
[193] Impugned Decision, para. 30.

110. Instead, the Chamber chose to rely heavily on the opinions of Professor Allen and Professor Musisi[194] and the "views and concerns" of victims.[195] The opinions of Professor Allen, Professor Musisi and the victims did not provide facts to aid in the Chamber's understanding of traditional justice systems and *Mato Oput*. Unlike these persons, Prime Minister Olaa, as Prime Minister of *Ker Kwaro Acholi*, was well placed to answer questions about traditional justice mechanisms and address any concerns held by the Chamber. Unfortunately, the Chamber refused to hear testimony from Mr Olaa and erred by relying on the opinions of person not well place make statements of fact regarding the traditional justice system. This refusal to hear testimony from one of the highest authorities in the Acholi Traditional Justice System amounts to an error that negatively and materially affected the Impugned Decision.

111. The Chamber's reliance on the testimony of non-Acholi persons and refusal to hear testimony from persons well placed to inform conclusions on the Acholi Traditional Justice System resulted in the Chamber holding a biased view of traditional justice mechanisms. Had the Chamber given due weight to the Acholi Traditional Justice Mechanism, as a complement to "formal", "western" justice, the sentence imposed against the Appellant may have been reduced. Therefore, the Chamber's error negatively and materially affected the Impugned Decision.

v. Conclusion

112. The Defence requests the Appeals Chamber to remand this ground to the Chamber and order it to review the material submitted properly to the Court. The Chamber should give attention to those who are from the region from which the culture comes. This includes calling as live witnesses those persons proposed by the Defence for the sentencing hearing to determine the applicability of the Traditional Justice Mechanisms of Acholi as a mitigating factor and to determine the weight to give this in mitigation.

[194] *See* paras 101-105 above. *See also* paras 106-111 above.
[195] Impugned Decision, paras 35-39.

GROUND 4: The Chamber erred in law and in procedure when it sentenced the Appellant on both war crimes and crimes against humanity for the same underlying conduct,[196] resulting in prejudice in the stigma of convictions, the ultimate sentence and obstructing future possibilities for revision of the sentence and rehabilitation. These errors materially affected and caused a disproportionate sentence against the Appellant.

113. The Chamber sentenced the Appellant on 18 counts of crimes against humanity and 18 counts of war crimes in situations where each pair of crimes was based on identical underlying conduct.[197] The pairs of war crimes and crimes against humanity are: Counts 2-3, 12-13, 25-26, 38-39 (murder); Counts 14-15, 27-28, 40-41, 51-52, 62-63 (attempted murder); Counts 4-5, 16-17, 29-30, 42-43 (torture); Counts 53-54, 64-65 (rape); and Counts 55-56, 66-67 (sexual slavery). For example, the Appellant was sentenced on murder four times both as a war crime and as a crime against humanity for the same exact conduct. The Defence contends that it was error to sentence the Appellant on 18 of the convictions.

114. In the Appeal Brief against the Trial Judgment, the Defence argued that it was fundamentally unfair to impose multiple convictions for the identical conduct and harm.[198] Now, in the Impugned Decision, the Chamber compounded this error by using the same conduct to sentence the Appellant for the conviction as two crimes: as a war crime and a crime against humanity. In sum, the Defence maintains that the Chamber impermissibly rendered impermissible concurrent convictions, and then impermissible concurrent sentences.

115. The Chamber acknowledged that the concurrence of crimes is relevant to sentencing.[199] The Court also noted "the need to avoid that a single conduct or circumstance that is reflected in more than one individual sentence be subsequently 'double-counted' on this ground in the determination of the joint sentence…".[200]

116. The Chamber avoided addressing the issue of duplicative war crimes and crimes against humanity based on the same underlying conduct because it viewed the overlap as not having

[196] Although the Defence appeal ground specifies war crimes and crimes against humanity based on the same conduct, as detailed in its Appeal Brief, there are also other pairs of crimes based on the same underlying conduct that similarly should not have been the subject of double sentencing. These are: 1) sexual slavery and rape and 2) sexual slavery and forced marriage. *See* Appeals Chamber, *Defence Appeal Brief Against the Convictions in the Judgment of 4 February 2021*, ICC-02/04-01/15-1866-Conf, paras 294-297 (Ground 22).
[197] Impugned Decision, paras 153-161, 187-196, 225-234, 261-269, 294-308, 315-319, 340-351 and 356-373.
[198] Appeals Chamber, *Defence Appeal Brief Against the Convictions in the Judgment of 4 February 2021*, ICC-02/04-01/15-1866-Conf, para. 289.
[199] Impugned Decision, para. 376.
[200] Impugned Decision, para. 382.

"a significant bearing on the determination of the joint sentence in the present case, given the strikingly large number of distinct convictions…".[201]

117. The Defence acknowledges that there are distinct offences on which the Appellant was sentenced. However, the Defence strongly contends that war crimes and crimes against humanity based on the exact same conduct are not distinct offences. Even if the Appeals Chamber finds that the double crimes are permissible concurrences for purposes of conviction (which the Defence contends is an error), both of the overlapping crimes should not be considered for purposes of sentencing. As argued in the Appeal Brief against the Trial Judgment, 18 of the 36 convictions should be dismissed.[202] The Defence further asserts that, even if the double convictions stand, 18 of the 36 convictions should not have been the subject of sentencing.

118. As detailed in our Appeal Brief, the principle of *ne bis in idem* undergirds the analysis of concurrences, even if the precise language of Article 20 does not literally apply.[203] The Appellant should not have been sentenced for the same conduct twice in light of this fundamental human right.[204]

119. Although the Chamber indicated that, even if they excluded overlapping crimes, there would be "no practical impact given the circumstances of the present case,"[205] the Defence disagrees. With all due respect, it is not possible to say that, without 18 sentences imposed that duplicated 18 sentences for the identical conduct, the Chamber's analysis would have remained the same for the Joint Sentence. The Appellant is entitled to a reasoned determination of a joint sentence based only on convictions on which he can validly be sentenced.

120. Moreover, an appropriate sentence should consider, *inter alia*, the harm to the victims and the nature of the unlawful behaviour.[206] The harm and the behaviour are fully reflected in one of

[201] Impugned Decision, para. 379.
[202] *See* Appeals Chamber, *Defence Appeal Brief Against the Convictions in the Judgment of 4 February 2021*, ICC-02/04-01/15-1866-Conf, para. 293.
[203] *See* Appeals Chamber, *Defence Appeal Brief Against the Convictions in the Judgment of 4 February 2021*, ICC-02/04-01/15-1866-Conf, paras 277-288.
[204] *See* references to approaches of certain jurisdictions to multiple convictions based on the same conduct at Trial Chamber IX, *Defence appeal brief against the convictions in the Judgment of 4 February 2021*, ICC-02/04-01/15-1866-Conf, paras 279-280, 292, and fn. 328.
[205] *See* Impugned Decision, fn. 691
[206] Rule 145(1)(c) of the Rules. The full provision states: In addition to the factors mentioned in article 78(1), give consideration, *inter alia*, to the extent of the damage caused, in particular the harm caused to the victims and their

the overlapping crimes against humanity or war crimes. It is unnecessary, duplicative and prejudicial to consider the same harm and behaviour twice in assessing the ultimate sentence.

121. The prejudice from the Chamber's double sentencing of crimes against humanity and war crimes based on the same conduct is not only in the ultimate joint sentence, but also in the stigma from the number of convictions on serious atrocity crimes and quite possibly in future efforts for revision of the sentence and rehabilitation.

122. The Defence urges the Appeals Chamber to declare that the Appellant should not have been sentenced on 18 of the 36 overlapping crimes against humanity and war crimes based on the exact same conduct. The Defence further urges the Appeals Chamber to remand the case to the Trial Chamber for re-sentencing, without imposing sentences for 18 of the crimes. Eighteen of the 36 convictions are duplicative: the identical conduct is used for a conviction for war crimes and for crimes against humanity. In essence, the Chamber has created a "double-counting" of convictions, based on the identical conduct, for the purpose of sentencing.

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.

GROUND 5: The Chamber erred in law by taking into account actions as aggravating circumstances which happened outside the scope of the charged period. These errors materially affected and caused a disproportionate sentence against the Appellant.

i. Introduction

123. The Chamber erred in law by using actions as aggravating circumstances that occurred outside the scope of the charged period.[207] The Chamber committed these errors to the detriment and prejudice of the Appellant when determining the sentences and Joint Sentence against the Appellant by taking into account actions prior to the temporal jurisdiction of the case and of the Court.

ii. The Chamber cannot use alleged crimes committed before the jurisdiction of the Court as an aggravating circumstance for which no conviction has been entered

124. The Appeals Chamber stated:

> The convicted person is sentenced for the crime or offence *for which he or she was convicted*, not for *other* crimes or offences that that person may also have committed, but in relation to which no conviction was entered. This applies even when, based on the factual findings entered by the Trial Chamber, it may be concluded that these other crimes or offences were actually established at trial. If it were otherwise, the sentencing phase could, in fact, be used to enlarge the scope of the trial – which would be incompatible with the Court's procedural framework.[208]

125. Rule 145(2)(b)(i) of the Rules allows a trial chamber to use "[a]ny relevant prior criminal **convictions** for crimes under the jurisdiction of the Court or of a similar nature."[209]

126. The founding documents of the Court allow for the use of prior criminal convictions to be used as aggravating circumstances, but not allegations of criminal conduct occurring before the persons appeared before the Court for which he or she was charged and convicted before the Court or another court with jurisdiction over the crimes. Furthermore, the Rules limit the application of criminal convictions to "crimes under the jurisdiction of the Court or of a similar nature."[210]

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[207] *See* Impugned Decision, paras 80, 84, 287 and 292.
[208] Appeals Chamber, *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"*, ICC-01/05-01/13-2276-Red, para. 113. [Emphasis in the original].
[209] *See also ibid*, para. 114. [Emphasis added].
[210] Rule 145(2)(b)(i) of the Rules.

iii. The Appellant does not have any record of criminal convictions under the jurisdiction of the Court or of a similar nature before surrendering to the ICC

127. No evidence was adduced to the Chamber of any record of prior criminal convictions or criminal convictions under the jurisdiction of the Court or of a similar nature before surrendering to the ICC. No such convictions exist.

128. Furthermore, the Defence admits that Rule 145(2)(b)(i) of the Rules does not appear once in the Impugned Decision. But, regardless of whether the specific rule appears in the Impugned Decision, it is obvious that the Chamber used prior alleged conduct – conduct which took place before 1 July 2002 – when determining the sentence against the Appellant to his detriment.

iv. The Impugned Decision reads as if the Chamber used prior alleged conducts before the temporal jurisdiction of the case and the Court as aggravating circumstances when determining the sentence

129. A plain English reading of the Impugned Decision impresses upon the reader that alleged conduct which happened before the temporal jurisdiction of the Court was taken into account as aggravating circumstances by the Chamber when determining the sentence against the Appellant. Use of said prior acts as aggravating circumstances, without a conviction **and** being crimes under the jurisdiction of the Court or similar in nature, is impermissible under the Rules.

130. In the Impugned Decision, the Chamber discussed the Appellant's background. During this discussion, the Chamber noted that the evidence of the Appellant's past from 1987-2002 could not be ignored.[211] In the same paragraph, the Chamber stated, "For example, as recalled above, already in 1996, Dominic Ongwen abducted P-0101, raped her and made her his so-called wife."[212] The Chamber noted this instance four (4) paragraphs earlier in paragraph 80 of the Impugned Decision. The Chamber also noted the abducted and alleged forced marriage to P-0099 before 1 July 2002[213] and the abduction of P-0226 in 1998.[214]

[211] Impugned Decision, para. 84 (*referring* to paras 65-83 and *noting* that the sub-section these paragraphs are found is entitled "Factors and circumstances generally applicable to all crimes").
[212] *Ibid*, para. 84.
[213] *Ibid*, para. 80 (*noting* that P-0099 was abducted in 1998 and escaped the LRA in [REDACTED], *see* UGA-OTP-0165-0081-R01, p. 0083, para. 14 where she stated, "[REDACTED]." and p. 0084, para. 29 where she stated, "[REDACTED].").
[214] Impugned Decision, para. 80.

131. In relation to Count 50, the Chamber again discussed the age of P-0226 when she was abducted, and her age when she became a so-called wife to the Appellant, both before the temporal jurisdiction of the Court.[215] The Chamber went on to discuss the forced marriages and children of the Appellant, some of which happened before the temporal jurisdiction of the Court.[216]

132. The Chamber went on to write:

> Insofar as the bearing of children fathered by Dominic Ongwen constitutes a consequence, and a significant part of the (continuing) imposition, as a matter of fact, of a forced 'marriage' on the women concerned, it is of no relevance for the point made here by the Chamber that not all such children were actually conceived during the specific, narrower timeframe of the crime of forced marriage of which Dominic Ongwen was convicted under Count 50.[217]

133. Finally, the Chamber discussed again in the section on the Joint Sentence about sexual and gender-based crimes.[218] The Chamber discussed the same and similar issues as it has before, and from a plain language reading, one can reasonably assume that factors which occurred before the temporal jurisdiction of the Court played a role in the determination of the Joint Sentence.

134. The Chamber stated that the timeframe of the action was of "no relevance". It disregarded the guidance of the Appeals Chamber pronounced a few years prior.[219] The Chamber used conduct which happened before the temporal jurisdiction of the Court for which there is no conviction. This cannot be allowed to remain.

v. The use of the improper material in sentencing is reversible error and should be remanded back to the Chamber for reconsideration

135. The Chamber took into account facts from crimes allegedly committed before the temporal jurisdiction of the Court for which no conviction has been entered when determining the sentence against the Appellant, which it should not have. It is not possible to determine what

[215] Impugned Decision, para. 287.
[216] Impugned Decision, para. 292 (*noting* that P-0099's child with the Appellant was born on [REDACTED], *see* UGA-OTP-0165-0081-R01, p. 0083, para. 14 and P-0227, [REDACTED]).
[217] Impugned Decision, fn. 548.
[218] Impugned Decision, paras 378, 384 and 385.
[219] Appeals Chamber, *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"*, ICC-01/05-01/13-2276-Red, para. 113.

weight the Chamber gave to these illicit factors, and only the Chamber can answer that question.

