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International Criminal Court

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

**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**

# Victims' Observations on the "Defence Document in Support of its Appeal against the Sentencing Decision"

**Source:** **Legal Representatives of Victims**

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

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**Victims Participation and Reparations Section**

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## I. Introduction

1. The Legal Representatives for Victims (the "LRVs"), pursuant to the Appeals Chamber decision of 20 August 2021,[1] hereby submit their observations on the "Defence Document in Support of its Appeal against the Sentencing Decision" ("Defence Appeal Brief").[2]

2. The LRVs submit that the Defence has failed to demonstrate any error of law, fact, abuse of discretion or any fair trial violation that would materially affect the sentence imposed by the Chamber on Dominic Ongwen. For this reason, the LRVs submit that the Defence appeal should be dismissed in its entirety.

## II. Confidentiality

3. Subject to the provisions of Regulation 23 *bis*(1), (2) of the Regulations of the Court ("RoC"), the LRVs file these observations classified as Confidential as they respond to a confidential document.

## III. Procedural history

4. On 4 February 2021, the Trial Chamber IX issued the Trial Judgment, by which it found Dominic Ongwen guilty of 61 out of 70 counts of war crimes and crimes against humanity ("Trial Judgment" or "Judgment").[3]

5. On 6 May 2021, the Trial Chamber IX sentenced Dominic Ongwen to 25 years of imprisonment ("Sentencing Decision").[4]

6. On 24 May 2021, the Defence requested an extension of the time limit to file its notice of appeal and appeal brief against the Sentence, which was granted by the Appeals Chamber.[5]

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[1] Decision on the page limit for victims' observations, ICC-02/04-01/15-1870, 20 August 2021.
[2] Defence Document in Support of its Appeal against the Sentencing Decision, ICC-02/04-01/15-1871-Conf, 26 August 2021; Public Redacted Version of 'Corrected Version of "Defence Document in Support of its Appeal against the Sentencing Decision", filed on 26 August 2021', filed on 30 August 2021 as ICC-02/04-01/15-1871-Conf-Corr, ICC-02/04-01/15-1871-Corr-Red, 31 August 2021.
[3] Trial Judgment, ICC-02/04-01/15-1762-Red, 4 February 2021.
[4] Sentence, ICC-02/04-01/15-1819-Red, 6 May 2021.
[5] Decision on the Defence request for extension of time limit for the filing of the notice of appeal and the appeal, ICC-02/04-01/15-1837, 2 June 2021.

7. On 28 June 2021, the Defence filed its notice of appeal against the Sentencing Decision.[6]

8. On 20 August 2021, the Appeals Chamber issued its Decision on the page limit for victims' observations.[7]

9. On 26 August 2021, the Defence filed its Defence Appeal Brief.[8]

## IV. The Standard of Appellate Review

10. Pursuant to Article 81(2)(a) of the Statute "[a] sentence may be appealed, in accordance with the Rules of Procedure and Evidence, by the Prosecutor, or the convicted person on the ground of disproportion between the crime and the sentence". According to Article 83(2) of the Statute, the Appeals Chamber may intervene only if it "finds that the proceedings appealed from were unfair in a way that affected the reliability of the decision or sentence, or that the decision or sentence appealed from was materially affected by error of fact or law or procedural error".

11. The role of the Appeals Chamber in deciding on appeal against a sentencing decision "is not to determine, on its own, which sentence is appropriate, unless – as stipulated in article 83 (3) of the Statute – it has found that the sentence imposed by the Trial Chamber is 'disproportionate' to the crime. Only then can the Appeals Chamber 'amend' the sentence and enter a new, appropriate sentence."[9]

12. The Appeals Chamber has previously held that: "[its] review of a Trial Chamber's exercise of its discretion in determining the sentence must be deferential and it will only intervene if: (i) the Trial Chamber's exercise of discretion is based on an erroneous interpretation of the law; (ii) the discretion was exercised based on an incorrect conclusion of fact; or (iii) as a result of the Trial Chamber's weighing and

[6] Defence Notice of Appeal of the Sentencing Decision, ICC-02/04-01/15-1862, 28 June 2021.
[7] *Supra* 1.
[8] Defence Document in Support of its Appeal against the Sentencing Decision, ICC-02/04-01/15-1871-Conf, 26 August 2021; Public Redacted Version of 'Corrected Version of "Defence Document in Support of its Appeal against the Sentencing Decision", filed on 26 August 2021', filed on 30 August 2021 as ICC-02/04-01/15-1871-Conf-Corr, ICC-02/04-01/15-1871-Corr-Red, 31 August 2021.
[9] *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeals of the Prosecutor and Mr Thomas Lubanga Dyilo against the "Decision on Sentence pursuant to Article 76 of the Statute", ICC-01/04-01/06-3122, 1 December 2014 ("*Lubanga* Sentencing Appeal Judgement"), para. 39.

