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International Criminal Court

Original: **English**

No.: **ICC-02/04-01/15**
Date: **26 October 2021**

THE APPEALS CHAMBER

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

SITUATION IN UGANDA

IN THE CASE OF
THE PROSECUTOR v. DOMINIC ONGWEN

Confidential

CLRV Observations on the "Defence Appeal of the Sentence"

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

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

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I. INTRODUCTION

1. The Common Legal Representative of the Victims participating in the proceedings[1] (the "CLRV") opposes the Defence Appeal of the Sentence in its entirety.

2. Before addressing the Defence's arguments on the merit of the appeal about the Sentencing Decision, the CLRV notes the incorrect approach of the Defence to incorporate in its appeal against the sentence earlier unsuccessful grievances against rulings it was not authorised to appeal and requests the Appeals Chamber to dismiss *in limine* as *de jure* inadmissible all Defence's arguments in this regard.

3. The CLRV argues that the Defence does not show that the Trial Chamber committed any error in delivering the sentence and therefore that all Grounds of Appeal should be dismissed.

4. Finally, the CLRV wishes to convey to the Appeals Chamber the Victims' views on the sentence imposed to Mr Ongwen. Victims maintain that the decision to impose 20 years of imprisonment - instead of life imprisonment as requested - is not proportionate to the gravity of the crimes nor to the victimisation recognised by the Trial Chamber. Indeed, it does not fully take into account their sufferings and the long-lasting consequences of the crimes inflicted upon them, their families and their communities. However, they hope that concrete steps will be soon taken by the Court to alleviate the consequences of the crimes on their lives.

[1] See the "Decision on contested victims' applications for participation, legal representation of victims and their procedural rights" (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-350, 27 November 2015, pp. 19-21; the "Decision on issues concerning victims' participation" (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-369, 15 December 2015, pp. 10-11; the "Second decision on contested victims' applications for participation and legal representation of victims" (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/05-384, 24 December 2015, pp. 20-23; and the "Decision on the 'Request for a determination concerning legal aid' submitted by the legal representatives of victims" (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-445, 26 May 2016, para. 13.

II. PROCEDURAL HISTORY

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

6. On 14 and 15 April 2021, the Chamber held a hearing on sentence.[3] On 6 May 2021, the Chamber issued the Sentence, imposing upon Mr Ongwen a total period of imprisonment of 25 years (the "Sentencing Decision").[4]

7. On 25 May 2021, the Appeals Chamber elected the Presiding Judge in any appeal against the Sentencing Decision.[5] On 2 June 2021, the Appeals Chamber granted the Defence's request, seeking an extension of the time limit to file its Notice of Appeal and Document in Support of the Appeal against the Sentencing Decision,[6] prolonging the time limits for the filing of said documents to 28 June and 26 August 2021, respectively.[7] On 20 August 2021, the Appeals Chamber issued a decision indicating the page limit for the Victims' observations on the appeal on sentence.[8]

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[2] See the "Trial Judgment" (Trial Chamber IX), No. ICC-02/04-01/15-1762-Conf, 4 February 2021 (the "Judgement"). A public redacted version was issued the same day, see No. ICC-02/04-01/15-1762-Red.
[3] See the transcripts of the hearings held on 14 and 15 April 2021, respectively T-260 and T-261.
[4] See the "Sentence" (Trial Chamber IX), No. ICC-02/04-01/15-1819-Confhttps://www.legal-tools.org/doc/vj1y8k/, 6 May 2021 (the "Sentencing Decision"). A public redacted version was issued the same day, see No. ICC-02/04-01/15-1819-Red.
[5] See the "Decision on the Presiding Judge of the Appeals Chamber in any appeal against the decision of Trial Chamber IX entitled 'Sentence'" (Appeals Chamber), No. ICC-02/04-01/15-1829 A2, 25 May 2021.
[6] See the "Defence Request for an Alteration of the due date for its Notice of Appeal and Document in Support of its Appeal of the Sentence", No. ICC-02/04-01/15-1828 A, 24 May 2021.
[7] See the "Decision on the Defence request for extension of time limit for the filing of the notice of appeal and the appeal brief" (Appeals Chamber), No. ICC-02/04-01/15-1837 A, 2 June 2021.
[8] See the "Decision on the page limit for victims' observations" (Appeals Chamber), No. ICC-02/04-01/15-1870 A2, 20 August 2021.

8. On 28 June 2021, the Defence filed its Notice of Appeal (the "Notice of Appeal").[9] On 26 August 2021, the Defence filed its Document in Support of the Appeal (the "Appeal Brief").[10]

III. LEVEL OF CLASSIFICATION

9. In accordance with regulation 23*bis* (2) of the Regulations of the Court, the present submission is filed confidential following the classification chosen by the Defence. A public redacted version will be filed in due course.

IV. SUBMISSIONS

A. Applicable law

10. The CLRV recalls that article 81(2)(a) of the Rome Statute (the "Statute") provides that a sentence may be appealed by the convicted person on the ground of disproportion between the crime and the punishment. Article 83(2) of the Statute also provides that the Appeals Chamber may intervene only if it finds that the proceedings appealed from were unfair in a way that affected the reliability of the sentence or that the sentence appealed from was materially affected by an error of fact or law or by a procedural error. Accordingly, the Appeals Chamber's primary task in an appeal against a sentencing decision is to review whether a trial chamber made any error in sentencing the convicted person.[11] The Appeals Chamber's role is not to determine, on

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[9] See the "Defence Notice of Appeal of the Sentencing Decision", No. ICC-02/04-01/15-1862 A2 28 June 2021 (the "Notice of Appeal").

[10] See the "Defence Document in Support of its Appeal against the Sentencing Decision", No. ICC-02/04-01/15-1871-Corr-Conf A2, 28 August 2021 (the "Appeal Brief"). A public redacted version of the document was filed on 31 August 2021, see No. ICC-02/04-01/15-1871-Corr-Red A2.

[11] See the "Judgment on the appeal of Mr Bosco Ntaganda against the decision of Trial Chamber VI of 7 November 2019 entitled 'Sentencing judgment'" (Appeals Chamber), No. ICC-01/04-02/06-2667-Red A3, 30 March 2021, para. 20 (the "Ntaganda Sentencing Appeal Judgment"); the "Judgment on the appeals of the Prosecutor, Mr Jean-Pierre Bemba Gombo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled 'Decision on Sentence pursuant to Article 76 of the Statute'" (Appeals Chamber), No. ICC-01/05-01/13-2276-Red A6 A7 A8 A9, 8 March 2018, para. 21 (the "Bemba et al. Sentencing Appeal Judgment"); and the "Judgment on the appeals of the Prosecutor and Mr Thomas Lubanga Dyilo against the 'Decision on Sentence pursuant to Article 76 of the Statute'"

its own, which sentence is appropriate, unless it found that the sentence imposed by the trial chamber is disproportionate to the crime, in which case it can amend the decision entering a new, appropriate sentence.[12]

11. Pursuant to article 78(1) of the Statute and rule 145 of the Rules of Procedure and Evidence (the "Rules"), trial chambers have broad discretion in the determination of an appropriate sentence.[13] Consequently, the Appeals Chamber will not interfere with the trial chamber's exercise of discretion merely because the former, if it had the power, might have made a different ruling.[14] Rather, the Appeals Chamber will only disturb the exercise of a trial chamber's discretion where it is shown that an error of law, fact or procedure was made.[15] In other words, it will intervene in the following broad circumstances, namely, where the trial chamber's exercise of discretion: (i) is based upon an erroneous interpretation of the law; (ii) is based upon an incorrect conclusion of fact; or (iii) as a result of the trial chamber's weighing and balancing of the relevant factors, the imposed sentence is so unreasonable as to constitute an abuse of discretion.[16] In its determination, the Appeals Chamber will also consider whether a trial chamber gave weight to extraneous or irrelevant considerations or failed to give weight or sufficient weight to relevant considerations in exercising its discretion.[17] Furthermore, once it is established that the discretion was erroneously exercised, the

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(Appeals Chamber), No. ICC-01/04-01/06-3122 A4 A6 1 December 2014, para. 39 (the "Lubanga Sentencing Appeal Judgment").

[12] See the Ntaganda Sentencing Appeal Judgment, *idem* note 11, para. 20; the Bemba et al. Sentencing Appeal Judgment, *idem* note 11, para. 21; and the Lubanga Sentencing Appeal Judgment, *idem* note 11, para. 39.

[13] See the Ntaganda Sentencing Appeal Judgment, *supra* note 11, para. 21; the Bemba et al. Sentencing Appeal Judgment, *supra* note 11, para. 22; and the Lubanga Sentencing Appeal Judgment, *supra* note 11, para. 40.

[14] See the Ntaganda Sentencing Appeal Judgment, *supra* note 11, para. 21; the Bemba et al. Sentencing Appeal Judgment, *supra* note 11, para. 22; and the Lubanga Sentencing Appeal Judgment, *supra* note 11, para. 41.

[15] *Ibid*.

[16] See the Ntaganda Sentencing Appeal Judgment, *supra* note 11, para. 23; the Bemba et al. Sentencing Appeal Judgment, *supra* note 11, para. 24; and the Lubanga Sentencing Appeal Judgment, *supra* note 11, para. 44.

[17] See the Ntaganda Sentencing Appeal Judgment, *supra* note 11, para. 31.

Appeals Chamber has to be satisfied that the improper exercise of discretion materially affected the concerned decision.[18]

12. Regarding an error of law, the Appeals Chamber will not defer to the trial chamber's interpretation of the law, but, rather, it will arrive at its own conclusions as to the appropriate law and determine whether or not the trial chamber misinterpreted the law.[19] If the trial chamber committed such an error, the Appeals Chamber will only intervene if said error materially affected the sentencing decision.[20]

13. Regarding an error of fact, the Appeals Chamber will determine whether a trial chamber's factual findings were reasonable in the particular circumstances of the case.[21] In assessing the reasonableness of factual findings, it will consider whether a trial chamber's evaluation was consistent with logic, common sense, scientific knowledge and experience, and whether a trial chamber took into account all relevant and connected evidence, and was mindful of the pertinent principles of law.[22] Therefore, the Appeals Chamber will not disturb a trial chamber's factual finding only because it would have come to a different conclusion.[23] Indeed, the Statute has vested a trial chamber with the specific function of determining an appropriate sentence which warrants the presumption that it has been properly performed, unless and until the contrary is shown.[24] Accordingly, the Statute requires the appellant to raise specific errors on appeal.[25]

14. In any case, the Appeals Chamber may interfere with a trial chamber's factual finding if it is shown to be attended by errors including: insufficient support by

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[18] See the Lubanga Sentencing Appeal Judgment, *supra* note 11, para. 45; and the Bemba et al. Sentencing Appeal Judgment, *supra* note 11, para. 25.
[19] See the Ntaganda Sentencing Appeal Judgment, *supra* note 11, para. 25.
[20] *Ibid.*
[21] *Idem*, para. 27.
[22] *Ibid.*
[23] *Idem*, para. 28.
[24] *Ibid.*
[25] *Ibid.*

evidence; reliance on irrelevant evidence; failure to take into account relevant evidentiary considerations and facts; failure to properly appreciate the significance of the evidence on record; or failure to evaluate and weigh properly the relevant evidence and facts.[26] Moreover, the Appeals Chamber may interfere where it is unable to discern objectively how a trial chamber's conclusion could have reasonably been reached from the evidence on the case record.[27]

15. Therefore, in assessing the correctness of a factual finding, a trial chamber's reasoning in support thereof is of great significance.[28] In particular, if the supporting evidence appears weak, or if there are significant contradictions in the evidence, or deficiencies in the reasoning as to why the trial chamber found that evidence persuasive, the Appeals Chamber may conclude that the finding in question was unreasonable.[29]