136. Because these factors were ones which were "generally applicable to all crimes",[220] the Defence requests the Appeals Chamber to either reconsider them and substantially reduce the sentence or to remand this issue back to the Chamber for reconsideration of the individual and Joint Sentence with the explicit instructions not to consider alleged crimes committed before the temporal jurisdiction of the Court for which no conviction has been entered when determining the new sentences.

[220] Impugned Decision, p. 25, title 2.

GROUND 6: The Chamber erred in law and in fact by rejecting the mitigating and/or personal circumstance of the Appellant's family life in the Impugned Decision pursuant to Rules 145(1)(b) and (c) of the Rules. These errors materially affected and caused a disproportionate sentence against the Appellant.

i. Introduction

137. The Chamber erred in law and in fact by rejecting the mitigating factor and personal circumstance of the Appellant's family life in the Impugned Decision.[221] The Defence requests the Appeals Chamber to reverse the Chamber's decision not to consider the Appellant's family life as a mitigating factor or personal circumstance and to remand the question to the Chamber as to the weight given to the Appellant's family life in sentencing.

ii. The Appellant and his children have the right to seek a family life

138. No competent court with jurisdiction has divested the Appellant or his children of the fundamental right to a family life with each other.[222] Unlike as the Prosecution and Legal Representatives have intimated – but not written – the children's mothers cannot unilaterally divest the Appellant of this right.[223] The Defence demonstrated during the sentencing hearing that the exact opposite is true.

139. The Convention on the Rights of the Child ('CRC') guarantees rights to every person under the age of majority without discrimination and in the best interest of the child.[224] Said rights must "tak[e] into account the rights and duties of his or her parents […]."[225] The state parties are obliged to take all appropriate measures to ensure that the rights are respected[226] and that the rights, responsibilities and duties of the parents are respected.[227] The rights extend to maintain family relations for those who live in different states[228] and "to be heard in any judicial and administrative proceedings affecting the child […]."[229]

[221] Impugned Decision, paras 117-124.
[222] *See* Convention of the Rights of the Child, Article 9.
[223] *See* Impugned Decision, paras 118-119.
[224] Convention of the Rights of the Child, Articles 1, 2 and 3(1) (entered into force on 2 September 1990, currently with 196 parties).
[225] CRC, Article 3(2).
[226] CRC, Article 4.
[227] CRC, Article 5.
[228] CRC, Article 10(2).
[229] CRC, Article 12(2).

140. The duty also exists "to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents […] have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern."[230] State parties have the obligation to "render appropriate assistance to the parents […] in performance of their child-rearing responsibilities and shall ensure the […] services for the care of children."[231]

141. While incarcerated, the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) ('Nelson Mandela Rules')[232] requires that incarcerated persons receive family visits at regular intervals by using correspondence, telecommunications, electronic, digital and other means, including in-person visits.[233] It further states that, "consideration shall be given to his or her future after release and he or she shall be encouraged and provided assistance to maintain such relations with persons or agencies outside the prison as may promote the prisoner's rehabilitation and the best interests of his or her family."[234]

iii. The Appellant has made concerted efforts to speak with his children

142. During the sentencing hearing, the Defence challenged the insinuations in the Prosecution's and Legal Representatives' submissions on the Appellant's family life.[235] The Appellant, through his Defence, fought to enforce his right to a family life until it was granted.[236] The Prosecution aided in this effort, attending to the witnesses who were the subject of the two Article 56 hearings.[237] The Appellant has also had several in-person visits from his children. There should be no doubt as to the Appellant's desire and intent to maintain family relations with his children.

[230] CRC, Article 18(1).
[231] CRC, Article 18(2).
[232] United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), UNGA Resolution A/RED/70/175, adopted on 17 December 2015.
[233] Nelson Mandela Rules, Rule 58(1).
[234] Nelson Mandela Rules, Rule 107.
[235] ICC-02/04-01/15-T-261, p. 39, l. 11 to p. 40, l. 13.
[236] ICC-02/04-01/15-T-261, p. 39, l. 11 to p. 40, l. 13. *See also generally* Presidency, *Defence Request for Review Pursuant to Regulation 220 of the Regulations of the Registry*, ICC-RoR220-01/21-1-Red, para. 39 and ICC-RoR220-01/21-1-Conf-Exp-AnxG.
[237] *Ibid*.

iv. The Chamber improperly used the crimes for which the Appellant was convicted to deny him the mitigating circumstance or personal circumstance of his family life in the Impugned Decision

143. The Chamber used the facts that the Appellant was convicted for sexual and gender-based crimes and that his children lived in the bush for a time after being born to negate the mitigating factor and personal circumstance of the Appellant's family life with his children.[238] The Defence argues that this is an incorrect application of the facts to mitigating factors and personal circumstances of the Appellant.

144. The Appellant is the biological father of the children concerned.[239] It has not been argued otherwise by the Prosecution or decided otherwise by the Chamber. The Appellant has attempted to maintain family relations with these children.[240] No one has shown, and the Defence argues as such, that the Appellant attempts to treat his children born in the bush differently than those born in Uganda.[241]

145. The way the children were conceived is immaterial. The Appellant is the father, and the children have the right to be cared for by their father and their father has the right to care for them. He has enforced this right and has seen several of his children in person at the ICC Detention Centre.[242] The children should not be permanently, or for an unreasonably long time, condemned to being without paternal care for the alleged criminal conduct of their father.

146. Furthermore, the Appellant is the head-of-household of his homestead in Coorom as he is the eldest living male of the wider family unit. His cousin, Onekalit, fulfils these duties while the Appellant is away, but his children and family in Coorom have been struggling as of late. Since the onset of the pandemic, the Appellant's family has seen an increased demand for help from the children, something which shall continue to happen for some time. As the children get older, school fees shall increase, and their need for food as well. The family needs help and guidance, especially now with land issues looming on the horizon.

[238] Impugned Decision, paras 122-124.
[239] *See* UGA-OTP-0265-0106 and UGA-OTP-0267-0160.
[240] *See* ICC-02/04-01/15-T-261, p. 39, l. 11 to p. 40, l. 13. *See also Defence Request for Review Pursuant to Regulation 220 of the Regulations of the Registry*, ICC-RoR220-01/21-1-Red.
[241] [REDACTED].
[242] [REDACTED].

147. In *Katanga*, the Appeals Chamber Judges who reviewed the sentence of Mr Katanga took into account issues arising from the changed circumstances of Mr Katanga.[243] Because of the deaths of Mr Katanga's father and brother, the Appeals Chamber determined that this warranted consideration as to whether Mr Katanga's sentence should be reduced.[244]

148. The Defence argued that the Appellant's large family deserved consideration as a mitigating factor, or at the least, a personal circumstance of the Appellant.[245] The Appellant's situation is very similar, yet with a much larger family and more underage children than Mr Katanga had.[246] The Appeals Chamber should take judicial of the recent death of a dependable cousin of the Appellant who gave economic assistance and guidance to the Appellant's family, a matter which was notified to the Chamber.[247] The Appellant's duties, and his family's duties, do not change because of the Appellant's incarceration, but the fact that the mothers are relying on the family more as of late and the death of provider does change the situation.[248]

149. The Appellant's large family, no matter how it was conceived, remains human and deserves consideration in the sentence. The Chamber's refusal to consider the Appellant's current family situation as a mitigating factor, or at the least a personal circumstance, goes against previous decisions of chambers of this Court considering family situations.[249] The Chamber's failure to consider this as a mitigating factor or personal circumstance in sentence cannot stand.

150. The Defence avers this is reversible error. Several trial chambers before this one considered lesser family situations as personal circumstances, and this should be no different. The Appellant's family in Coorom and children need his help for day-to-day living and basic

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[243] Appeals Chamber, *Decision on the review concerning reduction of sentence of Mr Germain Katanga*, ICC-01/04-01/07-3615, paras 108-110.
[244] *Ibid*.
[245] Trial Chamber IX, *Public Redacted Version of "Corrected Version of 'Defence Brief on Sentencing', filed on 1 April 2021"*, ICC-02/04-01/15-1809-Corr-Red, paras 135-148.
[246] *See* D-0008, UGA-D26-0015-1855, para. 5; D-0009, UGA-D26-0015-1851, para. 9; D-0161, UGA-D26- 0015-1858, para. 3; and D-0162, UGA-D26-0015-1861, para. 3. *See also* Trial Chamber III, *Decision on Sentence pursuant to Article 76 of the Statute*, ICC-01/05-01/08-3399, paras 77-78 (*noting* that Mr Bemba's family situation was significantly smaller than the Appellant, which was the reason why Trial Chamber III did not take it into account as a mitigating factor).
[247] Email to Trial Chamber IX from Thomas Obhof, *Request for extension to file specific Rule 68(2)(b) declarations*, sent on 23 March 2021 at 01h53 CET.
[248] *Ibid*.
[249] *See* Trial Chamber II, *Decision on Sentence pursuant to article 76 of the Statute*, ICC-01/04-01/07-3484-tENG, paras 88 and 144 (*noting* that Trial Chamber II counted his family life as mitigating factors for Mr Katanga) and Trial Chamber VII, *Decision on Sentence pursuant to Article 76 of the Statute*, ICC-01/05-01/13-2123-Corr, paras 62, 66, 90, 96, 149, 197, 244 and 248 (*noting* that Trial Chamber VII counted family life as a personal circumstance of the convicted persons).

necessities. The Defence requests the Appeals Chamber to reverse the Chamber's decision not to account for the Appellant's family situation in the determination of the sentence and to remand the question of the sentence with instructions to consider the Appellant's family circumstances as a mitigating factor, or at the least a personal circumstance.

GROUND 7: The Chamber erred in law and in fact when it disregarded the Defence's arguments and decided that the Appellant's mental state did not meet the threshold provided for in Rule 145(2)(a)(i) of the Rules or that the Appellant's current mental state was not a personal circumstance of the Appellant. The Chamber also erred by relying upon the testimonies of P-0099, P-0101, P-0214, P-0226, P-0227, P-0235 and P-0236 as evidence to support that the Appellant did not meet this threshold and by failing to take into account the Appellant's current mental disabilities when determining whether the Appellant met the "exceptional circumstances" situation from other international tribunals. The Chamber's errors materially affected and caused a disproportionate sentence against the Appellant.

151. The Chamber erred in law and in fact in its decisions regarding the Appellant's mental state at the material time and his current mental state. The Chamber found that the Appellant did not suffer from a substantially diminished mental capacity at the relevant time.[250] The Chamber also found that the Appellant's "current mental health cannot be taken into account as a mitigating circumstance with respect to his sentencing."[251] These errors materially affected and caused a disproportionate sentence against the Appellant.

i. The Chamber erred in finding that the Appellant did not suffer from a substantially diminished mental capacity at the material time

152. The Chamber erred when it found that the Appellant did not suffer from a substantially diminished mental capacity at the material time. According to Article 31(1)(a), a person is not criminally responsible for their conduct if "[t]he person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform with the requirements of law." Circumstances that fall "short of constituting grounds for exclusion of criminal responsibility, such as substantially diminished mental capacity," must be taken into account as a mitigating circumstance during sentencing.[252] The Chamber's conclusion that the Appellant did not suffer from a substantially diminished mental capacity was based on 1) an incorrect legal standard and 2) rejection of Defence expert witness evidence, the report from Professor de Jong and exclusive reliance on Prosecution expert evidence and lay persons.

[250] Impugned Decision, para. 96.
[251] Impugned Decision, para. 97.
[252] Rule 145(2)(a)(i) of the Rules.

1. The Chamber erred by applying the beyond reasonable doubt standard in its assessment of substantially diminished mental capacity as a mitigating factor

153. The Chamber erred by applying the beyond reasonable doubt standard instead of the balance of probabilities standard when determining whether it was convinced that a substantially diminished mental capacity existed and therefore served as a mitigating circumstance in this case. Mitigating circumstances "must be established 'on the balance of probabilities,' and need not to relate to the crimes of which the person was convicted."[253] In contrast, in order to convict the accused, "the Court must be convinced of the guilt of the accused beyond reasonable doubt."[254]

154. The balance of probabilities standard requires that "the circumstance in question must exist or have existed 'more likely than not.'"[255] Mitigating circumstances are listed in Rule 145(2)(a) of the Rules.[256] Additionally, the Chamber has a "considerable degree of discretion in determining what constitutes a mitigating circumstance" and in "deciding how much weight, if any, to be accorded to the mitigating circumstances identified."[257] However, it is trite law that such discretion must be exercised judiciously.

155. In this case, the Chamber erred by applying the beyond reasonable doubt standard when determining whether substantially diminished mental capacity should be taken into account as a mitigating factor. In the Impugned Decision, the findings on substantially diminished mental capacity are based on conclusions in the Trial Judgment regarding Article 31(1)(a).[258] So, the Chamber erred by failing to reassess the evidence under the balance of probabilities standard. Had the Chamber reassessed the factors under the balance of probabilities standard, the Chamber would have arrived at a different conclusion. These factors include 1) the findings

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[253] Impugned Decision, para. 54. *See also* Trial Chamber VI, Sentencing Judgment, ICC-01/04-02/06-2442, para. 24; Trial Chamber I, *Decision on Sentence pursuant to Article 76 of the Statute*, ICC-01/04-01/06-2901, paras 32, 34; Trial Chamber II, *Decision on Sentence pursuant to Article 76 of the Statue*, ICC-01/04-01/07-3484-tENG, para. 34; ICTY Appeals Chamber, Prosecutor v Milan Babić, *Judgement on Sentencing Appeal*, Case No. IT-03-72-A, para. 43; ICTY Appeals Chamber, Prosecutor v Miroslav Bralo, *Judgement on Sentencing Appeal*, Case No. IT-95-17-A, para. 53; ICTY Appeals Chamber, Prosecutor v Miodrag Jokić, *Judgement on Sentencing Appeal*, Case No. IT-01-42/1-A, para. 47, ICTR Appeals Chamber, Aloys Simba v the Prosecutor, *Judgement*, Case No. ICTR-01-76-A, para. 328.
[254] Article 66(3) of the Statute. *See also* Trial Judgment, para. 227.
[255] ICTR Appeals Chamber, Aloys Simba v the Prosecutor, *Judgement*, Case No. ICTR-01-76-A, para. 328; See, ICTY Appeals Chamber, Prosecutor v Milan Babić, *Judgement on Sentencing Appeal*, Case No. IT-03-72-A, para. 43.
[256] Rule 145(2)(a) of the Rules.
[257] Impugned Decision, para. 54.
[258] In the Trial Judgment at paras 2450-2580, the Chamber reached a conclusion regarding the Article 31(1)(a) defence, which was based on the beyond reasonable doubt standard. The Defence does not waive its objections made its appeal brief to the error of the Chamber failing to apply the correct reasonable doubt standard.

of the Prosecution expert witnesses, 2) the findings of the Defence expert witnesses and Professor de Jong, and 3) the [REDACTED].