balancing of the relevant factors, the imposed sentence is so unreasonable as to constitute an abuse of discretion."[10]

13. With regard to the above-mentioned exercise of discretion based on an erroneous interpretation of the law, an alleged incorrect conclusion of fact or an alleged abuse of discretion, the LRVs refer to the standard applied by the Appeals Chamber in the *Ntaganda* case.[11]

## V. Submissions

### i) Observations on Ground 1: Alleged error in law and in procedure concerning the Impugned Order and Sentencing Decision and disallowing Dominic Ongwen to participate meaningfully in the sentencing proceedings

14. At the outset, the LRVs submit that this ground should be dismissed as it does not address any legal or procedural errors in the Sentencing Decision issued against Dominic Ongwen.

15. Under this ground the Defence targets the Trial Chamber's Decision scheduling a hearing on sentence and setting the related procedural calendar,[12] and the Decision on Defence request for leave to appeal the 'Decision scheduling a hearing on sentence and setting the related procedural calendar'[13] (the "Decision on request for leave to appeal"). As such, this ground is an attempt to relitigate issues raised by the Defence that have been thoroughly addressed and decided upon by the Trial Chamber.

16. In the Decision on request for leave to appeal, the Trial Chamber explained in detail why the Defence's allegations raised were baseless. A similar argument can be made regarding this ground of appeal. The Trial Chamber noted in that

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[10] *The Prosecutor v. Bosko Ntaganda*, Judgment on the appeal of Mr Bosco Ntaganda against the decision of Trial Chamber VI of 7 November 2019 entitled 'Sentencing judgment', ICC-01/04-02/06-2667-Red, 30 March 2021 ("Ntaganda Sentencing Appeal Judgment"), para. 23; *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Judgement on the appeals of the Prosecutor, Mr Jean-Pierre Bemba Gombo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Decision on Sentence pursuant to Article 76 of the Statute", ICC-01/05-01/13-2276-Red, 8 March 2018, ("Bemba et al. Sentencing Appeal Judgment"), para. 24; Lubanga Sentencing Appeal Judgment, para. 44.
[11] Ntaganda Sentencing Appeal Judgment, paras 25-32.
[12] Trial Chamber IX, *Decision scheduling a hearing on sentence and setting the related procedural calendar*, ICC-02/04-01/15-1763, 4 February 2021.
[13] Trial Chamber IX, *Decision on Defence request for leave to appeal the 'Decision scheduling a hearing on sentence and setting the related procedural calendar'*, ICC-02/04-01/15-1777, 22 February 2021.

decision, amongst others, that the right to receive translations of Court documents provided for in Rule 144 RPE "is not absolute but subject to a concrete assessment of the necessity of such translations to meet the requirements of fairness."[14] Furthermore, the Chamber found that Article 76 of the Statute "envisages that the appropriate sentence can be pronounced together with the decision on the conviction under Article 74 of the Statute, rather than separately and consecutively, and therefore, logically, without the convicted person being informed of the conviction – and even less of the reasons thereof – prior to the determination of the sentence."[15]

17. Moreover, the Chamber explained that "the issue of accessibility of the reasoning for the decision under Article 74 to the convicted person does not form part of the considerations that underlie the decision to envisage separate sentencing proceedings and setting out the related calendar like the Sentencing Decision."[16] Finally, the Chamber noted that Dominic Ongwen has benefited from in court "interpretation into Acholi of the verdict and of an extensive summary of the main findings and underlying reasons of the Trial Judgment, and that he benefits from the assistance of counsel and, more broadly, of his defence team."[17]

18. Contrary to the Defence's assertions,[18] the possibility of the Defence to request a separate hearing on sentencing, does not put in question the reasoning of the Trial Chamber referred to above. The Defence failed to substantiate how the Trial Chamber erred in law in the Decision on the Defence's request for leave to appeal or that that Decision could not have been taken by any reasonable trier of fact. In light of the above reasons, ground one of the Defence Appeal should be dismissed.