16. Regarding the material effect of the error, the Appeals Chamber will not consider the impact of said error in isolation, but in light of all relevant findings relied upon by the trial chamber for its decision.[30] A sentencing decision is materially affected when it is demonstrated that the trial chamber's exercise of discretion led to a disproportionate sentence.[31]

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

[26] *Idem*, para. 29.
[27] *Ibid.*
[28] *Idem*, para. 30.
[29] *Ibid.*
[30] *Idem*, para. 32.
[31] *Ibid*. See also the Lubanga Sentencing Appeal Judgment, *supra* note 11, para. 45.
[32] See the Ntaganda Sentencing Appeal Judgment, *supra* note 11, para. 33.

sense, scientific knowledge and experience.[33] In their submissions on appeal, it will be for the parties and participants to draw the attention of the Appeals Chamber to all the relevant aspects of the case record or evidence in support of their respective submissions relating to the impugned factual finding.[34] Additionally, an appellant is required to demonstrate how the error materially affected the sentencing decision.[35]

B. Merit of the Defence Appeal

18. Before addressing the Defence's arguments on the merit of the appeal about the Sentencing Decision, the CLRV notes that the Defence indicates[36] that it "*appeals*" the latter, as well as, the "*Decision scheduling a hearing on sentence and setting the related procedural calendar*",[37] and the "*Decision on the Defence request for leave to appeal the 'Decision scheduling a hearing on sentence and setting the related procedural calendar'*".[38]

19. The CLRV posits that this approach is incorrect and inadmissible by virtue of the different remedies provided for in the Statute for challenging interlocutory rulings and decisions on the merit of a case. The Defence cannot, indeed, incorporate in its appeal against the Sentencing Decision earlier unsuccessful grievances against rulings it was not authorised to appeal. Consequently, the CLRV respectfully submits that the Defence's arguments related to interlocutory rulings it was not authorised to appeal should be dismissed *in limine* as *de jure* inadmissible.

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[33] *Ibid.*
[34] *Ibid.*
[35] *Ibid.*
[36] See the Appeal Brief, *supra* note 10, para. 1.
[37] See the "Decision scheduling a hearing on sentence and setting the related procedural calendar" (Trial Chamber IX), No. ICC-02/04-01/15-1763, 4 February 2021.
[38] See the "Decision on Defence request for leave to appeal the 'Decision scheduling a hearing on sentence and setting the related procedural calendar'" (Trial Chamber IX), No. ICC-02/04-01/15-1777, 22 February 2021.

***Ground 1*: The Chamber erred in law and in procedure by disallowing the Appellant to participate meaningfully in the sentencing proceedings, violating his fair trial rights**

20. The Defence argues that the Chamber erred in law and in procedure in issuing the Sentencing Decision by disallowing the Appellant to participate meaningfully in the sentencing proceedings, thereby violating his fair trial rights; and said error negatively and materially impacted the decision.[39] In particular, the Defence argues that the Chamber did not allow the Appellant to have a translated version of the Judgment.[40]

21. The CLRV recalls that the Appeals Chamber has already made a clear pronouncement on this matter. As already observed in her response to the Defence's appeal against the Judgement,[41] the Appeals Chamber concluded that a defendant's right under article 67(1)(f) of the Statute "*requires a chamber to determine what is 'necessary to meet the requirements of fairness'. It does not,* per se, *require that a full translation of the decision under article 74 of the Statute be provided to a convicted person before filing a notice of appeal*".[42] The Appeals Chamber added that "*it must also take into account the circumstances as a whole and the convicted person's ability to understand the details of his conviction by other means*".[43]

22. In line with this reasoning, during the sentencing proceedings, Mr Ongwen (i) had been provided with full Acholi translations of the core documents of the case; (ii) had followed the sentencing hearings in real-time through Acholi interpretation, including the oral summary of the reasons for the Sentencing Decision and all relevant

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[39] See the Appeal Brief, *supra* note 10, p. 6.
[40] *Idem*, para. 7.
[41] See the "CLRV Observations on the 'Defence Appeal Brief Against the Convictions in the Judgment of 4 February 2021'", No. ICC-02/04-01/15-1880-Conf A, 21 October 2021, paras. 64-67 (the "CLRV's Observations on the Conviction Appeal").
[42] See the "Decision on Mr Ongwen's request for time extension for the notice of appeal and on translation" (Appeals Chamber), No. ICC-02/04-01/15-1781 A, 24 February 2021, para. 10 (emphasis added).
[43] *Ibid.*

explanations regarding mitigating and aggravating factors assessed by the Chamber; (iii) had also had, throughout the proceedings, the assistance of a Defence team whose members (including the lead counsel) are fluent in English and Acholi.[44] This combination of having the assistance of a competent counsel, fluent in English and Acholi, together with the translation into Acholi of core documents (and pieces of evidence) has been found as satisfying the requirement of fairness of the proceedings.[45]

23. In this regard, the Defence's claim to the effect that the Lead Counsel speaks Langi, not Acholi, is disingenuous and patently false.[46] The fact that the Lead Counsel speaks Acholi was mentioned as a factual finding in several decisions (since as early as 2016) issued by Pre-Trial Chamber II, Trial Chamber IX and the Appeals Chamber.[47] Consequently, the Lead Counsel of the Appellant must be presumed to have relevant linguistic competences in Acholi.

24. Moreover, Mr Ongwen has heard the entire trial through Acholi interpretation and instructed his team throughout the trial without any discernible impediments.[48] If need be, he was also able to consult the Acholi recordings of hearings.[49]

25. Nevertheless, the Defence continues to argue that various international human rights instruments provide for the right of the Appellant to have the full translated

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[44] *Idem*, para. 11.
[45] See the "Decision Setting the Regime for Evidence Disclosure and Other Related Matters" (Pre-Trial Chamber II), No. ICC-02/04-01/15-203, 27 February 2015, para. 33.
[46] See the Appeal Brief, *supra* note 10, p. 51. It is also interesting to note that throughout trial, the Lead Counsel himself underlined that he speaks and understands Acholi, regularly offering interpretation or nuances for some words used by witnesses during their questioning in Court.
[47] See the "Decision on the confirmation of charges against Dominic Ongwen" (Pre-Trial Chamber II), No. ICC-02/04-01/15-422-Conf, 23 March 2016, para. 22, the "Decision on the Prosecution's Applications for the Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules (Trial Chamber IX)", No. ICC-02/04-01/15-596-Conf, 18 November 2016, para. 28; and the "Decision on Mr Ongwen's request for time extension for the notice of appeal and on translation", *supra* note 42, para. 11.
[48] See the "Decision on Defence Request for Findings on Fair Trial Violations Related to the Acholi Translation of the Confirmation Decision" (Trial Chamber IX), No. ICC-02/04-01/15-1147, 24 January 2018, para. 20.
[49] See the "Decision on Defence Request for Reconsideration of or Leave to Appeal the Directions on Closing Briefs and Closing Statements" (Trial Chamber IX), No. ICC-02/04-01/15-1259, 11 May 2018, para. 15.

version of the Judgment in Acholi. As established by the Appeals Chamber, the crux of the matter is whether the *requirements of fairness* were met in the context of the sentencing proceedings. The Defence does not show how exactly the Chamber failed to determine what is "*necessary to meet the requirements of fairness*" in violation of article 67(1)(f) of the Statute and thus committed a procedural error when issuing the Sentencing Decision.

26. Moreover, the Defence's arguments are constructed on the false premise that the Appellant is a mentally disabled person.[50] The CLRV contends that the reference to Mr Ongwen as a person with mental disabilities has no factual or legal basis. In fact, in the Judgment, the Chamber explicitly rejected such allegations. In particular, the Chamber considered as entirely untenable the Defence's submission to the effect that it had discriminated against Mr Ongwen by treating him as if he were not a defendant with mental disabilities.[51] Throughout the trial proceedings, the Chamber assessed the Appellant's mental health and made relevant rulings on information provided by independent medical experts.[52] Most importantly, the Chamber found, based on expert evidence, that Mr Ongwen is not currently suffering from the mental illnesses suggested by the Defence.[53] Thus, the CLRV opines that these factual findings of the Chamber should not be disturbed. In this regard, she recalls *in toto* her arguments developed in the response to the to the Defence's appeal against the Judgement.[54]

27. Moreover, the CLRV recalls that the Chamber has observed the Appellant's behaviour since 2016 and especially during the sentencing hearing in which he gave his personal statement. In this regard, the Chamber found:

> "[…]*itself greatly impressed by Dominic Ongwen's personal statement in court during the sentencing hearing. Dominic Ongwen spoke lucidly for one hour and 45 minutes, without a break, sustaining a structured and coherent declaration, while speaking largely freely (as opposed to reading out a prepared speech). The Chamber notes that*

[50] See the Appeal Brief, *supra* note 10, paras. 49-50.
[51] See the Judgment, *supra* note 2, paras. 107-112.
[52] *Ibid.*
[53] *Idem*, paras. 2475-2477, 2484, 2492-2493, 2518, 2538 and 2580.
[54] See the CLRV's Observations on the Conviction Appeal, *supra* note 41, para. 26.

> *Dominic Ongwen demonstrated a great and detailed understanding of the trial, including of legal and procedural matters. His argument, while on occasion at odds with the Trial Judgment and of no consequence to the sentencing proceedings, related to topics the relevance of which for the case was clear. Also remarkably, Dominic Ongwen made sure, without mistakes, not to refer to confidential information when discussing sensitive topics. Not at all unimportantly, Dominic Ongwen himself stated that treatment in the detention centre helped him and that his life in detention was better than in the bush with the LRA* […] *Accordingly, the Chamber considers that Dominic Ongwen's current mental health cannot be taken into account as a mitigating circumstance with respect to his sentencing*".[55]

28. Additionally, the CLRV posits that, *arguendo*, even if the Chamber committed an error in not providing the Appellant with the full translated version of the Judgment, the Sentencing Decision is not materially affected. Indeed, the Chamber took all necessary measures to ensure that the sentencing stage of the trial proceeded fairly. In particular, it recognised as submitted the documentary evidence presented by the Defence and allowed the introduction under rule 68(2)(b) of the Rules of all ten witnesses requested by the Defence.[56] Thus, it could be safely said that the Chamber gave the Defence a fair opportunity to introduce a substantial amount of additional evidence for the purposes of sentencing. The Chamber also heard the unsworn statement of the Appellant, as well as the oral submissions of the Defence.

29. It can be concluded that Mr Ongwen has been able to instruct his defence team throughout the sentencing stage of the proceedings without any discernible impediments. Consequently, the Defence fails to demonstrate that the Chamber's exercise of its discretion led to a disproportionate sentence because of this alleged error. Indeed, there is no showing that the Chamber would have reached a substantially different conclusion if the Sentencing Decision was issued after Mr Ongwen received the full translation of the Judgment. Therefore, the first ground of appeal should be dismissed.

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[55] See the Sentencing Decision, *supra* note 4, paras. 104-105.
[56] See the "Decision on the 'Defence request to submit additional evidence for Trial Chamber IX's determination of the sentence'"(Trial Chamber IX), No. ICC-02/04-01/15-1801, 19 March 2021.

***Ground 2:* The Chamber erred in law and in procedure by rejecting the Defence's objections to the Legal Representatives' submission on sentencing**

30. The Defence argues that the Chamber: (i) erred in law and in procedure by rejecting its objections to the Legal Representatives' submission of evidence from the bar in the Victims' joint submissions on sentencing and during their respective arguments at the sentencing hearing; and that said error (ii) negatively and materially impacted the Sentencing Decision as it relied upon testimonial evidence not submitted through the official mechanisms authorised by the statutory instruments of the Court.[57]

31. The CLRV contends that these arguments stem from the Defence's fundamental misunderstanding of the participation of victims in the proceedings.