2. Evidence from Prosecution expert witnesses

156. The Chamber failed to reassess the findings of the Prosecution expert witnesses under the balance of probabilities standard. In the Impugned Decision, the Chamber found that "[t]he possibility of mental disease or defect was discussed at trial and ultimately excluded in the Trial Judgment on the basis of a detailed analysis of evidence, including expert evidence."[259] The expert evidence includes evidence from Professor Mezey, Dr Abbo, and Professor Weierstall-Pust.[260]

157. Although the Prosecution experts concluded that there was insufficient evidence to justify a diagnosis of mental disease or defect at the material time, Professor Weierstall-Pust and Dr Abbo concluded that the Appellant suffered traumatic events that may have impacted his mental health as an adult.[261] So, based on the Appellant's experiences as a person who was abducted at 9 years of age, who was forced to be a child soldier, and who endured decades of trauma, it is more likely than not[262] that the Appellant developed a mental disorder and substantially diminished mental capacity under Rule 145(2)(a)(i) of the Rules.[263]

158. This conclusion is supported by Prosecution experts Professor Weierstall-Pust and Dr Abbo. For example, Professor Weierstall-Pust, whom the Chamber found to be "entirely convincing,"[264] explained that early traumatic experiences have a "profound impact on an individual's mental health, as they can leave lasting imprints in the individual, especially when they occur in relevant developmental periods."[265] He also determined that the Appellant

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[259] Impugned Decision, para. 92.
[260] Impugned Decision, para. 92.
[261] Trial Chamber IX, *Public Redacted Version of "Corrected Version of 'Defence Submissions on Sentencing', filed on 1 April 2021"*, ICC-02/04-01/15-1809-Corr-Red, para. 90.
[262] ICTR Appeals Chamber, The Prosecutor v Aloys Simba, *Judgement*, Case No. ICTR-01-76-A, para. 328 and ICTY Appeals Chamber, Prosecutor v Milan Babić, *Judgement on Sentencing Appeal*, Case No. IT-03-72-A, para. 43.
[263] *See* Trial Chamber IX, *Public Redacted Version of 'Corrected Version of "Defence Closing Brief", filed on 24 February 2020'*, ICC-02/04-01/15-1722-Corr-Red, para. 590. Here, the Defence notes that Professor Weierstall-Pust's positon was that the Appellant suffered from traumatic events and that the probability that the Appellant showed some signs of a mental disorder is high, but that it did not reach a level sufficient to diagnose PTSD. The Defence also notes that Dr Abbo appears to accept the PTSD diagnosis in the reports of the Defence Experts and Professor de Jong. *See*, Prof Weierstall-Pust Report, UGA-OTP-0280-0674, conclusions at pp 27-28 and Dr Abbo Expert Report, UGA-OTP-0280-0732, p. 25.
[264] Trial Judgment, para. 2496.
[265] Trial Chamber IX, *Public Redacted Version of "Corrected Version of 'Defence Brief on Sentencing', filed on 1 April 2021"*, ICC-02/04-01/15-1809-Corr-Red, para. 91. *See also* P-0447, ICC-02/04-01/15-T-170, p. 23, lns 1-6.

suffered trauma,[266] including trauma due to a "one specific event that happened."[267] The Appellant also most likely experienced trauma due to "chronic exposure to stress that is not as intense, but that remains or maintains over a longer period."[268] Professor Weierstall-Pust concluded that both types of trauma "'seriously affect [a person's] mental health.'"[269]

159. Professor Weierstall-Pust also conceded that he "found it 'plausible' that [the Appellant] 'showed some signs of a mental disorder' during the period of the charges."[270] In fact, Professor Weierstall-Pust further stated that there were hints that the Appellant suffered from at least one symptom, that it is plausible that the Appellant suffered from some symptoms[271] and that he had "no doubts that living in this war scenario might have resulted in being confronted with potentially traumatic events that later in life could have also resulted in a developmental psychopathological disorder."[272]

160. Additionally, Dr Abbo explained that "from conception onward, the intellectual, emotional, and physical attributes individuals develop are strongly influenced by their personal behaviours, and physical processes, interactions with the physical environment, and interactions with other people, groups and institutions."[273] Dr Abbo concluded that after the Appellant's abduction, he was exposed to many traumatic events[274] that were "literally shaping his brain."[275]

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[266] Trial Chamber IX, *Public Redacted Version of "Corrected Version of 'Defence Brief on Sentencing', filed on 1 April 2021"*, ICC-02/04-01/15-1809-Corr-Red, paras 92-93. *See also* P-0447, ICC-02/04-01/15-T-170, p. 23, lns 1-6.
[267] Trial Chamber IX, *Public Redacted Version of "Corrected Version of 'Defence Brief on Sentencing', filed on 1 April 2021"*, ICC-02/04-01/15-1809-Corr-Red, para. 92. *See also* P-0447, ICC-02/04-01/15-T-170, p. 23, ln. 3.
[268] Trial Chamber IX, *Public Redacted Version of "Corrected Version of 'Defence Brief on Sentencing', filed on 1 April 2021"*, ICC-02/04-01/15-1809-Corr-Red, paras 92 and 94. *See also* P-0447, ICC-02/04-01/15-T-170, p. 23, lns. 4-5.
[269] Trial Chamber IX, *Public Redacted Version of "Corrected Version of 'Defence Brief on Sentencing', filed on 1 April 2021"*, ICC-02/04-01/15-1809-Corr-Red, para. 92. *See also* P-0447, ICC-02/04-01/15-T-170, p. 23, lns 1-6.
[270] Trial Chamber IX, *Public Redacted Version of "Corrected Version of 'Defence Brief on Sentencing', filed on 1 April 2021"*, ICC-02/04-01/15-1809-Corr-Red, para. 96. *See also* Trial Judgment, para. 2491.
[271] Trial Chamber IX, *Public Redacted Version of "Corrected Version of 'Defence Brief on Sentencing', filed on 1 April 2021"*, ICC-02/04-01/15-1809-Corr-Red, para. 96. *See also* P-0447, ICC-02/04-01/15-T-169, p. 74 lns 1-9 and *Forensic Report on the mental health status of Mr. Dominic Ongwen YY*, UGA-OTP-0280-0674, p. 0698.
[272] Trial Chamber IX, *Public Redacted Version of "Corrected Version of 'Defence Brief on Sentencing', filed on 1 April 2021"*, ICC-02/04-01/15-1809-Corr-Red, para. 96. *See also* P-0447, ICC-02/04-01/15-T-169, p. 18, lns 10-13.
[273] Trial Chamber IX, *Public Redacted Version of "Corrected Version of 'Defence Brief on Sentencing', filed on 1 April 2021"*, ICC-02/04-01/15-1809-Corr-Red, para. 98. *See also* P-0445, *Forensic Psychiatric Report of Dominic Ongwen*, UGA-OTP-0280-0732, p. 0735.
[274] Trial Chamber IX, *Public Redacted Version of "Corrected Version of 'Defence Brief on Sentencing', filed on 1 April 2021"*, ICC-02/04-01/15-1809-Corr-Red, para. 99. *See also* P-0445, *Forensic Psychiatric Report of Dominic Ongwen*, UGA-OTP-0280-0732, p. 0748.
[275] Trial Chamber IX, *Public Redacted Version of "Corrected Version of 'Defence Brief on Sentencing', filed on 1 April 2021"*, ICC-02/04-01/15-1809-Corr-Red, para. 99. *See also* P-0445, *Forensic Psychiatric Report of Dominic Ongwen*, UGA-OTP-0280-0732, p. 0754.

161. In the Impugned Decision, the Chamber did not assess this factor demonstrating that the Appellant more likely than not experienced a substantially diminished mental capacity at the material time. Instead, the Chamber dismissed the factor based on its findings in the Trial Judgment, which were based on the incorrect burden of proof standard.[276]

3. Evidence from Defence expert witnesses and Professor de Jong

162. The Chamber failed to reassess the findings of the Defence expert witnesses and Professor de Jong under the balance of probabilities standard. In the *Defence Submissions on Sentencing*, the Defence argued that the Chamber should find that the Appellant likely experienced a substantially diminished mental capacity at the material time because he is currently receiving treatment for mental diseases and defects.[277] In light of Professor Weierstall-Pust's and Dr Abbo's concessions above, this inference is supported by the Defence expert witnesses' and Professor de Jong's conclusions.[278] The Defence experts concluded that the Appellant suffered from numerous mental disorders, including "severe [REDACTED], posttraumatic stress disorder (PTSD), and [REDACTED]."[279] Similarly, Professor de Jong concluded that the Appellant suffers from mental disorders, including "PTSD, [REDACTED], and [REDACTED]."[280]

163. Despite the obligation to assess the factors under the balance of probabilities standard, the Chamber rejected the evidence of Professor Ovuga and Dr Akena based on its findings in the Trial Judgment.[281] The Chamber also rejected Professor Ovuga's expert report prepared for sentencing because it was based on the conclusions of Dr Akena and Professor Ovuga's previous expert report.[282] The Chamber also rejected the evidence of Professor de Jong

[276] Impugned Decision, para. 93 (*noting* that the Chamber cited directly to the Trial Judgment which carries a different burden of proof).
[277] Trial Chamber IX, *Public Redacted Version of "Corrected Version of 'Defence Brief on Sentencing', filed on 1 April 2021"*, ICC-02/04-01/15-1809-Corr-Red, paras 86-87.
[278] Trial Chamber IX, *Public Redacted Version of "Corrected Version of 'Defence Brief on Sentencing', filed on 1 April 2021"*, ICC-02/04-01/15-1809-Corr-Red, paras 86 and 88.
[279] Impugned Decision, para. 87. *See also* D-0041 and D-0042, *Psychiatric Report*, UGA-D26-0015-0004, pp 0017-0018 and D-0042, *Report for Sentence Mitigation*, UGA-D26-0015-1878, pp 1883-1884.
[280] Trial Chamber IX, *Public Redacted Version of "Corrected Version of 'Defence Brief on Sentencing', filed on 1 April 2021"*, ICC-02/04-01/15-1809-Corr-Red, para. 88. *See also* Professor Joop T. de Jong, MD PhD Psychiatry, *Psychiatric examination Pro Justitia regarding Mr Dominic Ongwen YY*, UGA-D26-0015-0046-R01, pp 0050-0053 and Trial Judgment, para. 2576.
[281] Impugned Decision, para. 95.
[282] Impugned Decision, para. 95.

because Professor de Jong's report was prepared to examine the Appellant's mental health at the time of examination during the trial, not at the material time.[283]

164. The Chamber also rejected the inference based on the Prosecution experts' evidence.[284]

165. Thus, the Chamber failed to reassess the factors demonstrating that the Appellant more likely than not[285] experienced a substantially diminished mental capacity at the material time. Instead, the Chamber dismissed the Defence experts' evidence and Professor de Jong's evidence based on its findings in the Trial Judgment.

4. [REDACTED]

166. [REDACTED][286] [REDACTED].[287] [REDACTED].

167. [REDACTED][288] [REDACTED].

5. The Chamber erred by rejecting Defence expert witness evidence and relying exclusively on Prosecution Expert evidence and lay persons to conclude that the Appellant did not suffer from substantially diminished mental capacity

168. The Chamber found that the Appellant did not suffer from a substantially diminished mental capacity[289] because it rejected the submissions from Defence Expert witnesses.[290] Second, the Chamber relied on evidence provided by Professor Mezey, Dr Aboo, and Professor Weierstall-Pust.[291] The Defence extensively covered this in the *Defence Appeal Brief Against the Convictions in the Judgment of 4 February 2021*,[292] which discusses the Chamber's unequivocal rejection of the Defence Experts, total acceptance of Prosecution Expert evidence, and related errors.

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[283] Impugned Decision, para. 97 (*noting* that this is the same reason the Chamber rejected Dr de Jong's evidence in the Trial Judgment at para. 2575-2579).
[284] Impugned Decision, para. 96. *See also* Trial Chamber IX, *Public Redacted Version of "Corrected Version of 'Defence Brief on Sentencing', filed on 1 April 2021"*, ICC-02/04-01/15-1809-Corr-Red, para. 89.
[285] ICTR Appeals Chamber, The Prosecutor v Aloys Simba, *Judgement*, Case No. ICTR-01-76-A, para. 328 and ICTY Appeals Chamber, Prosecutor v Milan Babić, *Judgement on Sentencing Appeal*, Case No. IT-03-72-A, para. 43.
[286] ICTR Appeals Chamber, The Prosecutor v Aloys Simba, *Judgement*, Case No. ICTR-01-76-A, para. 328 and ICTY Appeals Chamber, Prosecutor v Milan Babić, *Judgement on Sentencing Appeal*, Case No. IT-03-72-A, para. 43.
[287] Impugned Decision, para. 98.
[288] ICTR Appeals Chamber, The Prosecutor v Aloys Simba, *Judgement*, Case No. ICTR-01-76-A, para. 328 and ICTY Appeals Chamber, Prosecutor v Milan Babić, *Judgement on Sentencing Appeal*, Case No. IT-03-72-A, para. 43.
[289] Impugned Decision, para. 100.
[290] Impugned Decision, para. 95.
[291] Impugned Decision, para. 96.
[292] Appeals Chamber, *Defence Appeal Brief Against the Convictions in the Judgment of 4 February 2021*, ICC-02/04-01/15-1866-Conf, paras 323-419.