19. Additionally, the LRVs submit that no error of law or procedure arises merely by the Chamber proceeding to issue an order and setting dates on sentencing following the delivery of its Article 74 Judgment, as it is entitled to do so in accordance with discretion given to it under Article 76(2) of the Statute read together with Rule 143 RPE.

20. The LRVs further observe that contrary to the Defence's submission, neither the Statute nor the RPE grant the convicted person with an absolute right to have

[14] Decision on the request for leave to appeal, para. 9.
[15] Ibid.
[16] Ibid.
[17] Decision on the request for leave to appeal, para. 10.
[18] Defence Appeal Brief, paras 46-47.

a full Article 74 judgment translated. As noted by the Trial Chamber VII in the *Bemba* et al. case:

> "The statutory texts do not require convicted persons to receive a translated judgment for purposes of sentencing. The Defence argues that '[a]ccording to Article 67(1)(f), [the convicted persons] have a right to have translations of documents presented to the Court'. This overstates the right granted in Article 67(1)(f) of the Statute, which actually requires only such translations 'as are necessary to meet the requirements of fairness'. Rule 144(2) of the Rules likewise requires that copies of certain decisions must be provided to 'the accused, in a language he or she fully understands or speaks, if necessary to meet the requirements of fairness [...]'. Rule 144(1) of the Rules explicitly specifies decisions on the 'criminal responsibility of the accused' as falling within the scope of Rule 144(2) of the Rules, making clear that something less than a full translation of a trial judgment may suffice to meet the requirements of fairness."[19]

21. Furthermore, the EU Directive on the right to interpretation and translation in criminal proceedings, 2010/64/EU,20 on which the Defence relies in its Appeal Brief, specifies in Article 3(4): "There shall be no requirement to translate passages of essential documents [including judgments] which are not relevant for the purposes of enabling suspected or accused persons to have knowledge of the case against them."

22. The LRVs note that the Defence failed to explain how exactly the lack of translation of the full Article 74 Judgement prevented Dominic Ongwen from preparing for the sentencing hearing and violated his rights under Article 67(1)(a)(b)(e) and (f) of the Statute. To this end, the LRVs submit that the situation of an accused before the ICC during the sentencing hearing cannot be considered in separation from his situation during the trial. To the contrary, pursuant to Article 76(1) of the Statute, at the sentencing stage, the Trial Chamber shall take into account the evidence presented and submissions made during the trial that are relevant to the sentence. Therefore, the sentencing hearing is not the only moment when parties and participants may request to present evidence relevant for determining the appropriate sentence. Furthermore, in many national jurisdictions, and in other

[19] *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*., Trial Chamber VII, Decision on Requests for Variation of Deadlines in the Sentencing Calendar, ICC-01/05-01/13-200, 2 November 2016, para. 9.
[20] Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, available at: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:280:0001:0007:en:PDF (accessed 25.10.2021).

international criminal tribunals, the sentence is determined in the judgment on the guilt/innocence of the accused.

23. The Appellant may not have received the full translation of the Trial Judgment, however, he was present at the delivery of the Judgment on the 4 February 2021, and followed the proceedings by simultaneous interpretation in the Acholi language where he was informed that he had been convicted of 61 out of the 70 counts of crimes against humanity and war crimes.

24. Whilst the Article 74 Judgement is 1077 pages long and Covid-19 pandemic prevented the Appellant from meeting with his lawyers as often as he would have liked, the Appellant was not prevented from consulting his counsel in order to seek their advice regarding the contents of the Trial Judgment in the period leading up to the sentencing hearing.

25. The LRVs submit that the Appellant was aware of the charges brought against him at trial and the Chamber, in delivering the summary of its Judgment reviewed the evidence and its findings and delivered a verdict for each count where the Appellant was found guilty.[21]

26. The LRVs accordingly submit that the Appellant has failed to demonstrate any material error of law or procedure.

**ii) Observations on Ground 2: Alleged error in law and in procedure concerning the Legal Representatives' submission of evidence from the bar in the "Victims' Joint submissions on sentencing" and in their respective arguments during the sentencing hearing**

27. The LRVs submit that the Defence misconstrues the LRV's submissions and the Trial Chamber's reasoning by alleging that the views and concerns of victims presented by the LRVs constitute evidence, on which the Chamber relied in the Sentencing Decision to "dismiss Defence requests for mitigating circumstances" in the form of Traditional Justice Mechanisms of Acholi.[22] This allegation concerns specifically the views and concerns of victims who expressed reluctance towards potential applicability of traditional justice mechanisms with regard to Dominic Ongwen.