32. As explicitly stated by the Chamber, the views and concerns presented by the participating victims are not evidence in nature. In the Sentencing Decision, the Chamber plainly explained that "[t]*he submissions by the legal representatives of the views and concerns of the participating victims, even if they take the form of direct quotation of communications by some victims, are not evidence. They are submissions of authorised participants in the proceedings, and are considered by the Chamber as any other submissions made before it in the proceedings. The fact that they are communicated to the Chamber in the words of the victims themselves, rather than being paraphrased by their legal representatives, in no way transforms such submissions into evidence. Indeed, the concerned victims express their own views as participants in the proceedings, rather than as witnesses to any fact purportedly underlying relevant findings requested of the Chamber*".[58] Consequently and rightly, the Chamber rejected the Defence's request to disregard the submissions by the Legal Representatives in the part quoting the words of the victims themselves.[59]

[57] See the Appeal Brief, *supra* note 10, p. 22.
[58] See the Sentencing Decision, *supra* note 4, para. 13 (emphasis added).
[59] *Ibid.*

33. In this regard, the CLRV notes that, during the trial, the Chamber also consistently made a clear distinction between victims giving evidence and victims expressing their views and concerns,[60] in line with the practice of other chambers.[61]

34. It can therefore be concluded that the Chamber never considered or treated the views and concerns expressed in the written and oral submissions of the Legal Representatives as "*testimonial evidence*", which must be submitted through the official mechanisms prescribed by the Statute, the Rules and the evidentiary procedures governing the Court. Thus, the Defence's portrayal to the effect that the Legal Representatives allegedly submitted testimonial evidence from the bar and during their respective arguments at the sentencing hearing is a gross misrepresentation of the facts and law.

35. Even if, *arguendo*, the Chamber committed a procedural error in relying on the views and concerns of the victims, the Sentencing Decision is not materially affected. In this regard, the Defence submits that the Legal Representatives used the "*testimonial*

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[60] See the "Preliminary Directions for any LRV or Defence Evidence Presentation" (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-1021, 13 October 2017, para. 2 (i). The Trial Chamber held that "[views and concerns of victims are] *non-evidentiary*" (emphasis added.). See also the "Decision on the Legal Representatives for Victims Requests to Present Evidence and Views and Concerns and related requests" (Trial Chamber IX), No. ICC-02/04-01/15-1199-Conf, 6 March 2018, paras. 73 – 78. The Chamber ruled that "[presentation of views and concerns of victims] *would not be part of the evidentiary record and can therefore not be taken into account in the judgment* […]" (emphasis added). A public redacted version was filed on the same day, see No. ICC-02/04-01/15-1199-Red.

[61] See the "Decision on the request by victims a/ 0225/06, a/0229/06 and a/0270/07 to express their views and concerns in person and to present evidence during the trial" (Trial Chamber I), No. ICC-01/04-01/06-2032-Anx, 26 June 2009, para. 25. Trial Chamber I held that "[…] *it needs to be stressed that the process of victims 'expressing their views and concerns' is not the same as 'giving evidence'. The former is, in essence, the equivalent of presenting submissions, and although any views and concerns of the victims may assist the Chamber in its approach to the evidence in the case, these statements by victims (made personally or advanced by their legal representatives) will not form part of the trial evidence*" (emphasis added and footnote removed). See also the "Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims" (Trial Chamber III), No. ICC-01/05-01/08-2138, 22 February 2012, paras. 19 – 20. Trial Chamber III held that "[…] *the presentation by individual victims of evidence on the one hand and the expression of their views and concerns on the other is governed by different requirements, which are elaborated upon below. In particular, the threshold to grant applications by victims to give evidence is significantly higher than the threshold applicable to applications by victims to express their views and concerns in person. For this reason, victims who fail to reach the threshold to be authorised to give evidence may still be permitted to express their views and concerns in person*"(emphasis added and footnote removed).

evidence" not to advance the views and concerns of the victims, but to argue against the proof of the matter of the proposed mitigating circumstance of the Acholi traditional justice mechanisms like *Mato Oput*.[62]

36. While it is true that the Chamber made reference to the submissions of the Legal Representatives,[63] the principal reasoning behind the rejection of the Defence's arguments advocating for the traditional justice mechanisms is anchored in the clear wording of article 77 of the Statute. In fact, the Chamber stated that "*Article 23 of the Statute provides that a person convicted by the Court may be punished only in accordance with the Statute. In turn, Article 77 of the Statute specifies – exhaustively – the penalties to be imposed for the commission of crimes within the jurisdiction of the Court. Any Defence submission to incorporate traditional justice mechanisms into the sentence imposed on the convicted person under Article 76 of the Statute must therefore fail directly as a result of this principle of* nulla poena sine lege".[64]

37. In this regard, the Appeals Chamber had already made a clear and conclusive ruling. In particular, it held that […] *the Statute and related provisions contain an exhaustive identification of the types of penalties that can be imposed against the convicted person and specify mandatory aggravating and mitigating circumstances as well as the parameters to be considered for the determination of the* quantum *of such penalties. The corresponding powers of a trial chamber are therefore limited to the identification of the appropriate penalty among the ones listed in the Statute and a determination of its* quantum. *No "inherent powers" may be invoked to introduce unregulated penalties or sentencing mechanisms not otherwise foreseen in the legal framework of the Court* […]".[65]

38. Unquestionably, article 77 of the Statute identifies only four types of penalties, including imprisonment, a term of life imprisonment, a fine and a forfeiture of

[62] See the Appeal Brief, *supra* note 10, para. 78.
[63] See the Sentencing Decision, *supra* note 4, paras. 21-23.
[64] *Idem*, para. 26.
[65] See the Bemba et al. Sentencing Appeal Judgment, *supra* note 11, para. 77 (emphasis added).

proceeds, property and assets derived directly or indirectly from the crime. Therefore, the powers of the Chamber at the sentencing stage are limited to the identification of the appropriate penalty amongst said specific types of sanctions and a determination of its *quantum*.[66] It follows that the Statute does not allow for administering penalties for a person convicted by the Court via so-called traditional mechanisms of justice in Uganda. Had the Chamber agreed with the Defence and sentenced Mr Ongwen via some sort of "*unregulated sentencing mechanisms*", it would then have committed the exact error sanctioned by the Appeals Chamber.

39. It is thus clear that the Chamber would still have rejected the Defence's arguments on Acholi traditional justice mechanisms basing itself on the clear wording of article 77 of the Statute and the jurisprudence of the Appeals Chamber, regardless of whether or not it relied on the views and concerns of the victims, expressed by their Legal Representatives. It does not follow that, even if established, this alleged error could have led to a disproportionate sentence. Therefore, there is no need to address the merits of the supporting arguments of the Defence. Consequently, the second ground of appeal should be dismissed.

Ground 3: The Chamber erred in fact in its conclusions about the Acholi traditional justice system

40. The Defence argues that the Chamber erred in fact in its conclusions about the Acholi traditional justice system in the Sentencing Decision. The Defence adds that the Chamber erred in (i) failing to appreciate correctly the relevant cultural beliefs and practices that informed the conduct of the Appellant; (ii) applying "*Western values*"; (iii) refusing to allow one of the highest authorities on the Acholi traditional justice system to give oral testimony during the sentencing hearing; (iv) failing to acknowledge that the Defence's request was to assist the Chamber in its understanding of the Acholi cultural beliefs and practices for the purpose of its assessment of the

[66] *Idem*, para. 3.

personal circumstances of the Appellant as a mitigating factor; and (v) failing to apply the principle of complementarity.[67]

41. As argued *supra* under Ground 2, the Chamber cannot possibly be faulted for not having sentenced Mr Ongwen via the Acholi traditional justice system. The relevant legal provisions of the Court offer no other options, such as administering a penalty using local mechanisms for rehabilitative and restorative justice. Therefore, as the Appeals Chamber explicitly indicated and as already argued in relation to Ground 2, the powers of the Chamber at the sentencing stage are limited to the identification of the appropriate penalty amongst specific types of sanctions and a determination of its *quantum.*

42. Furthermore, the Defence is trying to mislead the Appeals Chamber (as it attempted to do with the Chamber) by presenting the illusory picture of a uniform community wishing for traditional justice mechanisms to be implemented *in lieu* of a sentence as prescribed by the Statute[68]. As already underlined in the Victims' joint submissions, victims of the crimes for which Mr Ongwen was convicted not only find important that the latter assumes the term of imprisonment that corresponds to his culpability and responsibility for the harms they suffered from, but also plainly reject the Defence's proposition.[69] However, as also underlined in the joint submissions, victims do envisage how their local cultural customs could come into play as part of reparations.[70]

43. In light of the concerns expressed by the victims and of the abundant evidence in the Judgment of how the Chamber did take into consideration the cultural background of the convicted person, victims and witnesses in this case, the CLRV

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[67] See the Appeal Brief, *supra* note 10, pp. 30-31.
[68] *Idem*, para. 87: "[…] *while not everyone shall be happy, many shall, and this should have been taken into consideration by the Chamber*".
[69] See the "Victims' Joint Submissions on sentencing", No. ICC-02/04-01/15-1808, 1 April 2021, paras. 109 to 111 and 114-115.
[70] *Idem*, paras. 112-113.

further notes the inappropriateness of the Defence's allegations of judges' bias against Acholi traditions.[71]

44. Finally, the CLRV underlines that, contrary to the Defence's assertions,[72] the Chamber had the benefit of receiving further information on the traditional justice mechanisms through Defence's witnesses, at trial and during the sentencing proceedings and ultimately did not only rely on experts (Prof. Allen and Prof. Musisi) and the victims' submissions in this regard.

45. The CLRV also notes that the principle of complementarity does not apply to sentencing. Complementarity is regulated by article 17 of the Statute, which is designed to determine the circumstances in which a case shall be inadmissible before the Court, by reference to the actions of a State which has jurisdiction over that case.[73] In making such determination, the main question to be resolved is whether the Court or the State is the proper forum to exercise jurisdiction.[74] Accordingly, States have the primary responsibility to exercise criminal jurisdiction in investigating and prosecuting crimes under the jurisdiction of the Court, and the latter does not replace, but complements them in that respect.[75] Therefore, article 17 of the Statute contains elaborate tests in order to ensure the Court will not step in, should a case be

[71] See the Appeal Brief, *supra* note 10, paras. 100 *et seq*.
[72] *Idem*, paras. 109-110.
[73] See the "Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled 'Decision on the admissibility of the case against Abdullah Al-Senussi'" (Appeals Chamber), No. ICC-01/11-01/11-565 OA6, 24 July 2014, para. 215.
[74] *Ibid.*
[75] See the "Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute'", No. ICC-01/09-01/11-307 OA, 30 August 2011, para. 37. See also the "Dissenting Opinion of Judge Anita Usacka to Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute'", No. ICC-01/09-02/11-342 OA, 20 September 2011, paras. 18-20.

inadmissible under the relevant criteria.[76] Thus, the arguments raised by the Defence in this regard are entirely devoid of any substance.

46. Even if, *arguendo*, the Chamber committed procedural errors in rejecting the Defence's suggestion in favour of sentencing via the traditional justice system, the Sentencing Decision is not materially affected. Indeed, the Chamber had to strictly adhere to the clear wording of article 77 of the Statute, regardless of the conclusions it might have reached about the shape and content of the Acholi traditional justice mechanism. It cannot possibly be made out that, even if established, these alleged errors could have led to a disproportionate sentence. For this reason, there is no need to address the merits of the supporting arguments of the Defence. Accordingly, the third ground of appeal should be dismissed.