169. Finally, the Chamber erroneously relied on the testimonies of P-0099, P-0101, P-0214, P-0226, P-0227, P-0235 and P-0236.[293] Specifically, the Chamber found that "nothing in the testimonies of [these witnesses] indicated that these women, who were […] held as so-called 'wives' or otherwise captive in Dominic Ongwen's immediate proximity at various times over the course of around 20 years, observed behaviour on the part of Dominic Ongwen suggestive of a mental disease or defect."[294] However, the Chamber did not consider and give weight to the cultural aspects of these observations.[295] For example, in the relevant culture, some persons may interpret behaviours as spirit possession.[296] A person may also fail to recognize certain behaviours as an indication of mental illness because mental illness is not commonly discussed or recognized in the relevant culture.[297] Thus, the Chamber erred by relying on evidence from lay witnesses to find that the Appellant exhibited no symptoms of mental illness.[298]

170. In conclusion, when determining whether the Appellant suffered from a substantially diminished mental capacity, the Chamber erred by 1) applying an incorrect legal standard and 2) rejecting Defence expert witness evidence, Professor de Jong's report, and relying exclusively on Prosecution expert evidence and lay persons. This error also violates the Appellant's fair trial rights and his rights under the CRPD. The CRPD guarantees that all persons are equal under the law and "entitled without any discrimination to the equal protection and equal benefit of the law."[299] Failing to acknowledge that a person more likely than not suffered from a substantially diminished mental capacity deprives the person of equal protection and equal benefit of the law. Thus, the rejection of substantially diminished mental capacity as a mitigating circumstance was an error that negatively and materially affected the Impugned Decision.

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[293] Impugned Decision, para. 93.
[294] Impugned Decision, para. 93.
[295] *See* Trial Chamber IX, *Defence appeal brief against the convictions in the Judgment of 4 February 2021*, ICC-02/04-01/15-1866-Conf, paras 381-384.
[296] Trial Chamber IX, *Defence appeal brief against the convictions in the Judgment of 4 February 2021*, ICC-02/04-01/15-1866-Conf, paras 383-384.
[297] Trial Chamber IX, *Defence appeal brief against the convictions in the Judgment of 4 February 2021*, ICC-02/04-01/15-1866-Conf, paras 383-384. *See* T-254, p. 26, ln. 20 to p. 27, ln. 8. D-42 was asked by Defence counsel whether a person seeing Appellant acting violently one day, and then playing with children in a non-violent manner the next day would view these different behaviours as a sign of mental illness. He replied that it was tough to respond, because of the level of mental health literacy and person may not have been able to tell. But the angry, violent Dominic B always appeared on the battlefield, and violence in that situation was not viewed as abnormal. *See also* T-251, p. 35, lns 2-8.
[298] *See* Trial Chamber IX, *Defence appeal brief against the convictions in the Judgment of 4 February 2021*, ICC-02/04-01/15-1866-Conf, paras 381-392.
[299] CRPD, Article 5(1).

ii. The Chamber erred by finding that the Appellant's current mental state was not a personal circumstance of the Appellant

171. The Chamber's finding that the Appellant's current mental state is not a personal circumstance of the Appellant materially affected and caused a disproportionate sentence against the Appellant. When deciding a sentence, the Chamber should have take into account the personal circumstances of the person pursuant to Rule 145.[300] In the Impugned Decision, the Chamber found that "the health of the convicted person at the time of sentencing need not automatically be taken into account and poor health as such should not automatically be seen as a mitigating circumstance." [301] So, the Chamber found that "only in extreme and exceptional cases can it be imagined that a very serious health condition, or perhaps a terminal disease, may have to be taken into account as a mitigating circumstance."[302] In other words, "poor health is mitigating only in exceptional cases."[303] Thus, the Chamber's errors were two fold. Firstly, the Chamber erred by failing to define and correctly apply the "exceptional circumstances standard." Secondly, the Chamber erred by 1) failing to consider the Appellants current mental disabilities as a personal circumstance and 2) failing to consider his mental disabilities in its assessment of personal circumstances as a mitigating factor.

1. The Chamber erred by failing to define and correctly apply the "exceptional circumstances" standard

172. The Chamber erred by failing to articulate the "exceptional circumstances" standard used to determine whether the Appellant's health can be taken into account as a mitigating circumstance.[304] In the Impugned Decision, the Chamber stated that "poor health is mitigating only in exceptional circumstances."[305] This standard is vague and the Chamber did not cite primary law that clarifies the standard.[306] Rather, the Chamber cites persuasive authority that also lacks a clear standard for "exceptional circumstances" or "exceptional cases."[307]

[300] *See generally* Trial Chamber VII, *Decision on Sentence pursuant to Article 76 of the Statute*, ICC-01/05-01/13-2123-Corr, para. 92. *See also* Rule 145(1)(c) of the Rules.
[301] Impugned Decision, para. 103.
[302] Impugned Decision, para. 103.
[303] Impugned Decision, para. 103.
[304] Impugned Decision, paras 97 and 103-105.
[305] Impugned Decision, para. 103.
[306] Impugned Decision, para. 103.
[307] Impugned Decision, para. 103.

173. For example, the Chamber cited the Appeals Chamber Judgment in *Prosecutor v. Šainović et al.*[308] In *Šainović*, the Appeals Chamber found that "poor health is mitigating only in exceptional cases" and the Trial Chamber has discretion in weighing such evidence.[309] Neither the Trial Chamber nor the Appeals Chamber in *Šainović* provided a standard to determine whether a health condition is an "exceptional case".[310] Like the *Ongwen* Chamber, the *Šainović* Appeals Chamber cites *Prosecutor v. Galić* and *Prosecutor v. Blaškić* to support the conclusion that poor health is only mitigating in exceptional circumstances. However, neither *Galić* nor *Blaškić* provide a standard to determine whether a person's health condition is an "exceptional case."[311]

174. At best, the Chamber attempted to define "exceptional cases" as cases that are "extreme", "very serious", or "terminal."[312] These terms are vague and do not set a clear standard to determine whether a person's health should be considered as a mitigating factor. Even with its discretion, the Chamber should have provided the standard it applied in this case. Alternatively, the Chamber should have provided a reasoned statement explaining its conclusion that the Appellant's health conditions are not exceptional.

175. Instead, the Chamber avoided providing clarification or articulating a standard for "exceptional cases" by stating that it was not necessary to "attempt to specify precisely in what cases that might be."[313] The only reasoning provided by the Chamber to explain why the Appellant's mental disabilities are not "exceptional" is that the Chamber was impressed by the Appellant's personal statement.[314] Based on this brief explanation, it appears that, according to the Chamber, the ability to speak about the traumatic events he endured precludes the Appellant from suffering from "extreme" or "very serious" health issues. This is despite the evidence on the record presented in this ground of appeal. Also, the Appellant has

[308] Impugned Decision, para. 103 and fn. 194.
[309] ICTY, Appeals Chamber, Prosecutor v. Šainović et al, *Judgement*, Case No. IT-05-87-A, para. 1827.
[310] ICTY, Appeals Chamber, Prosecutor v. Šainović et al, *Judgement*, Case No. IT-05-87-A, para. 1827; ICTY, Trial Chamber, Prosecutor v. Šainović et al, *Judgement Volume 3 of 4*, Case No. IT-05-87-T, para. 1203.
[311] Impugned Decision, para. 103, *See also* ICTY, Appeals Chamber, Prosecutor v. Galić, *Judgement*, Case No. IT-98-29-A, para. 436 and ICTY, Appeals Judgment, Prosecutor v. Blaškić, *Judgement*, Case No. IT-95-14-A, para. 696.
[312] Impugned Decision, para. 103.
[313] Impugned Decision, para. 103.
[314] Impugned Decision, para. 104.

the right to remain silent and the right not to have his unsworn statement used against him in sentencing.[315]

176. This lack of clarification from the Chamber, primary authority or persuasive authority leaves the Defence questioning whether such "extreme" cases do, in fact, exist in the eyes of the Court.[316] As described below, the Appellant suffers from multiple mental disabilities, which have been diagnosed by multiple medical professionals. He is receiving treatment based on these diagnoses. The Chamber's failure to articulate the "exceptional circumstances" standard used to determine whether the Appellant's mental health can be taken into account as a mitigating circumstance is an error of law that materially affected and caused a disproportionate sentence against the Appellant.

2. The Chamber erred by 1) failing to consider the Appellants current mental disabilities as a personal circumstance and 2) failing to consider his mental disabilities in its assessment of personal circumstances as a mitigating factor

177. The Chamber erred by 1) failing to consider the Appellant's current mental disabilities as a personal circumstance of the Appellant and 2) failing to consider his mental disabilities in its assessment of the personal circumstances of the Appellant as a mitigating factor. As previously stated, the Chamber should take into account any mitigating factors and the personal circumstances of the person.[317] The Chamber erred by failing to consider the Appellant's mental disabilities as a personal circumstance of the Appellant because his mental disabilities were recorded in the trial record many times, including in 1) the requests for medical examinations pursuant to Rule 135 of the Rules of Procedure and Evidence, 2) Professor de Jong's report and diagnoses, 3) Defence Expert reports and diagnoses, 4) information from the Registry, ICC-DC officials, and ICC-DC medical officer and 5) the Appellant's [REDACTED].

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[315] *See*,Appeals Chamber, *Defence Appeal Brief Against the Sentence Against the Convictions in the Judgment of 4 February 2021*, ICC-02/04-01/15-1866-Conf, paras 227-233. *See also* Ground 10 below.

[316] The Defence notes that the Prosecution made two statements regarding the mental health of the Appellant. First, the Prosecution stated that mental health should affect the execution of a sentence, but not the length of the sentence. This statement is not helpful in determining a standard for whether a person's health should be considered as a mitigating factor because the statement pertains to treatment of health issues rather than legal criterion for the standard. Second, the Prosecution stated that "the standard for taking into account an accused's current health in determining their sentence is extremely high. International courts and tribunals, including this one, have stated that this factor may only be considered in rare or exceptional circumstances. One example of this might be where an individual is suffering from a terminal disease and is fast approaching the end of their life." This statement is also not helpful because the Prosecution did not cite to any primary or persuasive authority in making these statements. These statements also do not provide a standard for determining whether an illness is "exceptional". *See* ICC-02/04-01/15-T-260, p. 30, lns 1-10.

[317] Rule 145(1)(b) of the Rules.

178. Firstly, the Appellant's mental disabilities are recorded in the trial record because the Defence requested medical examinations of the Appellant pursuant to Rule 135 of the Rules three times.[318] For example, on 5 December 2016, the Defence requested that the Chamber order a Rule 135 examination of the Appellant based on a preliminary report from Defence Experts.[319] On 6 December 2016, the Chamber rendered an oral decision rejecting the request.[320] In the same proceeding, the Chamber accepted an illegal plea.[321] However, the Chamber found that it may order a psychiatric examination assessing the Appellant's "continued fitness to stand trial."[322] On 13 December 2016, the Chamber rejected the Defence request for a "psychiatric and/or psychological examination of [the Appellant] with a view to assessing his fitness to stand trial."[323] Instead, it ordered a psychiatric examination "with a view to: (i) making a diagnosis as to any mental condition or disorder that Dominic Ongwen may suffer at the present time; and (ii) providing specific recommendations on any necessary measure/treatment that may be required to address any such condition or disorder at the detention centre."[324] The Chamber also appointed Professor de Jong based on the Registry's recommendation.[325] The Chamber continued to proceed with the trial between the 5 December 2016 Defence request and the 7 January 2017 submission of Professor de Jong's findings.

[318] *See*, Rule 135 of the Rules. *See* Trial Chamber IX, *Second Public Redacted Version of "Defence Request for a Stay of the Proceedings and Examination Pursuant to Rule 135 of the Rules of Procedure Evidence, filed 5 December 2016*, ICC-02/04-01/15-620-Red2; Trial Chamber IX, *Public Redacted Version of "Defence Request for a Stay of the Proceedings and for Trial Chamber IX, pursuant to Rule 135 of the Rules of Procedure and Evidence, to Order a Medical Examination of Mr Ongwen"*, filed on 10 January 2019, ICC-02/04-01/15-1405-Red2; Trial Chamber IX, *Public Redacted Version of "Defence Urgent Request to Order a Medical Examination of Mr. Ongwen", filed on 16 September 2019*, ICC-02/04-01/15-1595-Red.
[319] *See* Rule 135 of the Rules. *See also* Trial Chamber IX, *Second Public Redacted Version of "Defence Request for a Stay of the Proceedings and Examination Pursuant to Rule 135 of the Rules of Procedure Evidence, filed 5 December 2016*, ICC-02/04-01/15-620-Red2, paras 1, 41-42.
[320] Trial Chamber IX, *Decision on the Defence Request to Order a Medical Examination of Dominic Ongwen*, ICC-02/04-01/15-637-Conf, para. 3.
[321] *See*, Appeals Chamber, *Defence Appeal Brief Against the Sentence Against the Convictions in the Judgment of 4 February 2021*, ICC-02/04-01/15-1866-Conf, paras 50-76.
[322] Trial Chamber IX, *Decision on the Defence Request to Order a Medical Examination of Dominic Ongwen*, ICC-02/04-01/15-637-Conf, para. 3 (public redacted version here).
[323] Trial Chamber IX, *Decision on the Defence Request to Order a Medical Examination of Dominic Ongwen*, ICC-02/04-01/15-637-Conf, p. 18.
[324] Trial Chamber IX, *Decision on the Defence Request to Order a Medical Examination of Dominic Ongwen*, ICC-02/04-01/15-637-Conf, p. 18.
[325] Trial Chamber IX, *Decision on the Defence Request to Order a Medical Examination of Dominic Ongwen*, ICC-02/04-01/15-637-Conf, para. 33 and p. 18.

179. Additionally, on 10 January 2019, the Defence requested an adjournment of proceedings for the purpose of a medical examination pursuant to Rule 135.[326] In its decision, the Chamber rejected the Defence request for an examination and ordered the Detention Centre and the Medical Officer to submit reports regarding whether the Appellant would be able to attend the 28 January hearing.[327] The Chamber explained that these reports were not additional examinations.[328]

180. Finally, on 16 September 2019, the Defence requested the Chamber to order "a psychiatric examination of [the Appellant] to be conducted with a view to: making a diagnosis as to any mental condition or disorder that [the Appellant] may suffer at the present time that makes him unable to make an informed decision whether or not to testify in his defence."[329] In its 1 October 2019 decision, the Chamber rejected the request.[330] Therefore, the Appellant's mental disabilities were recorded in three requests for medical examinations pursuant to Rule 135.