Ground 4: The Chamber erred in law and in procedure in sentencing the Appellant on both war crimes and crimes against humanity for the same underlying conduct

47. Due to the page limit imposed by the Appeals Chamber, the CLRV leaves this ground of appeal to be addressed by the Prosecution which is best placed to address the details of these issues. However, she refers to her closing submissions on the matter.[77]

Ground 5: The Chamber erred in law by taking into account as aggravating circumstances actions which happened outside the scope of the charged period

48. The Defence argues that the Chamber erred in law by taking into account as aggravating circumstances actions which happened outside the scope of the charged period and that said error materially affected the decision and caused a disproportionate sentence against the Appellant.[78] The Defence further argues that

[76] See the "Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi'" (Appeals Chamber), No. ICC-01/11-01/11-547-Red OA4, 21 May 2014, para. 78.
[77] See transcript of the hearing held on 14 April 2021, T-260 p. 61 lines 17 – 21.
[78] See the Appeal Brief, *supra* note 10, p. 42.

rule 145(2)(b)(i) of the Rules allows a trial chamber to use as an aggravating factor any relevant prior criminal convictions for crimes under the jurisdiction of the Court or of a similar nature, but that no such convictions exist with regard to Mr Ongwen.[79] The Defence concludes that *a plain English reading* of the Sentencing Decision *impresses upon the reader* that alleged conduct which happened before the temporal jurisdiction of the Court was taken into account by the Chamber as aggravating circumstances when determining the sentence.[80]

49. The CLRV contends that these allegations are untrue. In particular, paragraphs 80 and 84 of the Sentencing Decision – quoted by the Defence in its Appeal Brief to show the error by the Chamber - are part of the section entitled "*Dominic Ongwen's abduction as a child*". In said section, the Chamber stated that "[a] *significant consideration that applies for the determination of the individual sentences for all crimes of which Dominic Ongwen has been convicted is the fact that he was abducted by the LRA at a young age – when he was around nine years old*".[81] Then the Chamber recalled how the Appellant was abducted at a young age by the LRA and suffered in the bush.[82]

50. It is clear that in paragraphs 80 and 84, the Chamber made references to sexual and gender-based crimes perpetrated by the Appellant to merely *highlight* his rise in the LRA ranks. In particular, in paragraph 80, the Chamber emphasized that, by the late 1990s, Mr Ongwen was already an important member of the LRA with some status.[83] In paragraph 84, the Chamber then stressed that, in the following years, Mr Ongwen was noticed for his good performance as a commander in the LRA.[84]

51. Consequently, the Chamber determined that Mr Ongwen's personal history and circumstances of his upbringing, since his young age, in the LRA – in particular

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[79] *Idem*, paras. 125-128.
[80] *Idem*, para. 129.
[81] See the Sentencing Decision, *supra* note 4, para. 65.
[82] *Idem*, paras. 71-79.
[83] *Idem*, para. 80.
[84] *Idem*, para. 84.

his abduction as a child, the interruption of his education, the killing of his parents, his socialisation in the extremely violent environment of the LRA – must be given a certain weight in the determination of the length of each individual sentence.[85] Additionally, the Chamber dismissed the view expressed in the Victims' joint submissions, requesting it not to take into consideration Mr Ongwen's abduction as a mitigating circumstance.[86] Rather, the Chamber committed therein to consider his abduction and early experience in the LRA as constituting specific circumstances bearing a significant relevance in the determination of the sentence as warranting approximately *a one-third reduction* in the length of the sentence that, in their absence, the convicted person would otherwise receive.[87]

52. Therefore, a *proper* plain English reading of paragraphs 80 and 84 of the Sentencing Decision in their context reveals that the Chamber considered the Appellant's life history, including his abduction and subsequent developments in the bush, as a general *mitigating* factor. Nowhere appears any indication that the Chamber took into account any prior conviction (which was indeed absent) or events happening outside the scope of the charged period as an *aggravating* circumstance. It is rather inauthentic to argue otherwise.

53. Indeed, the Defence itself agrees that the Chamber did not make any reference to rule 145(2)(b)(i) of the Rules concerning prior convictions in the Sentencing Decision.[88] Moreover, the Defence also acknowledges that, from a plain language reading of the Sentencing Decision, "*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*".[89]

[85] *Idem*, para. 87.
[86] *Idem*, para. 88.
[87] *Ibid.*
[88] See the Appeal Brief, *supra* note 10, para. 128.
[89] *Idem*, para. 133 (emphasis added).

54. Furthermore, paragraphs 287 and 292 of the Sentencing Decision are part of the section entitled "*Sexual and gender-based crimes directly perpetrated by Dominic Ongwen*" addressing the aggravating circumstances which are present equally or very similarly, with respect to each of the 11 crimes for which Mr Ongwen was convicted of. In paragraph 287, the Chamber considered that the victims of the crimes were particularly defenceless within the meaning of rule 145(2)(b)(iii) of the Rules, constituting an aggravating circumstance since all seven women concerned by the crimes were abducted and suffered the events under consideration at a young age while some of them being only children at that time.[90] In paragraph 292, the Chamber discussed the gravity of the crime of forced marriage and, especially, *the continuing nature*, beyond the period of time of the established crime and even to date, of the features of such forced conjugal relationships.[91] Yet, the Defence takes issue with the inclusion of P-0226 in this part of the Chamber's reasoning because she was abducted in 1998 or outside of the temporal parameters of the case. As indicated, the Chamber considered that the crimes involving P-0226 are continuous crimes. This means that an ongoing criminal activity or a crime that continues after an initial illegal act has been consummated and lasts over an extended period.[92] Indeed, when P-0226 was first abducted in 1998, she was only seven years old.[93] Obviously, she was still a minor during the charged period or between 2002 and 2005 during which she continued to be a victim of the sexual and gender-based crimes of which the Appellant was convicted.

55. The inescapable conclusion from these facts is that the Chamber did not commit an error in taking into account the gravity of the crime of forced marriage and the defencelessness of the victims as aggravating circumstances when pronouncing the sentence. These circumstances fall perfectly within the scope of the charged period and

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[90] See the Sentencing Decision, *supra* note 4, para. 287.
[91] *Idem*, para. 292.
[92] See ICTR, *The Prosecutor vs Ferdinand Nahimana et al*, Case No. ICTR-99-52-A, Judgement (Appeals Chamber), 28 November 2007, para. 721.
[93] See the Judgement, *supra* note 2, paras. 2016-2020.

the elements of the respective crimes. Thus, these matters cannot possibly materially affect and/or cause a disproportionate sentence against the Appellant. Accordingly, the fifth ground of appeal should be dismissed.

***Ground 6*: The Chamber erred in law and in fact by rejecting the mitigating and/or personal circumstance of the Appellant's family life**

56. The Defence argues that the Chamber erred in law and in fact by rejecting the mitigating and/or personal circumstance of the Appellant's family life in the Sentencing Decision pursuant to rules 145(1)(b) and (c) of the Rules and said errors materially affected the decision and caused a disproportionate sentence against the Appellant.[94] The Defence essentially avers that Mr Ongwen is the biological father of several children and thus the way they were conceived is immaterial.[95] According to the Defence, the children have the right to be cared for by their father and the latter has the right to care for them.[96] And, the children should not be condemned to being without paternal care for the alleged criminal conduct of their father.[97] The Defence adds that Mr Ongwen has attempted to maintain family relations with his children in the past.[98] Finally, the Defence faults the Chamber for allegedly using 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 related to the personal circumstance of his family life.[99]

57. The CLRV recalls, first, that the cases[100] mentioned by the Appellant in support of his arguments are not at all similar to the unique circumstances of the present case. As found in the Judgment, the so-called "*family*" and children of the Appellant were a

[94] See the Appeal Brief, *supra* note 10, p. 46.
[95] *Idem*, paras. 144-145.
[96] *Idem*, para. 145.
[97] *Ibid.*
[98] *Idem*, para. 142.
[99] *Idem,* para. 143.
[100] *Idem,* paras. 147-148.

result of the sexual and gender-based crimes directly perpetrated by him.[101] While the concept of "*family*" may have many cultural variations,[102] the Chamber cannot be faulted for not considering as mitigating or personal circumstance the unique situations of the "*wives*" and the children born in the bush of the Appellant.

58. According to international human rights law, the fact that Mr Ongwen is the biological father of said children is not conclusive of the matters at hand. In this regard, the European Court of Human Rights (the "ECHR") held that the mere fact that the person had been living in a common household with his partner and her mentally disabled daughter and that he became that disabled daughter's child's biological father (as a result of sexual abuse) did not constitute a family link protected by Article 8 of the European Convention on Human Rights.[103]

59. Hence, whether or not "*family life*" exists between various individuals is essentially a question of fact depending upon the existence in practice of close personal ties.[104] Courts must therefore look at *de facto* family ties, such as applicants living together in the absence of any legal recognition of family life.[105] Other factors will include the length of the relationship and, in the case of couples, whether they have demonstrated their commitment to each other by having children together.[106]

60. The CLRV recalls that, in this case, the so-called "*wives*" of the Appellant never wanted to be married to him. They never showed or had any reason to demonstrate their commitment to the Appellant by having children together with him. In this regard, the ECHR held that, when the main motivation of a relationship is purely

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[101] See the Sentencing Decision, *supra* note 4, para. 122.
[102] See the "Judgment on the appeals against the 'Decision establishing the principles and procedures to be applied to reparations' of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2" (Appeals Chamber), No. ICC-01/04-01/06-3129 A A2 A3, 03 March 2015, and No. ICC-01/04-01/06-3129-AnxA A A2 A3 , 3 March 2015, para. 7.
[103] See ECHR, *Evers v. Germany,* App. No. 17895/14, Judgement, 28 May 2020, para. 52.
[104] See ECHR, *Paradiso and Campanelli v. Italy,* App. No. 25358/12, Judgment, 24 January 2017, para. 140.
[105] See ECHR, *Johnston and Others v. Ireland,* App. No. 9697/82, Judgment, 18 December 1986, para. 56.
[106] See ECHR, *X, Y and Z v. The United Kingdom,* App. No. 21830/93, Judgment, 22 April 1997, para. 36.

sexual in nature (let alone forcedly sexual), no "*family life*" can be considered to be established (not even *de facto*).[107] Indeed, a family exists where the persons involved envisage founding a family together and making a joint commitment towards the children before they are born.[108]

61. Particularly, the factors related to possible illegal conduct sitting at the origin of the establishment of a *de facto* family life must be taken into account when assessing alleged violations of the right to family life.[109] Indeed, a person who is convicted for criminal offences cannot raise a violation of his or her right to family life and complain about the foreseeable negative consequences on his or her life as a result of his or her misconduct entailing a measure of legal responsibility.[110] *Arguendo*, even if the Defence succeeds to show that the children along with the Appellant constitute a *de facto* family, the practice of international criminal jurisdictions do not accord great weight to the family situation of persons convicted for grave crimes.[111] Therefore, even if the Chamber had erred, such error could not have had any impact in this particular case, given the gravity of the crimes committed by the Appellant and the absence of exceptional family circumstances.[112]

62. Consequently, the Defence fails to show that the Chamber committed an error of law. In fact, the Chamber correctly found that it would be improper and even cynical in the circumstances of the case to consider Mr Ongwen's fatherhood as a circumstance warranting mitigation of his sentence, since his children were born as a result of his rapes of women and girls abducted into the LRA and forced to live with him as so-called "*wives*", both crimes for which Mr Ongwen was convicted.[113]

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[107] See ECHR, *Ahrens v. Germany*, App. No. 45071/09, Judgment, 22 March 2012, para. 59.
[108] *Ibid.*
[109] See ECHR, *Paradiso and Campanelli v. Italy*, App. No. 25358/12, Judgment (Concurring Opinion of Judge Raimondi), 24 January 2017, para. 3.
[110] See ECHR, *Evers v. Germany*, *supra* note 103, para. 55.
[111] See ICTR, *The Prosecutor v. Ferdinand Nahimana et al*, *supra* note 92, para. 1108.
[112] *Ibid.*
[113] See the Sentencing Decision, *supra* note 4, para. 123, and the Judgement, *supra* note 2. See also the Appeal Brief, *supra* note 10, especially para. 145: "*The children should not be permanently, or for an*

63. The CLRV echoes this sentiment fully. Moreover, agreeing with the Defence would send out a clear and dangerous message that rapists are protected by law or their sentence can be mitigated if a child is born out of their criminal conduct. Finally, the CLRV submits that it is worth noting, in light of the non-nuanced argument put forward by the Defence, that although not considered as a relevant mitigating circumstances, such paternal link and the right to family life were taken into consideration by the Chamber in the visits and contacts regime agreed upon and therefore that said contacts are not all together granted to Mr Ongwen, providing always that the victims concerned and their children give their consent to said contacts. Therefore, the sixth ground of appeal should be dismissed.

Ground 7: The Chamber erred in law and in fact in disregarding the Defence's arguments about the Appellant's mental state and current mental disabilities

64. The Defence argues that 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.[114] The Defence further submits that 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 by failing to take into account the Appellant's current mental disabilities when determining whether he met the "*exceptional circumstances*" threshold as described in the practice of other international tribunals.[115]

65. The Defence further argues that 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

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unreasonably long time, condemned to being without paternal care for the alleged criminal conduct of their father" (emphasis added).

[114] See the Appeal Brief, *supra* note 10, p. 51.

[115] *Ibid*.

existed and therefore served as a mitigating circumstance.[116] Finally, the Defence adds that, in the Sentencing Decision, the Chamber's findings on substantially diminished mental capacity are based on article 31(1)(a) of the Statute and thus that the latter erred by failing to re-assess the evidence under the balance of probabilities standard.[117]

66. Yet, as the Defence acknowledges as correct,[118] the Chamber did state that mitigating circumstances – examples of which are listed, in a non-exhaustive manner, in rule 145(2)(a) of the Rules – must be established "*on the balance of probabilities*".[119] The Chamber also noted that a substantially diminished mental capacity is a mitigating circumstance explicitly provided for in rule 145(2)(a)(i) of the Rules and, as a circumstance falling short of constituting grounds for exclusion of criminal responsibility, it is linked to mental disease or defect under article 31(1)(a) of the Statute.[120] Thus, the Chamber stressed that the question of substantially diminished mental capacity, like the question of mental disease and defect under article 31(1)(a) of the Statute, must be determined by reference to the time of the relevant conduct.[121] After having recalled its assessment of all the expert evidence, as well as other factual evidence, the Chamber held that the results of the detailed evidentiary analysis of the possibility of mental disease or defect in Mr Ongwen's case "*are also incompatible with any consideration of substantially diminished mental capacity*".[122]

67. In other words, the Chamber re-assessed all the relevant evidence (especially the expert witnesses called by both the Prosecution and the Defence), focused on the mental state of the Appellant during the charged period - against the proper legal standard - and made a conclusive factual finding that he did not suffer from any *substantially diminished mental capacity.* The Defence does not show how the Chamber's application of this evidentiary standard under rule 145(2)(a)(i) of the Rules was

[116] *Idem*, para. 153.
[117] *Idem*, para. 155.
[118] *Idem*, para. 153.
[119] See the Sentencing Decision, *supra* note 4, para. 54.
[120] *Idem*, para. 92.
[121] *Ibid.*
[122] *Idem*, paras. 92-94.

erroneous. It cannot be possibly suggesting that the Chamber should have individually re-assessed each piece of evidence and reached a conclusion pertaining the mental state of the Appellant categorically opposed to its factual findings in the Judgment.

68. Indeed, in the Sentencing Decision, the Chamber recalled that the possibility of mental disease or defect was discussed at trial and ultimately excluded in the Judgment on the basis of a detailed analysis of evidence, including expert evidence.[123] Thus, it found that Mr Ongwen did not suffer from any mental disease or defect at the time of the conduct relevant under the charges, basing itself on the reliable expert evidence and on the corroborating evidence heard during the trial which was incompatible with any suggestion of mental disease or disorder.[124] Therefore, the core of this finding was the total absence of any mental disease or defect whatsoever, not a presence of any such illness, regardless of how insignificant or mild it could be, affecting the Appellant's mental capacity at the time.

69. Consequently, had the Chamber followed the Defence's arguments, it would have reached an opposite conclusion, which would have meant that Mr Ongwen was indeed suffering from a mental disease or defect, therefore constituting a ground for exclusion of criminal responsibility under article 31(1)(a) of the Statute and would then have pronounced Mr Ongwen innocent. Indeed, as held by the ICTR and ICTY Appeals Chambers, guilt or innocence is a question to be determined prior to sentencing and, in the event that, an accused is convicted or his or her guilt has been proved beyond reasonable doubt.[125] Thus, *a possibility of innocence can never be a factor in sentencing*.[126] Accordingly, a Chamber cannot commit an error by sentencing the convicted person for crimes for which it has found that the latter is guilty beyond

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[123] *Idem*, para. 93.
[124] *Ibid.*
[125] See ICTR, *The Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-A, Judgment (Appeals Chamber), 1 June 2001, paras. 368-370 (citing ICTY, *The Prosecutor v. Anto Furundzija*, Case No. IT-95-17/1-A, Judgment (Appeals Chamber), 21 July 2000, para. 253.
[126] *Ibid.*

reasonable doubt.[127] Unquestionably, while the imposition of a sentence is necessarily dependent on a finding of guilt, the conviction itself stands entirely unaffected by the sentence eventually imposed and there is no basis or precedent for setting aside a conviction on the basis of sentence.[128]

70. The Defence further argues that the Chamber failed to assess the fact that it took measures (albeit late) to adjust the trial schedule as a factor showing that the Appellant - more likely than not - suffered from a substantially diminished mental capacity.[129] In this regard, the Chamber stressed that the question of substantially diminished mental capacity, like the question of mental disease and defect under article 31(1)(a) of the Statute, must be determined by reference to the time of the relevant conduct.[130] Thus, the fact that the Appellant allegedly suffered from any mental illness during the trial was irrelevant and inconsequential to the Chamber's assessment of evidence against the requirements of rule 145(2)(a)(i) of the Rules.

71. On the Defence's argument that the Chamber found that the Appellant did not suffer from a substantially diminished mental capacity erroneously rejecting the submissions from Defence's expert witnesses,[131] the CLRV notes that, indeed, the Chamber did not rely on the expert evidence of Professor Ovuga and Dr Akena for the same reasons explained in the Judgment. Consequently, it did not rely on Professor Ovuga's subsequent report, prepared specifically for the purposes of sentencing, because built on the premise of the conclusions from previous reports prepared by the two experts.[132]As held by the ECHR, the requirements of a fair trial do not impose on a court an obligation to accept an expert opinion merely because a party has requested

[127] *Idem*, para. 370.
[128] See ICTY, *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.2-A, Judgement (Appeals Chamber), 19 May 2010, para. 35.
[129] See the Appeal Brief, *supra* note 10, para. 166.
[130] See the Sentencing Decision, *supra* note 4, para. 92.
[131] See the Appeal Brief, *supra* note 10, para. 168.
[132] See the Sentencing Decision, *supra* note 4, para. 95.

it since a court of law is free to refuse or to accept evidence proposed by the defence if such evidence is not relevant to the subject matter in question.[133]

72. The Defence also argues that the Chamber erred by failing to articulate the "*exceptional circumstances*" standard used to determine whether the Appellant's health could have been taken into account as a mitigating circumstance.[134] The Defence contends that the Chamber's statement that "*poor health is mitigating only in exceptional circumstances*", is vague and does not set a clear standard to determine whether a person's health should be considered as a mitigating factor.[135]

73. The CLRV recalls that said "*exceptional circumstance*" standard is not expressly provided for in the statutory instruments of the Court and thus was invoked in the Sentencing Decision only as an expression of the Chamber's discretion in determining what constitutes a mitigating circumstance in addition to those explicitly set out in rule 145(2)(a) of the Rules. After having reviewed the relevant jurisprudence of the ICTY, the Chamber defined said standard by clearly stating that "*poor health is mitigating only in exceptional cases*" and "*only in extreme and exceptional cases can it be imagined that a very serious health condition, or perhaps terminal disease, may have to be taken into account as a mitigating circumstance*".[136]

74. These criteria are clear and unequivocal in their content. The Chamber proceeded exactly in accordance with relevant international criminal jurisprudence. Hence, the Chamber assessed the mental health of the Appellant against these criteria and correctly found that none of the information available, pertaining to Mr Ongwen's mental health at various times during his detention at the seat of the Court, pointed to

[133] See ECHR, *Hodžić v. Croatia*, App. No. 28932/14, Judgment, 4 April 2019, paras. 61, 72 and 73.
[134] See the Appeal Brief, *supra* note 10, p. 172.
[135] *Idem*, paras. 172 and 174.
[136] See the Sentencing Decision, *supra* note 4, para. 103.

anything exceptional.[137] The Defence thus fails to demonstrate that the Chamber misapplied this evidentiary standard.

75. Finally, on the Defence's arguments that the Chamber erred by failing to consider the Appellant's mental disabilities as a personal circumstance,[138] the CLRV recalls her arguments that said allegation is deprived of any basis of law or fact. Thus, the Appeals Chamber should dismiss these arguments since they are erected upon a false premise. Consequently, the seventh ground of appeal must be rejected.

***Ground 8:* The Chamber erred in law and in fact by disregarding the Defence's expert testimony in assessing whether the Appellant met the threshold of rule 145(2)(a)(i) of the Rules**

76. The Defence argues that 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 on duress.[139] The Defence further argues that the Chamber erred in rejecting the testimonies of those witnesses whose evidence supported the Defence's theory, including that (i) in the LRA, all the orders came directly from Kony; (ii) the Appellant always acted based on superior orders within the context of the indoctrination he went through and the spiritual attributes of Kony; (iii) the abductees had to follow the strict edicts of Kony without question; (iv) there were dire consequences for violating rules in the LRA; and (v) thus, the Appellant was under a state of duress while in the LRA.[140]

77. In the Sentencing Decision, the Chamber recalled that duress, when falling short of constituting a ground for exclusion of criminal responsibility under article 31(1)(d) of the Statute, can still be a mitigating circumstance as provided for by rule 145(2)(a)(i)

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[137] *Idem*, paras. 104-105.
[138] See the Appeal Brief, *supra* note 10, para. 177.
[139] *Idem*, p. 66.
[140] *Idem*, paras. 193-204.

of the Rules.[141] However, a factual finding of duress is still necessary, in the sense of the conduct constituting a crime being caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person.[142] The Chamber concluded that, based on a thorough analysis of the evidence, duress was excluded because the conduct constituting the crimes Mr Ongwen was convicted of was not caused by a threat of death or serious bodily harm to him or another person and thus duress is not applicable as a mitigating circumstance.[143]

78. Therefore, the CLRV reiterates that the Chamber's finding with regard to the issue of duress was clear and unequivocal. Indeed, the crux of the Chamber's finding in the Judgment was the total absence of duress whatsoever, not a presence of any trace of duress, regardless of how minor or of low level it could be, affecting the validity of the conviction of the Appellant. Had the Chamber followed the Defence's arguments, it would have reached an opposite conclusion, meaning that Mr Ongwen was indeed under duress and therefore innocent. Guilt or innocence is a question to be determined prior to sentencing.[144] Thus, a possibility of innocence of the Appellant cannot constitute a factor in sentencing as the Defence may not challenge the validity of the conviction via sentencing submissions. As a result, the eighth ground of appeal should be dismissed.