181. Secondly, the Appellant's mental disabilities are recorded in the trial record because the Chamber ordered Professor de Jong to submit a report regarding his psychiatric examination of the Appellant.[331] The purpose of this report was to make "a diagnosis as to any mental condition or disorder [the Appellant] may suffer at the present time" and to provide "specific recommendations on any necessary measure/treatment that may be required to address any such condition or disorder at the detention centre."[332] In his report, Professor de Jong "discussed [the Appellant's] mental health at the time of preparation of the report"[333] and concluded that the Appellant suffered from PTSD, [REDACTED], and [REDACTED].[334] This conclusion was based on "two in-person interviews and one telephone interview with

[326] Trial Chamber IX, *Public Redacted Version of "Defence Request for a Stay of the Proceedings and for Trial Chamber IX, pursuant to Rule 135 of the Rules of Procedure and Evidence, to Order a Medical Examination of Mr Ongwen", filed on 10 January 2019*, ICC-02/04-01/15-1405-Red2, para. 44.
[327] Trial Chamber IX, *Public redacted version of Decision on Defence Request to Order an Adjournment and a Medical Examination*, ICC-02/04-01/15-1412-Red, para. 12.
[328] Trial Chamber IX, *Public redacted version of Decision on Defence Request to Order an Adjournment and a Medical Examination*, ICC-02/04-01/15-1412-Red, para. 12.
[329] Trial Chamber IX, *Public Redacted Version of "Defence Urgent Request to Order a Medical Examination of Mr. Ongwen", filed on 16 September 2019*, ICC-02/04-01/15-1595-Red, para. 27.
[330] Trial Chamber IX, *Decision on Further Defence Request for a Medical Examination*, ICC-02/04-01/15-1622, para. 29.
[331] Professor Joop T. de Jong, MD PhD Psychiatry, *Psychiatric examination Pro Justitia regarding Mr Dominic Ongwen YY*, UGA-D26-0015-0046-R01.
[332] Trial Judgment, para. 2576.
[333] Trial Judgment, para. 2576.
[334] Professor Joop T. de Jong, MD PhD Psychiatry, *Psychiatric examination Pro Justitia regarding Mr Dominic Ongwen YY*, UGA-D26-0015-0046-R01, pp 0050-0053. *See also* Trial Judgment, para. 2576.

[the Appellant], as well as on the basis of '[d]ocumentation of the physical, psychological, and psychiatric assessment of the Detention Centre staff in The Hague."[335] Therefore, the Appellant's mental disabilities were recorded in Professor de Jong's report.

182. In the Trial Judgment, the Chamber did not rely on Professor de Jong's report because the purpose of the report was to examine the Appellant's mental health at the time of examination, not at the time of the conduct relevant to the charges.[336] The court appointed expert, Professor de Jong, recognised and diagnosed the Appellant's current mental disabilities.[337] Now, the Court should recognise the Appellant's mental disabilities in its assessment of the Appellant's personal circumstances, based on its expert's conclusions.

183. Thirdly, the Appellant's mental disabilities were recorded in Defence Experts' reports. After examination, the Appellant was diagnosed with various disorders, including [REDACTED], post-traumatic stress disorder and [REDACTED].[338] He was also found to be at a high risk of [REDACTED].[339] These diagnoses align with the diagnoses of Professor de Jong.

184. Fourthly, the Appellant's mental disabilities were recorded in the information and recommendations provided by the Registry, ICC-DC officials, and the ICC-DC medical officer.[340] During trial, the Chamber was informed that the Appellant [REDACTED]. For example, the Chamber was informed that 1) [REDACTED],[341] 2) "[REDACTED]",[342] 3) [REDACTED],[343] 4) [REDACTED],[344] 5) [REDACTED][345] and 6) [REDACTED].[346] The

[335] Trial Judgment, para. 2577.
[336] Trial Judgment, para. 2578.
[337] Professor Joop T. de Jong, MD PhD Psychiatry, *Psychiatric examination Pro Justitia regarding Mr Dominic Ongwen YY*, UGA-D26-0015-0046-R01, pp 0050-0053. *See also* Trial Judgment, para. 2576.
[338] D-0041 and D-0042, *Psychiatric Report*, UGA-D26-0015-0004, pp 0017-0018. *See also* D-0042, *Report for Sentence Mitigation*, UGA-D26-0015-1878, pp 1883-1884 and Professor Joop T. de Jong, MD PhD Psychiatry, *Psychiatric examination Pro Justitia regarding Mr Dominic Ongwen YY*, UGA-D26-0015-0046-R01, pp 0050-0051.
[339] D-0041 and D-0042, *Psychiatric Report*, UGA-D26-0015-0004, pp 0017-0018. *See also* D-0042, *Report for Sentence Mitigation*, UGA-D26-0015-1878, pp 1883-1884 and Professor Joop T. de Jong, MD PhD Psychiatry, *Psychiatric examination Pro Justitia regarding Mr Dominic Ongwen YY*, UGA-D26-0015-0046-R01, pp 0050-0051.
[340] Trial Chamber IX, *Public Redacted Version of 'Corrected Version of "Defence Closing Brief", filed on 24 February 2020'*, ICC-02/04-01/15-1722-Corr-Red, para. 123.
[341] ICC-02/04-01/15-T-45-CONF, p. 30, lns 11-12. In this regard, the Defence notes the Trial Chamber's email decision of 16 December 2019, ordering the CMS to "[p]lease proceed with the correction as proposed ("So, when I heard about that issue, I have not been happy and up till now my mind is not functioning well sir.") and implement it in the English and corresponding French version of the transcript.
[342] Trial Chamber IX, *Registrar Submission of Information Provided by the Medical Officer*, ICC-02/04-01/15-1200-Conf-Exp-Anx.
[343] Annex to Registry Transmission of [REDACTED], ICC-02/04-01/15-1416-Conf-AnxI-Corr.
[344] Registry Transmission of the Detention Centre Medical Officer's Report, ICC-02/04-01/15-1449-Conf-AnxII.
[345] Defence Urgent Request to Order a Medical Examination of Mr. Ongwen, ICC-02/04-01/15-1595-Conf-AnxA.
[346] ICC-02/04-01/15-T-210-CONF-ENG.

Chamber was also informed that the Appellant will receive mental health treatment.[347] Therefore, the Appellant's mental disabilities were recorded in the trial record because of information provided by the Registry, ICC-DC officials, and the ICC-DC medical officer.

185. Finally, the Appellant's mental disabilities were recorded in the trial record because of [REDACTED]. For example, on 7 January 2019, the ICC-DC officials informed the Chamber of [REDACTED].[348] This is in addition to at least [REDACTED].[349] Therefore, the Appellant's mental disabilities were recorded in the trial record due [REDACTED] in the ICC-DC.

186. Thus, requests for medical examinations, Professor de Jong's report, the Defence experts' report, information from the Registry and ICC-DC, and documented [REDACTED] show that the Appellant's mental disabilities were recorded in the trial record. So, the trial record shows that the Appellant suffers mental disabilities that should have been considered in the Chamber's assessment of the Appellant's personal circumstances.

187. In light of the significant amount of evidence demonstrating that the Appellant currently suffers from mental disabilities, the Chamber erred by failing to consider 1) the Appellant's current mental disabilities as a personal circumstance of the Appellant and 2) his mental disabilities in its assessment of the personal circumstances of the Appellant as a mitigating factor. Had the Chamber considered the Appellant's current mental disabilities as a personal circumstance and properly considered his personal circumstance as a mitigating factor, the Chamber would have imposed a lesser sentence. Therefore, these errors materially affected and caused a disproportionate sentence against the Appellant.

iii. Conclusion

188. The Defence requests the Appeals Chamber to overturn the Chamber's decision that the Appellant did not meet the standard for in Rule 145(2)(a)(i) of the Rules for a substantially diminished capacity during the temporal jurisdiction of the case and that he did not meet the exceptional circumstances standard as a personal circumstance for his mental capacity. The

[347] Registrar Transmission of a Medical Report from the Medical Officer, ICC-02/04-01/15-1315-Conf-Exp-Anx.
[348] Registry Report on [REDACTED], ICC-02/04-01/15-1403-Conf-Exp.
[349] *See* Trial Chamber IX, *Public Redacted Version of 'Corrected Version of "Defence Closing Brief", filed on 24 February 2020'*, ICC-02/04-01/15-1722-Corr-Red, paras 597-598.

Defence requests the Chamber to remand this question to the Chamber to re-determine its applicability with guidance on a proper standard to use.

GROUND 8: The Chamber erred in law and in fact by disregarding the expert testimony of Professor Kristof Titeca, Dr Eric Awich Ochen and Major Pollar Awich in its assessment of whether the Appellant met the threshold of Rule 145(2)(a)(i) of the Rules. The Chamber's errors materially affected and caused a disproportionate sentence against the Appellant.

i. Introduction

189. According to Article 78(1) of the Statute, "in determining the sentence, the Court shall, in accordance with the Rules of Procedure and Evidence, take into account such factors as the gravity of the crime and the individual circumstances of the convicted person. In its determination, the Court must "balance all the relevant factors, including any mitigating and aggravating factors and consider the circumstances both of the convicted person and of the crime."[350]

190. Rule 145(2)(a)(i) of the Rules enjoins the Court to take into account mitigating factors, such as the circumstances falling short of constituting grounds for exclusion of criminal responsibility, such as substantially diminished mental capacity or duress.

191. When considering mitigating circumstances, the "Chamber must be convinced of the existence of mitigating circumstances on a balance of probabilities."[351] There is no "particular rubric" to which the Chamber must adhere in considering mitigating circumstances."[352] Instead, the Chamber has a "considerable degree of discretion […] in determining what constitutes mitigating circumstances and the weight, if any, to be accorded thereto."[353] Mitigating circumstances are not required to be directly related to the crimes and "are not limited by the scope of the charges or Judgment."[354]

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[350] Rule 145(1)(b) of the Rules.
[351] Trial Chamber III, *Decision on Sentence pursuant to Article 76 of the Statute*, ICC-01/05-01/08-3399, para. 19. *See also* Trial Chamber I, *Decision on Sentence pursuant to Article 76 of the Statute*, ICC-01/04-01/06-2901, para. 34; Trial Chamber II, *Decision on Sentence pursuant to article 76 of the Statute*, ICC-01/04-01/07-3484-tENG-Corr, para. 34; ICTY Appeals Chamber, Prosecutor v. Babić, *Judgement on Sentencing Appeal*, Case No. IT-03-74-A, para. 43, finding that "the circumstances in question must have existed or exists 'more probably than not'" and ICTY Appeals Chamber, Prosecutor v. Milomir Stakić, *Judgment*, Case No. IT-97-24-A, para. 406.
[352] *Id*. *See also* ICTY Appeals Chamber, Prosecutor v. Milorad Krnojelac, *Judgement*, Case No. IT-97-25-A, para. 254.
[353] *Id*. *See also* ICTY Appeals Chamber, Prosecutor v Miroslav Bralo, *Judgement on Sentencing Appeal*, Case No. IT-95-17-A, para. 29.
[354] *Id*. *See also* Trial Chamber II, *Decision on Sentence pursuant to article 76 of the Statute*, ICC-01/04-01/07-3484-tENG-Corr, para. 27 (*citing* Trial Chamber II, *Decision on Sentence pursuant to article 76 of the Statute*, ICC-01/04-01/07-3484-tENG-Corr, para. 32; Trial Chamber I, *Decision on Sentence pursuant to Article 76 of the Statute*, ICC-01/04-01/06-2901, para. 34; and ICTR Appeals Chamber, Prosecutor v. Juvénal Kajelijeli, *Judgment*, Case No. ICTR-98-44A-A, para. 298.

ii. The Chamber erred when it disregarded evidence of D-0060, D-0114 and D-0133 to the effect that the Appellant was under a constant state of duress throughout his time in the LRA owing to the spiritual actions by Joseph Kony

192. The Defence incorporates by reference its submissions in its submissions on sentencing.[355]

193. The Defence submits that the LRA did not operate like a conventional military. Rather, all the orders and instructions came directly from Joseph Kony, who was a medium of the spirits.

194. The evidence adduced during trial underscores the Defence notion to the effect that the LRA rank structure can only be understood in the context of the spiritualism within which it operated. It is unsafe to compare the structure and ranks given in the LRA to that of a traditional military.

1. Major Pollar Awich – D-0133

195. The Defence reiterates the evidence adduced during trial that the LRA war was about spirit control, Joseph Kony being the spirit medium. This was further emphasized by D-0133's expert report on sentencing:

> Using the spirits, Kony managed to create an aura of fear and mysticism around him-self and while an adult might have questioned those powers, young impressionable minds could not. Young adults who acquired ranks within the LRA and now maintain those ranks or lower ones in the LRA have an unwavering belief in the powers of the spirits and in Kony as their *laoo*. These young adults believe that what kept them alive in the bush was the strict adherence to the rules and regulations of the spirits and total obedience to the orders of Kony.[356]

196. The Defence submits that the Appellant always acted on superior orders within the context of the indoctrination he went thorough and the spiritual attributes of Joseph Kony he was made to assiduously believe. This is where duress expressed itself on the Appellant.

197. LRA initiation ceremonies and spiritual indoctrination were performed on abductees.[357] The Chamber rightly acknowledged this in its Trial Judgment when it found that abductees underwent initiation ceremonies intended to instil obedience and prevent escape and that they were forced to brutally kill or were forced to witness brutal killings shortly after their

[355] *See* Substantive Annex A, paras 102-110. Regulation 36(2)(b) of the RoC does not count appendixes (annexes) in the page limit as they are not to contain substantive. The Defence argues that the inclusion of substantive annexes are not disallowed if the annexes are counted in the overall page count and the page count does not exceed the allotted limit, which in this case, it does not exceed the 100-page limit when Substantive Annex A is included.
[356] UGA-D26-0015-1891, p. 1891.
[357] UGA-D26-0015-1889, pp 1889-1890.

abduction.[358] However, it erred when it disregarded evidence on spiritualism and how this played a pivotal role on the actions of the Appellant having been abducted at the age of nine and grew up in captivity.[359]

2. Professor Eric Awich Ochen, Ph.D. – D-0114

198. The Chamber disregarded expert evidence of this witness who stated, *inter alia*, that there was extensive spiritualism practiced by Joseph Kony in the bush. This made most of the abductees believe him and that they had to follow the strict edicts of Joseph Kony without question in order to preserve their lives and avoid the repercussions of being executed for disobedience.[360]

199. The Defence submits that the Chamber erred by disregarding evidence of this expert witness merely because he mentioned in his report that he pleads for leniency and compassion for the Appellant.[361] The expert witness in the preamble of his report clearly stated that he grew up in Northern Uganda and witnessed a lot of suffering of people. Further, he stated how he worked with former child soldiers in the region who were abducted at a young age just like the Appellant over the last twenty years.[362] The expert witness testimony was therefore informed by his own personal and professional experiences and that did not in any way diminish his report when he thus beseeched Court to be lenient in the course of sentencing the Appellant.