Ground 9: The Chamber erred in law by deciding that four deaths at Pajule IDP Camp met the threshold for multiple victims

79. The Defence raised this ground in its Notice of Appeal.[145] However, no arguments are developed in the Appeal Brief. Thus, the Appeals Chamber should dismiss it *in limine.*

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[141] See the Sentencing Decision, *supra* note 4, para. 108.
[142] *Idem*, paras. 108-109.
[143] *Idem*, para. 111.
[144] See ICTR, *The Prosecutor v. Clément Kayishema and Obed Ruzindana*, *supra* note 125, para. 253.
[145] See the Notice of Appeal, *supra* note 9, p. 8.

***Ground 10:* The Chamber erred in law by using the Appellant's unsworn statement pursuant to article 67(1)(h) of the Statute against him in its determination of the joint sentence**

80. The Defence argues that the Chamber erred in law by using the Appellant's unsworn statement pursuant to article 67(1)(h) of the Statute against him in its determination of the joint sentence.[146] The Defence adds that this error materially affected the decision and caused a disproportionate sentence against the Appellant.[147] In particular, the Defence argues that the Chamber used the Appellant's unsworn statement to negate the mitigating factor and personal circumstance of substantially diminished mental capacity pursuant to rule 145(2)(a)(i) of the Rules.[148]

81. The CLRV notes that the Chamber recalled in paragraph 104 of the Sentencing Decision how it was impressed by Mr Ongwen's personal statement in court during the sentencing hearing, in particular with respect to how lucidly and freely he spoke, demonstrating a great and detailed understanding of the trial.[149] In the preceding paragraphs of the decision, the Chamber also recalled its assessment of expert evidence concerning the mental illness from which the Appellant allegedly suffered during the charged period and its conclusion to the effect that he cannot be considered as having substantially diminished mental capacity. Given these particular circumstances, the Chamber considered that the Appellant current mental health cannot be taken into account as a mitigating circumstance with respect to his sentencing.[150]

82. Indeed, pursuant to article 78(1) of the Statute and rule 145 of the Rules, trial chambers have a broad discretion in the determination of an appropriate sentence and in considering what constitute mitigating circumstances and the weight, if any, to be

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[146] See the Appeal Brief, *supra* note 10, p. 71.
[147] *Ibid*.
[148] *Idem*, para. 205, where the Defence cites paragraphs 104 and 394 of the Sentencing Decision.
[149] See the Sentencing Decision, *supra* note 4, para. 104.
[150] *Idem*, para. 105.

accorded thereto.[151] In particular, the Chamber correctly recalled that, in line with the jurisprudence of international criminal tribunals, poor health is a mitigating factor only in exceptional cases. The health of the convicted person at the time of sentencing needs not automatically be taken into account or be seen as a mitigating circumstance.[152] Trial Chamber II also shared this view.[153]

83. Most importantly, weighing any relevant evidence concerning the convicted person's alleged ill-health is a typical exercise of a trial chamber's discretion in determining whether said condition constitutes a mitigating circumstance.[154] Moreover, it is also intrinsic in said discretion to observe the appearance or the utterance of the convicted person when assessing his or her alleged ill-health along with the available scientific evidence. In this regard, the trial chamber at the ICTY, in the *Simić* case, stated that:

> "[…] *The Trial Chamber has considered the medical report (Exhibit A), the representations of Milan Simić's defence counsel during the sentencing hearing and Milan Simić's physical appearance*. […] *Although sympathetic with the medical complications that Milan Simić has suffered and his current medical condition, the Trial Chamber is not satisfied that the medical problems are present to such a degree as would justify a reduction of the sentence. Milan Simic's medical condition is not to be taken into account as a mitigating factor in the determination of sentence*".[155]

84. In the *Krstic case*, the ICTY trial chamber also noted that it had observed the alleged ill-health of the convicted person throughout the trial before considering any mitigating circumstance.[156] Indeed the first-instance court enjoys a wide margin of appreciation, since it is particularly well placed to determine the mental health status of the person concerned. Therefore, the Chamber cannot be faulted for considering the

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[151] See the Ntaganda Sentencing Appeal Judgment, *supra* note 11, para. 5.
[152] See the Sentencing Decision, *supra* note 4, para. 103.
[153] See the "Decision on Sentence pursuant to Article 76 of the Statute" (Trial Chamber IV), No. ICC-01/05-01/13-2123-Corr, 22 March 2017, para. 187.
[154] See ICTY, *Prosecutor v. Nikola Šainović et al*, Case No. IT-05-87-A, Judgement (Appeals Chamber), 23 January 2014, para. 1827.
[155] See ICTY, *Prosecutor v. Milan Simić*, Case No. IT-95-9/2-S, Sentencing Judgement (Trial Chamber II), 17 October 2002, paras. 99-101. (Emphasis added)
[156] See ICTY, *Prosecutor v. Radislav Krstic*, Case No. IT-98-33-T, Judgement (Trial Chamber), 2 August 2001, para. 716 (confirmed on appeal, see ICTY, *Prosecutor v. Radislav Krstic*, Case No. IT-98-33-A, Judgement (Appeals Chamber), 19 April 2004, para. 271.

Appellant's unsworn statement in assessing his health condition along with solid expert evidence elicited during the trial.

85. Moreover, in paragraph 394 of the Sentencing Decision, the Chamber stated that "[i]*n addition, while not an aggravating factor in and of itself or an element otherwise impinging as such on the length of the prison sentence to be imposed in the present case, the Chamber cannot overlook the absence, in Dominic Ongwen's submissions during the hearing on sentence, of any expression of empathy for the numerous victims of his crimes – and even less of any genuine remorse – supplanted by a lucid, constant focus on himself and his own suffering eclipsing that of anyone else*".[157]

86. The CLRV posits that remorse expressed by an accused person or the lack thereof is a factor to be taken into account by a trial chamber when sentencing him or her to imprisonment for the commission of serious international crimes. According to Trial Chamber VIII, such expression of remorse and empathy for the victims is a substantial factor going to the mitigation of the sentence.[158] On the other hand, lack of remorse or the absence of sincere demonstrations of remorse may also be taken into

[157] See the Sentencing Decision, *supra* note 4, para. 394.
[158] See the "Judgment and Sentence" (Trial Chamber VIII), No. ICC-01/12-01/15-171, 27 September 2016, paras. 103-105.

account when a trial chamber assesses the utterances of the convicted persons. Trial Chamber I,[159] Trial Chamber II,[160] and Trial Chamber VI[161] also shared the same view.

87. As this is an established practice of the Court, the Chamber rightly assessed the unsworn statement of the Appellant against the established factors in sentencing. Thus, the Defence fails to demonstrate that the Chamber abused its discretion in issuing the Sentencing Decision. Accordingly, the tenth ground of appeal should be dismissed.

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[159] See the "Decision on Sentence pursuant to Article 76 of the Statute" (Trial Chamber I), No. ICC-01/04-01/06-2901, 10 July 2012, paras. 82-87. The Trial Chamber held that "[…] *Mr Lubanga made a personal statement during the sentencing hearing, in which he spoke of the extent of the violence and insecurity in Ituri during the period of the charges. He stated that although 'no one can say with certainty that no child below 15 was among the soldiers' who were part of the UPC/FPLC in 2002 - 2003, he was opposed to their enlistment. He also emphasised that he took up this position of responsibility not for power but for peace, and he submitted that the UPC was created, and the FPLC soldiers were trained, in order to pursue this objective*. […] *The Chamber accepts that Mr Lubanga hoped that peace would return to Ituri once he had secured his objectives, but this is only of limited relevance given the persistent recruitment of child soldiers during the period covered by the charges. The critical factor is that, in order to achieve his goals, he used children as part of the armed forces over which he had control* […] *notwithstanding public statements to the contrary and the demobilisation orders he issued*".

[160] See the "Decision on Sentence pursuant to article 76 of the Statute"(Trial Chamber II), No. ICC-01/04-01/07-3484-tENG-Corr, 23 May 2014, paras. 116-121. The Trial Chamber held that "[…] *The Chamber notes that a statement of remorse may be taken into account as a mitigating circumstance. It states, nonetheless, that only a sincere statement of remorse may amount to such a circumstance. Furthermore, whereas the expression of sympathy or genuine compassion for the victims may also be taken into account in the determination of the sentence, it cannot be considered commensurate to a statement of remorse under any circumstance, and must in the mind of the Chamber, be accorded less weight*. […] [Yet] *during the proceedings Germain Katanga made no statement that can be interpreted as an expression of deep and genuine remorse. The Chamber notes that at best he made some statements attesting to his compassion for the victims and his desire for justice* [which were] *mere convention and* [he] *found it very difficult to acknowledge the crimes committed*. […] *In the light of the foregoing, the Chamber will therefore not consider that Germain Katanga's statement amounts to an expression of compassion or genuine remorse for the victims of Bogoro sufficient to be taken into account as a mitigating circumstance*".

[161] See the "Sentencing judgment" (Trial Chamber VI), No. ICC-01/04-02/06-2442, 7 November 2019, paras. 236-239. The Trial Chamber held that "[…] *The Chamber notes that a sincere statement of remorse may be taken into account as a mitigating circumstance, and that expressions of sympathy or genuine compassion for the victims, while also relevant for the determination of the sentence, may be accorded less weight.* […] *In his unsworn statements at the end of closing arguments and at the end of the sentencing hearing,* [Mr Ntaganda made very general statements of compassion] *rather than specifically aimed at the victims of his own crimes.* […] *In this context, the Chamber does not consider that Mr Ntaganda has made any sincere demonstrations of remorse, nor that his abovementioned expressions of compassion are sufficient to constitute a mitigating circumstance*".

***Ground 11:* The Chamber erred in law by increasing the Appellant's sentence from 20 years to 25 years in the joint sentence on the grounds of aggravating circumstances already considered in the Judgment**

88. The Defence argues that the Chamber erred in law by increasing the Appellant's sentence from 20 years to 25 years in the joint sentence on the grounds of aggravating circumstances already been considered in the Judgment, and without clearly identifying and isolating additional aggravating circumstances not used in the Sentencing Decision or that were not requirements to prove the convictions.[162] The Defence argues further that the Chamber disregarded overlapping factors or general factors and circumstances which were double-counted or were considered in the Sentencing Decision as aggravating factors.[163]

89. To support its contentions, the Defence opposes that 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'*.[164] It adds that 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.[165] The Defence also contends that "*accumulation of aggravating factors*" is not a relevant factor mandated by the Statute pursuant to article 78(3).[166] Lastly, the Defence submits that the Chamber's double-counting and failure to give an explanation as to the imposition of an additional five years in the joint sentence negatively impacted the Appellant's sentence.[167]

90. The CLRV avers that the Defence simply misrepresents the process reflected in the Sentencing Decision. The parts identified by the Defence as "*impermissible double-*

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[162] See the Appeal Brief, *supra* note 10, p. 75.
[163] *Idem*, para. 218.
[164] *Idem*, para. 219.
[165] *Ibid.*
[166] *Idem*, para. 222.
[167] *Idem*, para. 234.

counting" were explicitly avoided by the Chamber when determining the joint sentence imposed upon the Appellant. In this regard, the reasoning of the Chamber reads as follows:

> "[…] *All relevant circumstances and factors related to the gravity of the specific crimes as well as the personal circumstances of Dominic Ongwen have been taken into account for the determination of the individual sentence for each of the crimes of which he was convicted. At this juncture, the Chamber is required to determine, within the statutory parameters, the extent of accumulation of the individual sentences which shall constitute the 'total period of imprisonment' as the joint sentence for all crimes, reflecting Dominic Ongwen's 'total culpability'. To do so, the Chamber, first, shall consider to what extent the criminal conduct underlying each of the crimes – and corresponding blameworthiness as expressed in the related individual sentences – overlap in the concrete circumstances, or must be (separately) reflected in the joint sentence*".[168]

91. The Chamber did acknowledge that a number of crimes for which Mr Ongwen was convicted are in concurrence with each other (in that the same conduct and consequence are characterised as more than one crime) and other instances of (partial) overlap in the underlying conduct between different crimes he committed.[169] Yet, it did not consider that any such overlap – taken individually or in combination – have a significant bearing in the determination of the joint sentence, given the strikingly large number of distinct convictions, holding entirely different factual basis.[170]

92. Therefore, the Chamber held that, "*while mindful of 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, it did not consider, in the concrete circumstances of the case, any such issue to weigh noticeably in its determination.[171] Consequently, the Defence's arguments to the effect that the Chamber allegedly "*double-counted*" overlapping factors underlying conducts of the Appellant is baseless.

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[168] See the Sentencing Decision, *supra* note 4, para. 375.
[169] *Idem*, paras. 376-377.
[170] *Idem*, para. 379.
[171] *Idem*, para. 382.

93. Obviously, the Chamber's consideration of the *totality of the aggravating and mitigating circumstances and the personal circumstances* of the convicted person is intrinsic in the process for determination of the joint sentence (whether it is called "*accumulation*" or else). In any case, in its determination of the final joint sentence, the Chamber reluctantly, but resolutely declined to accede to the submission of the Legal Representatives advocating for a life imprisonment to be imposed upon Mr Ongwen after considering all relevant circumstances and factors, including the so-called "*accumulation of aggravating factors*" raised by the Defence.[172]

94. In concrete terms, the fact that the Chamber's assessment of the gravity of the crimes for which Mr Ongwen was convicted, along with the aggravating factors (including the very large extent of cumulative victimisation of the crimes and many victims being particularly defenceless)[173] against the mitigating and personal circumstances of the Appellant (including his abduction at a young age and suffering in the hands of the LRA[174] and his potential for rehabilitation)[175] *actually worked in his favour*.

95. In other words, when properly read in the context of the pertinent parts of the Sentencing Decision, the Chamber's exercise of discretion based on all the relevant factors (be them accumulated or else) in determining the joint sentence, *essentially reduced* in a significant fashion the Appellant's sentence from *the real possibility* of imposing a life sentence on him, down to 25 years of imprisonment,[176] rather than increasing his sentence by 5 years.

96. Therefore, the arguments raised to the contrary by the Defence are devoid of any logic and inconsequential. They dismally fail to show that the Chamber's exercise of discretion was truly unfair or unreasonable in issuing the Sentencing Decision since

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[172] *Idem*, paras. 383-391.
[173] *Idem*, para. 384.
[174] *Idem*, para. 388.
[175] *Idem*, paras. 389-390.
[176] *Idem*, paras. 383-392.

the imposition of the joint sentence was *ultimately beneficial* to the Appellant in comparison to the genuine prospect of him receiving a life sentence. Accordingly, the eleventh ground of appeal should be dismissed.

***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 Judgment**

97. The Defence argues that 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 Judgment.[177] According to the Defence, the Chamber violated the prohibition against not relying on the same factor more than once and double-counted: (i) discrimination and the multiplicity of victims both as factors informing gravity and as aggravating factors; (ii) the vulnerability of children conscripted by the LRA; and (iii) by factoring twice elements that are essential to the mode of liability for which the Appellant was convicted.[178]

98. As for the first allegation of double-counting, the Defence submits that, despite correctly stating that factors that the Chamber did not consider in its assessment of gravity may be taken into account separately as aggravating circumstances, it did 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*".[179] The CLRV posits that the Defence's argument is self-defeating since it admits itself that the Chamber considered discrimination as an aggravating circumstance for the "*other crimes*" (which do not require it as an element of crime), not for the crime of persecution for which the existence of a discriminative motive is one of the constituent elements.

[177] See the Appeal Brief, *supra* note 10, p. 81.
[178] *Idem*, para. 238.
[179] *Idem*, para. 240 (emphasis added).

99. In this regard, the Appeals Chamber held in the *Ntaganda* case that:

> "[…] [the] *prohibition on 'double counting' of factors relevant to the determination of a sentence, such that 'factors taken into consideration as aspects of the gravity of a crime cannot additionally be taken into account as separate aggravating circumstances, and* vice versa'. *The Appeals Chamber has previously held, in this regard, that a legal element of the crime or mode of liability in relation to which an accused was convicted cannot be considered as an aggravating circumstance. The Appeals Chamber considers that in the context of the Court's sentencing regime, the risk of double-counting is perhaps most likely to occur in a trial chamber's determination of the appropriate individual sentence. During this step of the sentencing process, 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*".[180]

100. The prohibition on double-counting applies only when a trial chamber considers a factor in the assessment of both the gravity of and the aggravating circumstance of *a particular crime*, not in cases involving a multitude of crimes whose constitutive elements protect differing interests.[181] Thus, the Appeals Chamber also held that:

> "[…] *Mr Ntaganda was convicted of persecution both as a direct perpetrator and as an indirect co-perpetrator in connection with acts of murder (counts 1 and 2), intentionally attacking civilians (count 3), rape (counts 4 and 5), sexual slavery (counts 7 and 8), pillage (count 11), forcible transfer of the population (count 12), ordering the displacement of the civilian population (count 13), intentionally directing attacks against protected buildings (count 17) and the destruction of the property of an adversary (count 18).* […] *When a person is convicted of more than one crime, the Trial Chamber is required, by law, to first impose an individual sentence for each crime that fully reflects the convicted person's culpability for that particular crime. The calculation of an individual sentence necessarily entails an assessment of all the circumstances*

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[180] See Ntaganda Sentencing Appeal Judgment, *supra* note 11, paras. 123-124 (footnotes removed and emphasis added).

[181] See ICTY, *Prosecutor v. Tihomir Blaskic*, Case No. IT-95-14-A, Judgment (Appeals Chamber), 29 July 2004, para. 693: "*The Appeals Chamber finds that the Trial Chamber did not err in holding that 'a discriminatory state of mind may however be regarded as an aggravating factor in relation to offences for which such a state of mind is not an element.' A discriminatory state of mind is not an element of the crime of murder under Article 3 of the Statute and was not therefore taken into account in convicting the Appellant for the crime of murder. It could however be taken into account in estimating the gravity of the murder. This is the way the Trial Chamber used it. The discriminatory state of mind was used once in order to assess the gravity of the crime of murder and, of course on another occasion, in order to establish that the Appellant had the requisite discriminatory intent of the crime of persecution. The Trial Chamber committed no error in holding that a discriminatory state of mind can be regarded as an aggravating factor in relation to the crime of murder*".

> *relevant to a particular crime. For the crime of persecution, which is not a stand-alone crime but one requiring a connection with any act constituting a crime against humanity or any crime within the jurisdiction of the Court, certain circumstances (i.e. the underlying factual conduct or those establishing the 'discriminatory dimension' of persecution) are therefore relevant to the calculation of more than one individual sentence. In such a case, if the circumstances relevant to more than one individual sentence were to be excluded from the calculation of any one of those individual sentences, the true culpability of a convicted person for a particular crime would be unclear. Consequently, the Appeals Chamber finds that the Trial Chamber did not err in imposing an individual sentence for persecution by taking into account the same underlying conduct and the discriminatory nature of such conduct that was also considered* […] *when setting individual sentences for the crimes underlying counts 1 to 5, 7 to 8, 11 to 13, and 17 to 18*".[182]

101. Indeed, in paragraph 145 of the Sentencing Decision (to which other paragraphs identified by the Defence refer),[183] the Chamber strictly followed the above mentioned guidance of the Appeals Chamber and concluded that:

> "[A] *feature common to the crimes of attack against the civilian population as such, murder, torture, enslavement and pillaging in the context of the attack on Pajule IDP camp is that they were all committed for motives involving discrimination – within the meaning of Rule 145(2)(b)(v) of the Rules* […]. *This aspect therefore informs the Chamber's consideration of the gravity of the crimes under Counts 1, 2-3, 4-5, 8 and 9. The Chamber is aware that this 'discriminatory dimension' is also reflected in the separate crime of persecution for which a conviction was entered under Count 10* […]. *However,* […] *the determination of an individual sentence for each crime – that fully reflects the convicted person's culpability for that particular crime – 'necessarily entails an assessment of all the circumstances relevant for that particular crime'. Specifically for the crime of persecution this means that, when a conviction was entered concurrently, on the basis of the same conduct for both such crime and one or more additional crimes, 'certain circumstances (i.e. the underlying factual conduct or those establishing the 'discriminatory dimension' of persecution) are […] relevant to the calculation of more than one individual sentence'. Indeed, '[i]n such a case, if the circumstances relevant to more than one individual sentence were to be excluded from the calculation of any one of those individual sentences, the true culpability of a convicted person for a particular crime would be unclear'. While, therefore, in imposing the individual sentence for the crimes concerned the Chamber will take into account the same underlying conduct (including its 'discriminatory dimension', whether as an aggravating circumstance for the crimes under Counts 1, 2-3, 4-5, 8 and 9 or as a*

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[182] See Ntaganda Sentencing Appeal Judgment, *supra* note 11, paras. 126, 129-130.
[183] See the Appeal Brief, *supra* note 10, footnote 415; pointing to paragraphs 182, 220, 255 and 377 of the Sentencing Decision.

> *constitutive element of the crime of persecution under Count 10), it will then consider such overlap in its determination of the joint sentence*".[184]

102. This statement is conclusive on the matter. While the Chamber stated later that the presence of motives involving discrimination "*informed its consideration of the gravity of the crimes*" under Counts 11, 12-13, 14-15, 16-17, 20, 21 and 22, it explicitly referred back to paragraph 145 which expressed its considerations on the interplay between the crimes under Counts 1, 2-3, 4-5, 8 and 9, on the one hand, and the crime of persecution under Count 10, as applicable, *mutatis mutandis*, also to the crimes of the same nature committed in the context of the attacks on the IDP camps.[185] Therefore, the Chamber appropriately determined the individual sentences for the crimes that do not require discrimination as a legal element along with the crime of persecution which does.