3. Professor Kristof Titeca, Ph.D. – D-0060

200. D-0060's expert report on sentencing stated, *inter alia*, that for the Appellant, the cosmological space of the LRA did lead to an understanding that disobeying the spiritual order creates direct harm and that this particularly was the case for the idea of escaping.[363]

201. The Chamber erred when it disregarded D-0060's report on the "LRA's cosmological space" after noting that it extensively referred to quotes from the Appellant and that it did not contain any critical assessment of the statements received from the Appellant notwithstanding the fact that it rightly found that the said report was based on available literature on the matter,

[358] Trial Judgment, para. 129.
[359] D-0133, UGA-D26-0015-1895, pp 1895-1896.
[360] D-0114, UGA-D26-0015-1909, pp 1909-1911
[361] Impugned Decision, paras 115-116.
[362] UGA-D26-0015-1907, p. 1907.
[363] UGA-D26-0015-1842, p. 1842

previous interviews with ex-LRA combatants and interviews with the Appellant.[364] The Defence further asserts that the statements from the Appellant were properly and critically assessed by the expert and he came to conclusions after juxtaposing them with other factors.

iii. The Chamber erred when it ignored evidence to the effect that there were dire consequences for violating rules in the LRA

202. The Defence incorporates its submissions in its submissions on sentencing.[365]

203. There is a plethora of evidence on record regarding the consequences and the threat of death for breaking the rules or for trying to escape.[366] Experts D-0060, D-0114 and D-0133, in their expert reports for sentencing, stated how persons would be forced to follow rules within the LRA, like not trying to escape, in order to preserve their lives.[367]

iv. Conclusion

204. The Defence therefore submits that the evidence on record, as well as the expert reports of D-60, D-114 and D-133, on a balance of probabilities standard or Rule 145(2)(a)(i) of the Rules, supports that the Appellant was under a constant state of duress while in the LRA. Therefore, duress ought to have been considered as a mitigating factor during his sentencing, much as in the Trial Judgment the Chamber may not have considered that the Defence may have fallen sort of proving the defence of duress to the requisite standard in Article 31(1)(d) of the Rome

[364] Impugned Decision, para. 114.
[365] *See* Substantive Annex A, paras 111-117.
[366] T-8-Red2, p.22, lns 8-19 and T-9-Red, p.3 lns 2-4 (P-226); T-14-Red, p. 23 l. 1 to p. 24, l. 9 (P-99); T-16-Red, p. 10 ln. 22 to p. 11 ln. 5 (P-236); T-17-Red, p. 23, l. 19 to p. 24, l. 3 (P-235); T-34-Conf, p. 40, l. 9 to p. 41 l. 14 (P-16); T-41-Red, p. 13 lns 12-20 (P-440); T-48-Red2, p. 31 lns 7-22 (P-205); T-49-Red3, p. 3, l. 14 to p. 4, l. 11 and p. 6, l. 8 to p. 7, l. 16 (P-205); T-56-Red, p. 21, l. 23 to p. 22, l. 16 (P-379); T-60-Red2, p. 40 lns 6-12 (P-309); T-65-Red, p. 25 lns 18-24 (P-264); T-68-Red2, p. 61, l. 16 to p. 62, l. 1 (P-18); T-72-Red, p. 46, lns 2-16 (P-142); T-79-Red2, p. 12, l. 25 to p. 13, l. 9 (P-249); T-82-ENG, p. 37, l. 18 to p. 38, l. 19 (P-9); T-85-Conf, p. 24, lns 13-19 (P-269); T-87-Conf, p. 67 and p. 17, lns 18-21 (P-252); T-90-ENG, p. 85, lns 1-6 (P-218); T-91-Red2, p. 9, l. 25 to p. 10, l. 5 (P-144); T-97-Conf, p. 16, lns 23-25 (P-355); T-103-Red2, p. 72, l. 25 to p. 73, l. 10 (P-45); T-106-Red2, p. 59, l. 20 to p. 60, l. 2 (P-70); T-111-Red2, p. 10, l. 9 to p. 11, l. 4 (P-233); T-120-Red2, p. 9, lns 4- 16 (P-138); T-123-Conf, p. 20 l. 15 to p. 22, l. 12 (P-231); T-127-Red, p. 9 lns 17-21 (P-396); T-140-Red2, p. 25, l. 22 to p. 26, l. 4 (P-6); T-146-Red, p. 24, lns 11-14 (P-200); T-148-Red, p. 64, lns 10-25 (P-372); T-150-Red, p. 45, lns 5-14 (P-374); T-153-Red, p. 19, lns 20-23 (P-307); T-157-Red2, p. 27, l. 15 to p. 28, l. 5 and UGA-OTP-0236-0557, para. 80 (P-448); T-158-Red, p. 9, lns 5-14 (P-85); T-160-Red2, p. 35, lns 5-23 (P-209); T-171-Red, p. 12, lns 6-14 and p. 14, lns 5-9 (V-2); T-181-ENG, p. 24, lns 9-18 (D-28); T-187-ENG, p. 8, l. 24 to p. 9, l. 3 (D-74); T-189-Red2, p. 10, lns 2- 25 and p. 19, l. 18 to p. 20, l. 11 (D-79); T-192-Red2, p. 16, lns 4-15 (D-24); T-193-ENG, p. 7, l. 17 to p. 8, l. 9 (D-7); T-194-Red2, p. 11, l. 22 to p. 12, l. 5 (D-6); T-203-ENG, p. 58, lns 2-11 (D-133); T-208-Red2, p. 14, lns 12-25 and p. 22, lns 16-22 (D-92); T-215-Red, p. 9, l. 9 to p. 12, l. 1 (D-117); T-216-Red2, p. 18, l. 4 to p. 19, l. 3 (D-118) T-219-Red, p. 20, lns 13-19 (D-76); T-222-Red2, p. 20, lns 15-21 (D-68); T-224-Red2, p. 11, lns 1-8 (D-75); T-226-Red2, p. 8, lns 1-5 and p. 11, lns 1-11 (D-25); T-230-ENG, p. 13, lns 2-9 (D-88).
[367] *Supra*, fns 354-355, 358 and 361.

Statute. The failure of the Chamber to take duress into account resulted in a disproportionate sentence being imposed on the Appellant as the proper standard pursuant to Rule 145(2)(a)(i) was not applied by the Chamber.

GROUND 10: The Chamber erred in law by using the Appellant's unsworn statement pursuant to Article 67(1)(h) of the Statute against the Appellant in its determination of the joint sentence. The Chamber's error materially affected and caused a disproportionate sentence, an additional five (5) years of imprisonment, against the Appellant.

i. Introduction

205. On 15 April 2021, the Appellant gave an unsworn statement to the Chamber.[368] On 6 May 2021, the Chamber used the unsworn statement against the Appellant in the Impugned Decision.[369] The Chamber impermissibly used the unsworn statement against the Appellant in the Joint Sentence to increase the sentence from 20 years to 25 years of imprisonment and to negate the mitigating factor and personal circumstance of substantially diminished mental capacity pursuant to Rule 145(2)(a)(i) of the Rules. The Defence argues that the Appellant's state of being on 15 April 2021 is not reflective of his overall state, and it was improper for the Chamber to use this single day to reject mitigating factors for the Appellant. The Defence requests that the Appeals Chamber reverse the Chamber's decision to use the Appellant's unsworn statement against him and remand the issue back to the Chamber for reconsideration of the sentences and Joint Sentence.

ii. The Appellant's unsworn statement reflected a moment of clarity and is not reflective of his mental state

206. The Appellant suffers from diagnosed mental disabilities.[370] These mental disabilities plague the Appellant, but they do not encompass every waking moment of the Appellant's life. The Appellant has moments of extreme clarity, but he also has moments of extreme problems.[371] The Appellant's day-to-day situation can change with little-to-no warning, which includes [REDACTED][372] or crying because of a witness's testimony.[373] The Appellant's therapy

[368] ICC-02/04-01/15-T-261, p. 3, l. 20 to p. 37, l. 16.
[369] Impugned Decision, paras 104 and 394. *See generally* Impugned Decision, paras 374-397.
[370] *See* Ground 7 above. *See also* para. 161 and fns 278 and 279 above (*citing* to the specific mental disabilities that the Appellant has).
[371] *See* D-0041 and D-0042, *Psychiatric Report*, UGA-D26-0015-0004, pp 0017-0018; D-0042, *Report for Sentence Mitigation*, UGA-D26-0015-1878, pp 1883-1884; Professor Joop T. de Jong, MD PhD Psychiatry, *Psychiatric examination Pro Justitia regarding Mr Dominic Ongwen YY*, UGA-D26-0015-0046-R01, pp 0050-0051; Trial Chamber IX, *Annex to Registry Transmission of* [REDACTED], ICC-02/04-01/15-1416-Conf-AnxI-Corr; Trial Chamber IX, *Registry Report on* [REDACTED], ICC-02/04-01/15-1403-Conf-Exp; and Trial Chamber IX, *Public Redacted Version of 'Corrected Version of "Defence Closing Brief", filed on 24 February 2020'*, ICC-02/04-01/15-1722-Corr-Red, paras 597-598.
[372] *See* [REDACTED].

sessions even increased as the trial proceeded, and the ICC Detention Centre's Medical Officer [REDACTED].[374]

207. Mental disabilities are not necessarily all-encompassing. The Appellant, now removed from harm's way, has, what a normal person would say, good days and bad days. This is normal and to be expected. On 15 April 2021, the Appellant, having known the relevant timeframe of the sentencing hearing since the issuance of the Impugned Order on 4 February 2021,[375] prepared for his unsworn statement to the Chamber with Counsel. He was able to remain calm, remember information and speak without revealing confidential information because he knew about this for over two months. Had this been an impromptu speech, the Defence cannot surmise how it would have turned out.

208. The Chamber used a discrete moment in time, the approximate one hour and forty-five minutes in which the Appellant spoke, to determine the overall mental state of the Appellant in rejecting the mitigating factor and personal circumstance of the Appellant.[376] Furthermore, the Chamber unabashedly discussed about the overall content of the Appellant's unsworn statement during its discussion of the Joint Sentence.[377] The Chamber supplanted this one hour and forty-five minutes against all the medical evidence given to the Chamber about the Appellant's mental state. And while saying that it did not use it as an aggravating circumstance, the Chamber used this moment of lucidity against the Appellant.[378] With respect, the Appeals Chamber cannot let this stand.

iii. The Chamber failed to use the proper standard to assess the Appellant's mental state

209. The Defence has written extensively on the Appellant's mental disabilities above in Ground 7. The Defence incorporates those submissions in Ground 10 as they are clearly delineated above. Additionally, the Defence incorporates by reference its *Corrected Version of 'Defence Brief on Sentencing', filed on 1 April 2021*, paragraphs 85-101, which are attached in Substantive Annex A.[379] The Defence asserts that the Chamber used the improper standard,

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[373] *See* ICC-02/04-01/15-T-193, p. 17, lns 15-22 (*noting* that the Presiding Judge asked about taking a break because the Appellant was crying in Court when listening to the witness's testimony).
[374] *See* paras 166-167 above.
[375] Impugned Order, para. 8.
[376] Impugned Decision, para. 104.
[377] Impugned Decision, para. 394.
[378] *See* Impugned Decision, paras 104 and 394.
[379] *See* Substantive Annex A, paras 85-101.

using a beyond a reasonable doubt standard for mitigating factors and personal circumstances, instead of a balance of probabilities standard as required.

iv. The Chamber improperly used the content of the Appellant's unsworn statement against him for the purpose of the Joint Sentence

210. The Appellant had the fundamental fair trial right to remain silent.[380] The Appellant also had the fundamental fair trial right to give an unsworn statement to the Chamber.[381] Most notably, the Appellant did not give a sworn statement, *i.e.* testimonial evidence, to the Chamber.[382]

211. As noted above, the Chamber used the content of the Appellant's unsworn statement in its determination of the Joint Sentence.[383] The unsworn statement should not have been used against the Appellant.[384] The Chamber noted in the Impugned Decision that the ***content*** of the Appellant's unsworn statement was unapologetic and "focus[ed] on himself and his own suffering eclipsing that of anyone else."[385]

212. While the Chamber attempted to negate the use of the content of the unsworn statement in the Impugned Decision,[386] one cannot divest such words and actions from the Chamber in the Impugned Decision. The Chamber thought it was relevant to the Impugned Decision and wrote about the content of the unsworn statement to negate mitigating factors and personal circumstances for the Appellant, regardless of what was written in the first part of paragraph 394.[387] The Defence avers that to use the content of an unsworn statement against the Appellant is tantamount to reversing the fundamental fair trial right of the Appellant to remain silent pursuant to Article 67(1)(g) of the Statute. The content should not have been used against the Appellant.

213. Most notably, the Chamber saw fit to discuss the content while determining the Joint Sentence. Instead of disregarding the content, the Chamber used said content when it decided to increase the Appellant's sentence from the highest single sentence of 20 years to 25 years

[380] Article 67(1)(g) of the Rome Statute.
[381] Article 67(1)(h) of the Rome Statute.
[382] *See* Ground 2 above.
[383] *See* Impugned Decision, para. 394.
[384] *See generally* paras 73-80 above. *See also* Trial Chamber IX, *Decision on the Prosecution's Applications for Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules*, ICC-02/04-01/15-596-Red, para. 5 and *Decision on Prosecution's Request to Submit 1006 Items of Evidence*, ICC-02/04-01/15-795, paras 18-21.
[385] Impugned Decision, para. 394.
[386] Impugned Decision, para. 394.
[387] Impugned Decision, paras 104 and 394. *See generally* Impugned Decision, paras 374-397.

of imprisonment. Without knowing what weight the Chamber used, regardless of what it wrote about the opposite, it is impossible to determine how this illicit use of the Appellant's unsworn statement weighed upon the Chamber's determination. The Defence requests the Chamber to remand this question back to the Chamber for its reconsideration of the Joint Sentence.

v. Conclusion

214. The Defence asserts that the Chamber committed an error in law by using the content of the Appellant's unsworn statement against the Appellant in the Impugned Decision in violation of Articles 67(1)(g) and (h) of the Rome Statute. The Defence also asserts that the Chamber committed an error when it used the unsworn statement negatively against the Appellant when determining the applicability of the mitigating factor and personal circumstance of diminished mental capacity as allowed pursuant to Rule 145(2)(a)(i) of the Rules. The Defence requests the Appeals Chamber to remand this issue back to the Chamber with the instructions not to use the content of the Appellant's unsworn statement against the Appellant when determining the applicability of Rule 145(2)(a)(i) of the Rules and to not use said content of the unsworn statement when determining any length of sentence against the Appellant.