103. The Defence further argues that the discriminatory intent was also factored as an essential element of the respective common plans of attacking IDP camps.[186] According to the Defence, the Chamber, when describing the nature of the common plans to attack Pajule and Odek in the Judgment, pointed to its finding that the LRA, including Mr Ongwen, perceived civilians living in the IDP camps as the enemy which demonstrated that it had considered the discriminatory motives as an essential component of the common plan or a legal element of the mode of liability, in addition to considering it as an aggravating factor.[187]

104. While it is true that the Chamber mentioned in the Judgment that Mr Ongwen harboured a discriminatory motive against the civilians residing in Pajule and Odek, in the process of making its factual finding on the existence of an agreement or common plan, the Sentencing Decision did not take this into account in its determination of the final sentence imposed upon the Appellant. In fact, the Chamber

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[184] See the Sentencing Decision, *supra* note 4, para. 145 (footnotes removed).
[185] *Idem*, paras. 182, 220 and 255.
[186] See the Appeal Brief, *supra* note 10, para. 243.
[187] *Idem*, para. 244.

ruled that a legal element of the crime or of the mode of liability cannot be considered an aggravating circumstance.[188] This limitation, however, applies only to such legal elements and does not extend to those non-essential factual findings which only served to prove the legal elements of the crimes of which the person was convicted, or the relevant mode of liability, and may thus be considered aggravating factors.[189]

105. Indeed, the proscription on double-counting applies only when a trial chamber considers a certain factor that is contained in the elements of *a particular crime* both as an aggravating circumstance and an indicator of gravity or form of criminal liability; not in cases involving a multitude of crimes whose constitutive elements protect differing interests. Concretely applied in this case, the Appellant was convicted for a number of crimes committed during the attacks on Pajule and Odek, including attack against the civilian population as a war crime, murder (and attempted murder) as a crime against humanity and a war crime, torture as a crime against humanity and a war crime, enslavement as a crime against humanity, pillaging as a war crime and destruction of property as a war crime which do not require a discriminatory intent as part of their elements.

106. Consequently, even if the Defence ponders that the Chamber should not have considered discrimination when making its finding in relation to the common agreement or plan to attack the IDP camps, the ultimate determination of the joint sentence was not materially affected. Indeed, the Chamber specifically noted that there existed a number of instances of (partial) overlap in the underlying conduct between different crimes committed by Mr Ongwen in the context of each of the attacks on Pajule, Odek, Lukodi and Abok IDP camps, including the crimes of persecution which were committed through acts constituting also other crimes perpetrated in the same context, qualified by the element of discrimination on political grounds.[190] However,

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[188] See the Sentencing Decision, *supra* note 4, para. 53
[189] *Ibid.*
[190] *Idem*, para. 377.

the Chamber ultimately ruled that said overlaps – considered individually or in combination – *will not have a significant bearing* in the determination of the joint sentence, given the strikingly large number of distinct convictions, holding entirely different factual basis.[191] Thus, *arguendo*, even if the Chamber would have double-counted discrimination as a mode of liability and as an aggravating factor, the eventual length of the joint sentence would not have been substantially different.

107. Moreover, the Defence argues that 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.[192] The Defence adds that the "*high number of victims*" and the "*multiplicity of victims*" are essentially the same consideration.[193]

108. The CLRV notes that the actual reasoning of the Chamber in relation to its assessment of the specific crimes tells a different story. For example, the Defence cites paragraph 154 of the Sentencing Decision in which the Chamber stated that the gravity of the crimes of murder under Counts 2 and 3 is very high since "*in course of the attack on Pajule IDP camp, LRA fighters killed at least four civilians* […]".[194] This in fact demonstrates the Chamber's consistent application of the rule against double-counting, which concerns itself only with the legal elements of the crimes. Since the multiplicity of victims is not a legal element of the crime of murder, the Chamber was well within its power to consider it as an aggravating factor. Thus, the exact number of victims mentioned therein was indeed a non-essential factual finding, which only served to prove the legal elements of the crimes of which the Appellant was convicted.

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[191] *Idem*, para. 379.
[192] See the Appeal Brief, *supra* note 10, para. 245.
[193] *Ibid.*
[194] See the Sentencing Decision, *supra* note 4, para. 154.

109. Furthermore, the Defence argues that the Chamber erred when double--counting the "*defencelessness*" of children recruited into the LRA as an aggravating factor, since the vulnerability of the victims is inherently part of the gravity of the crime and thus it should not be considered as an aggravating factor as well.[195] The Defence adds that the Chamber determined without basis that the very young age of the conscripted children made them (especially those under 10 years of age) additionally vulnerable and "*particularly defenceless*", thereby constituting an aggravating factor while the vulnerability of victims of all ages was already taken into consideration in the gravity.[196]

110. Yet, the Chamber explained its reasoning in the following terms:

> "*The Chamber observes that the crime under consideration is, by definition, committed against children under the age of 15 years old, and that the particularly vulnerability of the victims is therefore part of the gravity of the crime as such. Nevertheless, it must be recognised that even within this – necessary – category of vulnerable victims, some may even be of – unnecessary – additional vulnerability due to their particularly young age and qualify on this ground, even in the context of the crime under consideration, as 'particularly defenceless' within the meaning of the relevant aggravating circumstance under Rule 145(2)(b)(iii). The Chamber is satisfied that this is the case in the present context, given the considerable amount of evidence that even children under 10 years old were abducted and integrated to serve in Sinia by Dominic Ongwen and his co-perpetrators* […]".[197]

111. The CLRV avers that, while it is true that all children under 15 years of age are vulnerable in general, those under 10 years are particularly vulnerable and defenceless. In fact, their special vulnerability is not integrally contained in the gravity of the crimes in question since there exist huge differences in terms of physical, mental

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[195] See the Appeal Brief, *supra* note 10, para. 251.
[196] *Idem*, paras. 252-255.
[197] See the Sentencing Decision, *supra* note 4, para. 369 (footnotes removed). See also the "Sentencing judgment" (Trial Chamber VI), No. ICC-01/04-02/06-2442, 7 November 2019, para. 195. Trial Chamber VI held that "[…] *considering that a legal element of the crime cannot be considered as an aggravating circumstance, the fact that the victims were children as such does not constitute an aggravating factor in relation to the enlistment and conscription of children under the age of 15 years and their use in hostilities. However, the Chamber has considered the fact that at least* [some] [*sic*] *of the victims was very young, and therefore particularly defenceless, as an aggravating circumstance*".

and emotional developments of particularly young children and teenagers. A substantial amount of evidence was presented before the Chamber in this regard.

112. For example, according to expert witness Prof Wessells (PCV-0002), "[children who] *spend significant time during their formative years with the LRA are likely to experience a diversity of consequences on their social, emotional, or cognitive development. Living in constant or near constant fear produces toxic stress which in young children (0-5 years) has negative, long-term neurological, health, and psychological consequences*. […] *Children from age 6 years and older, who in normal circumstances would likely have gone to school, received no education if they were with the LRA. This lack of schooling was an emotional loss for the children since children in northern Uganda see this as one of their highest priorities. Not attending school limits children's cognitive competencies, which has emotional consequences as well. Children who go to school and develop strong cognitive competencies such as problem-solving skills are better able to navigate and cope with the complexities of adverse environments*".[198]

113. Moreover, PCV-0002 stressed that the LRA demonstrated a preference for young people between 12 and 16 years of age and especially children between 12 and 14 years of age were four times more likely to be abducted than children of 9 years of age or youth of 23 years of age.[199] This preference seemed to reflect the dominance of the 12-16 year old age group in the overall population, who were more easily indoctrinated and disoriented than older children but more effective soldiers than younger children.[200] In particular, PCV-0002 also testified that, in war, young children are affected in different ways than teenage children.[201] For example, while young children who are exposed to attack cannot even make sense of what is happening to them (often suffering greater traumatic reaction), adolescents or teenagers are

[198] See UGA-PCV-0002-0091 and UGA-PCV-0002-0092.
[199] *Idem* at UGA-PCV-0002-0104 and UGA-PCV-0002-0105.
[200] *Ibid.*
[201] See the transcript of the hearing held on 15 May 2018, T-176, p. 10, lines 12-19.

relatively large in stature and physically mature so that they can make complex decisions under combat circumstances, thus put in front lines by armed groups.[202]

114. This is an educated view of an expert witness based on years of scientific research and personal experience specialising in child soldiers. Even the expert witnesses called by the Defence largely agree with this fact. For example, Professor Ovuga (D-042)[203] and Mr Ochen (D-0114)[204] stressed in their respective reports that Mr Ongwen was forcefully abducted when he was *only 8 or 9 years old* and thus how defenceless he might have been at the time. Even the Defence counsel, when making oral submissions at the sentencing hearing, acknowledged this fact by stating that "[…] *Mr Ongwen was abducted at the age of 9 and 25 forced to become a child soldier in the LRA, a grim foreshadowing of the crimes he would himself commit some 15 years later. The evidence suggests Mr Ongwen's years as a child and adolescent in the LRA must have been extremely difficult, and it is unlikely that he would have committed the crimes he did in 2005 had he not been abducted on his way to school in 1987*".[205] Therefore, the Chamber was well within its power to consider the particular defencelessness of child soldiers under 10 years of age as an aggravating factor, based on witness accounts, as well as expert evidence.

115. Lastly, the Defence argues that 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.[206] The Defence further states that the Chamber determined that the enslavement of civilians was one of the main purposes of the attack on Pajule IDP camp, as designed by Mr Ongwen and other members of the LRA

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[202] *Idem*, p. 15, lines 1-25.
[203] See UGA-D26-0015-1879, UGA-D26-0015-1881 and UGA-D26-0015-1887.
[204] See UGA-026-0015-1907, UGA-026-0015-1912 and UGA-026-0015-1914.
[205] See the transcript of the hearing held on 15 April 2021, T-261, p. 46, line 24 - p. 47, line 4 (emphasis added).
[206] See the Appeal Brief, *supra* note 10, para. 257.

hierarchy involved in its planning and execution.[207] Then, it adds that, 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.[208]

116. The Defence cites in support of its allegations only paragraph 167 of the Sentencing Decision in which the Chamber further :

> *"[...] recalls that the enslavement of civilians was one of the main purposes of the attack on Pajule IDP camp, as designed by Domenic Ongwen and other members of the LRA hierarchy involved in its planning and execution. In addition to this, the Chamber also notes that on the ground, Dominic Ongwen personally ordered a subordinate to abduct civilians, and that this order was executed. Dominic Ongwen also personally led a group of abductees and ordered abductees to carry looted goods and instructed them not to drop items. After the attack, some abductees remained in the LRA and were distributed to various units, including among Dominic Ongwen's group".*[209]

117. The Chamber then found in the next paragraph that "[w]*eighing and balancing all the relevant factors, taking into account both the gravity of the crime and the individual circumstances of Dominic Ongwen, including in relation to his personal history, as well as the presence of the aggravating circumstance of the multiplicity of victims, as just discussed, and the aggravating circumstance of commission of the crime for a motive involving discrimination, the Chamber sentences Dominic Ongwen to a term of 14 years of imprisonment for the crime against humanity of enslavement (Count 8)*".[210]

118. In this regard, the Appeals Chamber held that a legal element of the crime or mode of liability in relation to which an accused was convicted cannot be considered as an aggravating circumstance.[211] Yet, there is no indication whatsoever pointing to the conclusion that the Chamber erroneously made any double-counting.

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[207] *Idem*, para. 258.
[208] *Idem*, para. 260.
[209] See the Sentencing Decision, *supra* note 4, para. 167 (footnotes removed).
[210] *Idem*, para. 168.
[211] See Ntaganda Sentencing Appeal Judgment, *supra* note 11, paras. 123-124 (footnotes removed and emphasis added).

119. What the Chamber did in paragraph 167 was to simply recall the legal elements of the crime for which the Appellant was convicted.[212] Therefore, contrary to the Defence's contention, the Chamber did not violate the principle according to which a legal element of the offence or the mode of liability cannot be considered as an aggravating factor. Therefore, the twelfth ground of appeal should be dismissed.

V. CONCLUSION

For the foregoing reasons, the Common Legal Representative respectfully requests the Appeals Chamber to dismiss the Defence Appeal in its entirety.

Paolina Massidda
Principal Counsel

Dated this 26th day of October 2021
At The Hague, The Netherlands

[212] See the Bemba et al. Sentencing Appeal Judgment, *supra* note 11, para. 128.