GROUND 11: The Chamber erred in law by increasing the Appellant's sentence from 20 years to 25 years in the joint sentence in Section II(B) of the Impugned Decision, on the grounds of aggravating circumstances which had already been considered during the Trial Judgment issued on convictions in Section II(A)(3) of the Impugned Decision; and without clearly identifying and isolating additional aggravating circumstances not used in Section II(A)(3) of the Impugned Decision, or that were not requirements to prove the convictions or admissibility. The Chamber's errors materially affected and caused a disproportionate sentence, an additional five (5) years of imprisonment, against the Appellant.

215. The Chamber determined that Article 78(3) of the Statute required, as a first step, for the Chamber to pronounce a sentence for each crime of which the convicted person was convicted. The Chamber recognised that "in calculating such individual sentence, all relevant circumstances concerning the gravity of the crime and the individual circumstances of the convicted person must be considered with reference to all relevant facts and circumstances applicable to the crime concerned".[388]

216. The Chamber decided that each individual sentence must be calculated separately irrespective of the possibility of overlap of the relevant circumstances between some or all of the convicted crimes; and reasoned that "it is then in the context of the second step required in the statutory sentencing regime – *i.e.* the determination of the joint sentence – that any relevant factual overlap between two or more crimes is duly taken into account with a view to ensuring that the convicted person is not actually punished beyond his or her real culpability to ensure that the convict was not actually punished beyond his real culpability."[389]

217. Applying to the Appellant, the Chamber considered a number of factors and underlying facts which were "not specific to individual crimes, but relevant to several or even all the crimes and sentences to be determined before turning to more specific considerations".[390]

218. When it came to determining the Joint Sentence, the Chamber, despite the criteria which it established in paragraph 59 of the Impugned Decision, disregarded overlapping factors, partially overlapping factors[391], general factors and circumstances which were double-counted or were considered in the Impugned Decision as aggravating factors. The Chamber abused its discretion and violated the sentencing regime of the Court.

[388] Impugned Decision, para. 59.
[389] Impugned Decision, para. 59.
[390] Impugned Decision, para. 61.
[391] Impugned Decision, paras 377-380.

219. The Chamber established and relied on criteria of a "very large extent of cumulative victimisation" and "the extent of accumulation of the individual sentences constituting the 'total period of imprisonment' as the Joint Sentence for all crimes, reflecting Dominic Ongwen's 'total culpability' to determine "the total period of imprisonment "as the "joint sentence for all crimes"[392] and imposed a joint sentence of 25 years. The Chamber did not provide a reasoned statement on these criteria nor did it identify new aggravating factors and failed to provide a reasoned statement about any new alleged aggravating factors.

220. The Chamber did not balance relevant factors, individual circumstances and mitigating factors pursuant to the applicable evidentiary standard of "balance of probabilities" in imposing a Joint Sentence which met the parameters of Article 78(3) of the Statute.

221. The Chamber decided that when determining the Joint Sentence, it would consider double counting, overlapping factors and circumstances which it overlooked when imposing individual sentences. The Chamber failed to appropriately assess and exclude these factors and circumstances when it imposed a joint sentence of 25 years imprisonment. This was a discernible error warranting an appellate intervention and reversal of the Joint Sentence.[393]

222. The Defence submits that "accumulation of aggravating factors" is not a relevant factor mandated by the Statute pursuant to Article 78(3). It is not an applicable criterion for balancing all the relevant factors. The Chamber did not demonstrate how this criterion balanced the relevant factors and the individual sentences to impose a Joint Sentence of 25 years reflecting the total culpability of the Appellant. The exercise of discretion in imposing the Joint Sentence of 25 years was, therefore, arbitrary and without justifiable legal and evidentiary basis.

223. The Chamber impermissibly abused its discretion by recounting the same factors, in many cases overlapping,[394] and double-counting factors which it identified and relied on to impose the individual sentences[395] for the determination of the Joint Sentence based on the criteria of "very large extent of cumulative victimisation and extent of accumulation".[396]

[392] Impugned Decision, paras 375 and 384. [Emphasis added].
[393] Impugned Decision, paras 141, 148 and 395.
[394] Impugned Decision, paras 135-373
[395] Impugned Decision, para. 384.
[396] Impugned Decision, para. 384.

224. Furthermore, the Chamber did not provide a reasoned statement demonstrating how it balanced all the relevant circumstances in imposing a Joint Sentence.

225. The criteria adopted did not give due or sufficient weight to the specific circumstances decided by the Chamber in paragraph 88 of the Impugned Decision[397] and failed to exclude impermissible aggravating factors, such as modes of liability and acts and conduct not committed or attributable to the Appellant.

226. The Appellant was not convicted for his participation through ordering under Article 25(3)(b) of the Statute. The Chamber decided it would not take the legal elements of a crime or the mode of liability into consideration as an aggravating factor.[398] Yet, in the Impugned Decision, the Chamber repeats its findings that the Appellant ordered crimes to be committed.[399] The attribution of crimes ordered by the Appellant in the Trial Judgment,[400] as aggravating factors for individual sentences[401] and for aggravation due to cumulative aggravation for the Joint Sentence, violated the Appellant's right to a fair trial and is tantamount to an abuse of discretion.

i. Abuse of discretion

227. The Statutory framework and the jurisprudence of the Court grants a trial chamber discretion in imposing sentences on persons convicted of committing crimes before the Court.[402] The Chamber, citing the *Lubanga* Appeals Judgment, decided that it was mandated to identify relevant factors in accordance with Article 78(1) of the Statute and Rule 145(1)(c) and (2), and then weigh and balance all such factors in accordance with Rule 145(1)(b) and pronounce a sentence for each crime, and that **"**the weight given to an individual factor and the balancing

[397] Impugned Decision, para. 88. The Chamber reiterated "its view that Dominic Ongwen's abduction and early experience in the LRA constitute specific circumstances bearing a significant relevance in the determination of the sentence". The Chamber did not demonstrate it considered this specific factor in imposing the sentence.
[398] Impugned Decision, para. 53.
[399] Impugned Decision, paras 86, 167, 171, 188, 195, 253, 296 and 372.
[400] Trial Judgment, paras 131-132, 150, 153, 161, 192, 210, 213, 223, 278, 965, 996, 998, 1040, 1284, 1295, 1330, 1347, 1389, 1395, 1397, 1424, 1473, 1484, 1497, 1676, 1681, 1740, 1882, 1884, 1869, 1880, 2032, 2042, 2075, 2078, 2357, 2860, 2862, 2866, 2871, 2873, 2910, 2913, 2916, 2920, 2924, 3013, 3030, 3064, 3094, 3110 and 3113.
[401] Impugned Decision, paras 86, 167, 171, 188, 195, 253, 296 and 372.
[402] Appeals Chamber, *Judgment on the Appeals of Mr. Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 7 November 2019 entitled 'Sentencing judgment'*, ICC-01/04-02/06-2667-Red, para. 21 (*noting* that the Appeals Chamber considers that pursuant to article 78(1) of the Statute and rule 145 of the Rules, trial chambers have broad discretion in the determination of an appropriate sentence).

of all relevant factors in arriving at the sentence is at the core of a Trial Chamber's exercise of discretion."[403]

228. However, despite the Chamber's decision, this discretion is not unfettered or absolute. In any event, it was incumbent upon the Chamber to exercise such discretion judiciously. The Appeals Chamber of the ICC decided that a trial chamber must identify, take into account, and balance all relevant factors before determining a sentence in order to impose a proportionate sentence that reflects the total culpability of a convicted person.[404] The identification, taking into account and balancing all the identified relevant factors is mandatory. It is not discretionary.

229. The Defence submits that the Chamber abused its discretion by imposing a Joint Sentence of 25 years against the Appellant without a reasonably logical basis, without articulating a reasoned opinion or statement on the criteria it relied on to arrive at the sentence. The decision imposing the Joint Sentence, impermissibly premised on double-counting of relevant factors which were already fully identified and relied on to impose individual sentences, is invalid. It was therefore no longer legally permissible for the Chamber to rely on a criteria of the extent of accumulation of aggravating circumstances as the basis of calculating the Joint Sentence of 25 years without demonstrating reasonably that it had balanced all the factors and circumstances ordained by the statutory framework of the Court and without providing a reasoned statement or motivation to substantiate its exercise of discretion in imposing the Joint Sentence of 25 years. The Defence submits that an exercise of discretion must be explained and justified that it was reasonably exercised. The Chamber failed to do so, warranting an appellate intervention.

230. Additionally, the "extent of accumulation" criteria which the Chamber applied in imposing the Joint Sentence of 25 years is not of a relevant factor. The criteria was developed and applied to circumvent double-counting which the Chamber decided against applying against the Appellant.[405]

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[403] Impugned Decision, para. 50 (*citing* Appeals Chamber, *Judgment on the appeals of the Prosecutor and Mr Thomas Lubanga Dyilo against the "Decision on Sentence pursuant to Article 76 of the Statute"*, ICC-01/04-01/06-3122, paras 40 and 43).
[404] Impugned Decision, para. 50 and Appeals Chamber, *Judgment on the appeals of the Prosecutor and Mr Thomas Lubanga Dyilo against the "Decision on Sentence pursuant to Article 76 of the Statute"*, ICC-01/04-01/06-3122, paras 32-34 and 40.
[405] Impugned Decision, paras 55-56 and 382.

231. Furthermore, the aggravating factors which the Chamber identified and relied on for aggravating circumstances in individual sentences were determined as aggravating factors in the Trial Judgement.[406] Many of them applied to many of the individual convictions and/or overlapped. Relying on the extent of accumulation of these factors as a criteria for imposing a Joint Sentence compounded the double or multiple counting of the same factors which were duly accounted for in imposing individual sentences.

232. In imposing a Joint Sentence of 25 years, the Chamber did not identify new aggravating factors for aggravating circumstances and did not balance all relevant factors constituting the gravity of the crimes, the individual circumstances of the appellant and the mitigating circumstances as ordained by Article 78(1) and Rule 145(1)(c) and 145(2). It merely counted the aggravating factors which were determined in the Trial Judgment and Impugned Decision and relied on them in imposing the individual sentences and relied on the accumulation of these aggravating facts which it double-counted as the basis of the Joint Sentence of 25 years.

233. Article 78(3) enjoins a Chamber to pronounce a sentence for each of the crimes for which the appellant was convicted and a joint sentence specifying the total period of imprisonment upon balancing all the relevant factors. The Chamber pronounced a sentence for each of the crimes which the appellant was convicted; the highest sentence being 20 years imprisonment.[407] The Chamber did not demonstrate that it balanced all the factors as mandated by the Statute in pronouncing a "joint sentence for all crimes" which reflected the culpability of the Appellant. The Chamber did not identify new additional factors in aggravation of the aggravating factors it identified, analysed and balanced when imposing the individual sentences. The extent of accumulation of individual sentences not being an identifiable factor, it is therefore an impermissible legal and factual basis for the imposition of the Joint Sentence. It is a criteria which the Chamber failed to justify how it "constitute[s] the 'total period of imprisonment' as the joint sentence for all crimes, reflecting Dominic Ongwen's 'total culpability'." [408]

[406] Trial Judgment, paras 150, 153, 161, 213, 233, 1284, 1392, 1473, 1484, 1641, 1647, 1681, 1740, 1844, 1880, 2860; disciplinary measures, para. 2862; looting, paras 2866, 2871, 2873, 2910, 2913, 2916, 2920, 2924, 3010, 3013, 3064, 3097, 3110, 3113, 1638, 1641 and 2001; and increased extent of suffering, para. 2309.
[407] Impugned Decision, para. 381.
[408] Impugned Decision, para. 375.

ii. The Chamber's error negatively impacted the total sentence against the Appellant

234. The Chamber's impermissible double-counting and failure to give a reasoned explanation as to the imposition of an additional five (5) years in the Joint Sentence negatively impacted the Appellant's sentence.

235. The Chamber issued an additional 25 percent to the Appellant's sentence with the imposition of the additional five years in the Joint Sentence.[409] It goes without saying that the addition of five years without justification and double-counting aggravating factors is reversible error. As such, the Defence requests the Appeals Chamber to reverse the Chamber's issuances of the five-year additional sentence in the Joint Sentence and order the sentence against the Appellant to be no more than 20 years, which is the highest single sentence.

[409] Impugned Decision, paras 374-396 (*noting specifically* paras 395-396).

GROUND 12: The Chamber erred in law and in procedure by counting, as aggravating circumstances, actions and/or mental states which were necessary to prove convictions in the Trial Judgment. The Chamber's errors materially affected and caused a disproportionate sentence against the Appellant.

236. The prohibition against counting the same factor twice in sentencing is well established. In the *Deronjic* case at the ICTY, the Appeals Chamber found that "factors which a Trial Chamber takes into account as aspects of the gravity of the crime cannot additionally be taken into account as separate aggravating circumstances, and *vice versa.*"[410] This was confirmed in subsequent cases.[411] The rationale of this prohibition is to avoid that "the same factor […] detrimentally influence the Appellant's sentence twice."[412]

237. The ICC adopted this approach.[413] In the *Ntaganda* appeal judgment, the Appeals Chamber found that:

> A trial chamber identifies all the relevant factors associated with the gravity of the particular crime, (such as the degree of participation and intent of the convicted person) and any aggravating or mitigating circumstances arising from the underlying facts. The trial chamber then attaches the appropriate weight to these factors being careful not to rely on the same factor more than once.[414]

238. In the instant case, the Chamber violated this prohibition by double-counting discrimination and the multiplicity of victims both as factors informing gravity and as aggravating factors, by double-counting the vulnerability of children conscripted by the LRA, and by factoring twice elements that are essential to the mode of liability for which the Appellant was convicted.

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[410] ICTY, *Prosecutor v Deronjic*, No. IT-02-61-A, *Judgement on Sentencing Appeal* (20 July 2005), para. 106.
[411] ICTY, *Prosecutor v Nikolic*, No. IT-02-60/1-A, *Judgement on Sentencing Appeal* (8 March 2006), para. 58; *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015), para. 2019; *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017), para. 3251, *Dordevic* Appeal Judgement, para. 936; *D. Milosevic* Appeal Judgement, paras 306, 309; *Limaj et al.* Appeal Judgement, para. 143.
[412] ICTY, *Prosecutor v Nikolic*, No. IT-02-60/1-A, *Judgement on Sentencing Appeal* (8 March 2006), para. 61.
[413] Trial Chamber I, *Decision on Sentence pursuant to Article 76 of the Statute*, ICC-01/04-01/06-2901, para. 35; Trial Chamber III, *Decision on Sentence pursuant to Article 76 of the Statute*, ICC-01/05-01/18-3399, para. 14; Trial Chamber VIII, *Judgment and Sentence*, ICC-01/12-01/15-171, para. 70; Trial Chamber VI, *Sentencing judgment*, ICC-01/04-02/06-2442, para. 13; Appeals Chamber, *Judgment on the Appeals of Mr. Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 7 November 2019 entitled 'Sentencing judgment'*, ICC-01/04-02/06-2667-Red, para. 123.
[414] Appeals Chamber, *Judgment on the Appeals of Mr. Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 7 November 2019 entitled 'Sentencing judgment'*, ICC-01/04-02/06-2667-Red, para. 124 (*citing* Appeals Chamber, *Judgment on the appeals of the Prosecutor, Mr Jean-Pierre Bemba Gombo, Mr Fidèle Babala and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Decision on Sentence pursuant to Article 76 of the Statute"*, ICC-01/05-01/13-2276-Red, para. 112).

i. The Chamber double-counted the 'discriminatory intent' as both a factor of the gravity of the crime and as an aggravating factor; and as an element of the common plan for Pajule and Odek

239. The Chamber erred in counting as an aggravating factor the 'discriminatory intent' and also accepting it as a consideration of the gravity of the crimes.[415] This impermissible double-counting resulted in a manifestly unreasonable increase of the sentence.

240. Despite correctly stating that "[f]actors that the Chamber does not consider in its assessment of gravity may be taken into account separately as aggravating circumstances",[416] the Chamber went on to do exactly the opposite and concluded that the "'discriminatory dimension' underlying the corresponding legal element of the crimes of persecution also constitutes a specific circumstance aggravating the other crimes committed in the course of the four attacks."[417]

241. The Chamber indeed found that the presence of 'motives involving discrimination' informed "the Chamber's consideration of the gravity of the crimes".[418] This finding should have meant that the Chamber would refrain from considering this factor again later in its analysis.

242. However, the Chamber went on to impermissibly also consider the discriminatory intent as an aggravating factor for Counts 1, 2-3, 4-5, 8 and 9 (Pajule IDP camp);[419] Counts 11, 12-13, 14-15, 16-17 and 20-22 (Odek IDP camp);[420] Counts 24, 25-26, 27-28, 29-30 and 33-35 (Lukodi IDP camp);[421] and Counts 37, 38-39, 40-41, 42-43 and 46-48 (Abok IDP camp).[422] This led the Chamber to erroneously impose a harsher sentence on the Appellant on 37 individual counts.

243. In the specific case of the crimes committed in Pajule and Odek IDP camps, the Chamber's error is even more blatant. In addition to the double-counting established above, the

[415] Impugned Decision, paras 145, 182, 220, 255 and 377.
[416] Impugned Decision, para. 52, (*citing* to Trial Chamber VI, *Sentencing judgment*, ICC-01/04-02/06-2442, para. 17).
[417] Impugned Decision, para. 377.
[418] Impugned Decision, paras 145 (Pajule IDC camp), 182 (Odek IDP camp), 220 (Lukodi IDP camp), 255 (Abok IDP camp). (Emphasis added).
[419] Impugned Decision, paras 152 (Count 1), 156 (Counts 2-3), 161 (Counts 4-5), 168 (Count 8) and 173 (Count 9).
[420] Impugned Decision, paras 186 (Count 11), 191 (Counts 12-13), 194 (Counts 14-15), 196 (Counts 16-17), 200 (Count 20), 205 (Count 21) and 211 (Count 22).
[421] Impugned Decision, paras 224 (Count 24), 229 (Counts 25-25), 232 (Counts 27-28), 234 (Counts 29-30), 237 (Count 33), 241 (Count 34) and 246 (Count 35).
[422] Impugned Decision, paras 260 (Count 37), 265 (Counts 38-39), 267 (Counts 40-41), 269 (Counts 42-43), 272 (Count 46), 276 (Count 47) and 279 (Count 48).

discriminatory intent was also factored as an essential element of the respective common plans. The Chamber therefore counted this element three times.

244. In the Trial Judgment, the Chamber, when describing the nature of the common plans to attack Pajule and Odek, specifically pointed to its finding that "the LRA, including Dominic Ongwen, perceived as associated with the Government of Uganda, and thus as the enemy, the civilians living in Northern Uganda, in particular those who lived in government established IDP camps in Northern Uganda."[423] This mention is significant, because it demonstrates that for the Chamber, the discriminatory motives were an essential component of the common plan, which in turn, is a legal element of the mode of liability under which the Appellant was convicted. Since the discriminatory intent was considered by the Chamber as part of the common plan and thus the mode of liability, it should not have also considered it as an aggravating factor.[424]

ii. The Chamber erred in factoring the high number of victims both as a factor of gravity and as an aggravating factor

245. The Chamber erred in counting both the high number of victims as a factor relevant to assessing the gravity of the crime, as well as the 'multiplicity of victims' as an aggravating factor.[425] The "high number of victims", and the "multiplicity of victims" are essentially the same consideration. This impermissible double-counting for the crimes of murder, attempted murder, torture and enslavement, resulted in a manifestly unreasonable increase of the sentence for Counts 2-3, 4-5, 8, 12-13, 14-15, 16-17, 20, 25-26, 27-28, 29-30, 33, 38-39, 40-41 and 46.

246. Firstly, in relation to the crime of murder and attempted murder, the number of victims was the first factor mentioned by the Chamber when assessing the gravity of the crime, charged under Counts 2-3,[426] 12-13,[427] 14-15,[428] 25-26,[429] 27-28,[430] 38-39,[431] and 40-41.[432] Since the

[423] Trial Judgment, paras 2852 and 2910.
[424] Trial Chamber VI, *Sentencing judgment*, ICC-01/04-02/06-2442, paras 125, 151 and 169.
[425] Impugned Decision, paras 145, 182, 220, 255 and 377.
[426] Impugned Decision, para. 154 ("Also in the concrete circumstances of the case, the Chamber considers the gravity of the crimes of murder under Counts 2 and 3 to be very high. As concerns the extent of victimisation, the Chamber found that in the course of the attack on Pajule IDP camp, LRA fighters killed at least four civilians…") (emphasis added).
[427] Impugned Decision, para. 188 ("In the concrete circumstances of the case, the Chamber considers the gravity of the crimes of murder Count 12 and 13 to be very high. This is so in particular because of the number of victims…") (emphasis added).
[428] Impugned Decision, para. 192 ("The Chamber deems the gravity of the crimes in the concrete circumstances to be high, noting that the LRA fighters attempted to kill at least ten civilians…") (emphasis added).

number of victims was considered as factoring in the gravity of the crime, it should not have been found an aggravating factor.

247. However, the Chamber found that the multiplicity of victims was an aggravating factor for the murder[433] and attempted murder counts,[434] leading it to double-count this factor and to impose a heavier sentence on the Appellant.

248. Secondly, in analysing the gravity of the crime of torture committed at Pajule and Odek IDP camps, in the concrete circumstances of the *Ongwen* case, the Chamber took into account the large number of torture victims for which the Appellant was convicted.[435] The Chamber then again referred to the "multiplicity of victims", but this time as an aggravating factor,[436] therefore double-counting this factor. Therefore, the Chamber erroneously double-counted the number of victims for Counts 4-5, and 16-17.

249. Finally, the Chamber did the same with regards to the crime against humanity of enslavement, clearly relying on the large number of victims as a factor of gravity,[437] and then as an aggravating factor.[438] This double-counting of the same factor led the Chamber to impose a heavier sentence on Counts 8, 20, 33 and 46.

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[429] Impugned Decision, para. 226 (In the concrete circumstances of the case, the Chamber considers the gravity of the crimes of murder under Counts 25 and 26 to be very high. The high number of victims, at least 48, justifies this conclusion…") (emphasis added, footnote omitted).
[430] Impugned Decision, para. 230 ("The Chamber deems the gravity of the crimes in the concrete circumstances to be high, noting that the LRA fighters attempted to kill at least 11 civilians…) (emphasis added).
[431] Impugned Decision, para. 262 ("In the concrete circumstances of the case, the Chamber considers the crimes of murder under Counts 38 and 39 to be of very high gravity. Indeed, the Chamber found that the LRA attackers killed at least 28 civilian residents…") (emphasis added).
[432] Impugned Decision, para. 266 ("The Chamber deems the gravity of the crimes in the concrete circumstances to be high, noting that the LRA fighters attempted to kill at least four civilians…") (emphasis added).
[433] Impugned Decision, paras 156, 191, 229 and 265.
[434] Impugned Decision, paras 193-194, 232 and 267.
[435] Impugned Decision, paras 158 (Pajule) and 195 (Odek).
[436] Impugned Decision, paras 159, 161 (Pajule) and 196 (Odek).
[437] Impugned Decision, para. 163 ("In the concrete circumstances, the Chamber considers the gravity of the crime of enslavement in the context of the attack on Pajule IDP camp to be high. As found by the Chamber, hundreds of civilians from the Pajule IDP camp were abducted and enslaved." (emphasis added)); para. 197 ("In the concrete circumstances, the Chamber considers the gravity of the crime to be high. The Chamber found that the LRA attackers abducted at least 40 civilian residents…") (emphasis added); paras 235 ("In the concrete circumstances, the Chamber considers the gravity of the crime to be high. This is because LRA fighters abducted at least 29 civilians…") (emphasis added); and para. 270 ("In the concrete circumstances, the Chamber considers the gravity of the crime to be high. This is because in the course of the attack, the LRA fighters deprived many civilians of their liberty…") (emphasis added).
[438] Impugned Decision, paras 164, 168 (Pajule); 199-200 (Odek); 236-237 (Lukodi); and 271-272 (Abok).

250. By double-counting the number of victims as a factor of gravity and as an aggravating factor, the Chamber erroneously allowed this factor to detrimentally influence the Appellant's sentence twice on 24 counts.

iii. The Chamber erred when double-counting the 'defencelessness' of children recruited into the LRA as an aggravating factor

251. The Chamber correctly noted that the crime of conscription of children under the age of 15 and their use to participate in hostilities is, by definition, committed against particularly vulnerable victims.[439] As such, the vulnerability of the victims is inherently part of the gravity of the crime, and should not be also considered as an aggravating factor.

252. However, the Chamber determined that in this case, the very young age of the conscripted children made them additionally vulnerable and 'particularly defenceless', thereby constituting an aggravating factor.[440]

253. In doing so, the Chamber erroneously introduced an arbitrary and undefined threshold to quantify the vulnerability of the victims, and impermissibly double-counted this factor.

254. The vulnerability of the victims, as evaluated under the prism of gravity, does not foresee a gradation according to age. The Chamber's evaluation was erroneous, because in essence, it created two arbitrary age categories for assessing vulnerability: while the vulnerability of children above 10 years would be part of the gravity, that of children younger than 10 would constitute an aggravating factor.[441] The Chamber gave no explanation as to why the age of 10 was chosen as the border between vulnerable and 'particularly vulnerable'.

255. There is no statutory or jurisprudential basis for such a differentiation. The vulnerability of victims of all ages is already taken into consideration in the gravity assessment. The Chamber therefore double-counted this factor when it also found it to constitute an aggravating factor.

256. The Chamber therefore erroneously allowed the vulnerability factor to detrimentally influence the Appellant's sentence twice on 2 counts.

[439] Impugned Decision, para. 369.
[440] Impugned Decision, paras 369 and 373.
[441] In justifying the decision to find vulnerability as an aggravating factor, the Chamber only referred to examples of conscription of children under the age of ten. *See* Impugned Decision, para. 369.

iv. The Chamber erred when double-counting essential elements of the mode of liability as aggravating factors

257. The Chamber erroneously took into consideration the role of the Appellant and the nature of the common purpose in its assessment of the gravity and aggravating factors for the crime of enslavement in Pajule IDP camp, under Count 8.[442] In doing so, it double-counted essential elements of the mode of liability as aggravating factors.

258. The Chamber determined that the "enslavement of civilians was one of the main purposes of the attack on Pajule IDP camp, as designed by Domenic [*sic*] Ongwen and other members of the LRA hierarchy involved in its planning and execution."[443] It then described the personal role of the Appellant in the crime, including his ordering the commission of the crime and leading a group of abductees.[444]

259. The Impugned Decision does not clearly specify the purpose for which elements of the common plan and of the Appellant's role are being emphasised. However, given the placement of the paragraph in the analysis of Count 9, it is readily apparent that the Chamber's intent was to take into account these factors as the confluence of gravity and aggravating factors.

260. In the Judgment, the Chamber found that the enslavement of civilians was an integral part of the common plan to attack Pajule, "pursuant to an agreement involving Dominic Ongwen" and others.[445] Since the crime of enslavement formed an essential component of the common plan, the Chamber could not find that the agreement, or common plan, was also an aggravating factor, or a factor relevant to the gravity of the crime of enslavement. Such circular reasoning is impermissible, as it leads to double-counting an essential element of the mode of liability. The Chamber therefore erroneously allowed the role of the Appellant and the nature of the common plan to detrimentally influence the Appellant's sentence twice on one count.

[442] Impugned Decision, para. 167.
[443] Impugned Decision, para. 167.
[444] Impugned Decision, para. 167.
[445] Trial Chamber IX, *Trial Judgment*, ICC-02/04-01/15-1762-Red, para. 2853.

v. Conclusion

261. In light of the above, the Defence requests that the Appeals Chamber quash the individual sentences imposed after an erroneous double-counting, and either impose reduced individual sentences, or remand the matter to Trial Chamber IX.

V. REQUESTED RELIEF

262. The Defence requests the Appeals Chamber to accept these submissions and to follow the guidance given by the Defence on behalf of the Appellant.

Respectfully submitted,

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Hon. Krispus Ayena Odongo

On behalf of Dominic Ongwen

Dated this 31st day of August, 2021

At The Hague, Netherlands