[21] ICC-02/04-01/15-T-259.
[22] Defence Appeal Brief, paras 73-80.

28. Pursuant to Article 68(3) of the Statute victims can present their views and concerns at the sentencing stage of proceedings. In the Sentencing Decision the Trial Chamber explained that "the submissions by the legal representatives of participating victims, even if they take the form of direct quotation of communications by some victims, are not evidence."[23]

29. It is misleading of the Defence to argue that the Chamber relied on "testimonial evidence submitted from the bar by the LRVs" to reject the Defence's submissions on the use of the Acholi traditional justice mechanisms in the determination of the appropriate sentence.[24]

30. Prior to discussing LRVs' submissions regarding traditional justice mechanisms, the Chamber found that in accordance with Article 23, a person convicted can only be punished pursuant to what is provided under the Statute. The Chamber stated:

> "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*. Indeed, as emphasised in this regard by the Appeals Chamber, 'the Statute and related provisions contain an exhaustive identification of the types of penalties that can be imposed against the convicted person' and '[t]he 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'. In light of the principle of legality, the Chamber is thus precluded from introducing 'unregulated penalties or sentencing mechanisms not otherwise foreseen in the legal framework of the Court."[25]

31. Nevertheless, the Chamber found it appropriate "in light of the submissions received and the evidence on the record" to make additional considerations on the Appellant's desire to have the Acholi traditional justice system applied to him.[26]

[23] Sentencing Decision, para. 13.
[24] Defence Appeal Brief, paras 73-78.
[25] Sentencing Decision, para. 26.
[26] Sentencing Decision, para. 27.

It is in the framework of these "additional considerations" that the Chamber referred to, amongst others, the views and concerns of participating victims.

32. Any allegations by the Defence that the Trial Chamber "dismissed the Defence requests for mitigating circumstances" due to victims' testimonial "evidence" presented by the LRVs are unfounded.[27] The Trial Chamber has referred to the views and concerns of participating victims regarding possible use of the traditional justice mechanisms in paragraphs 35 through 40 of the Sentencing Decision. Specifically, the Chamber explained that the LRVs submissions are relevant and important but "do not constitute evidence and do not underlie a finding of fact".[28] The Chamber explained that "in these specific circumstances in which the Defence bases an argument on its own interpretation of the interests of the victims of the crimes for which Dominic Ongwen was convicted, it is appropriate to refer directly to the submission of the victims as expression of their will and opinion".[29]

33. The Chamber relied in these considerations as well as the testimonial evidence from a number of witnesses, including defence witnesses, such as Rwot Yusuf Adek (witness D-0028), Ojwiya James Okot (witness D-0087), Eric Awich Ochen (witness D-114), Professor Tim Allen, and Professor Musisi and on the decisions of the High Court of Uganda to dismiss the alleged wide use of traditional justice mechanisms.[30]

34. Therefore, the Appellant failed to demonstrate any error of law or procedure occasioned by the Chamber with regard to its assessment of the LRVs' submissions, specifically the views and concerns of victims conveyed by the LRVs to the Chamber.

### iii) Observations on Ground 3: Alleged error in fact concerning the Chamber's conclusions about the Acholi Traditional Justice System in the Sentencing Decision[31]

[27] Defence Appeal Brief, paras 73-80.
[28] Sentencing Decision, para. 38.
[29] Sentencing Decision, para. 38.
[30] Sentencing Decision, paras 28-34.
[31] The conclusions include the Chamber's alleged: failure to appreciate correctly the relevant cultural beliefs and practices that informed the conduct of the Appellant; b) application of "Western values" in the Sentencing Decision; c) refusal to allow one of the highest authorities on the Acholi Traditional Justice System to give oral testimony before the Chamber during the sentencing hearing, d) failure to

35. In addressing this ground of the Defence Appeal, the LRVs adopt their submissions in response to the second ground of appeal. The Defence has failed to substantiate any error of fact regarding the Chamber's conclusion about the Acholi traditional justice mechanisms.

36. By raising ground three, the Defence seems to ignore the Chamber's finding pursuant to the provisions of Article 23 that it can only apply a sentence defined in accordance with the Statute. Moreover, Article 77 defines the penalties that may be imposed on conviction for crimes defined by the Statute.[32] The Defence does not argue in the Appeal Brief that this finding of the Chamber amounts to an error of law but rather makes allegations of factual errors which do not arise from the Sentencing Decision in light of the Chamber's findings.

37. Moreover, the LRVs submit that the Chamber has rightly found that it is not clear what the Defence aims to achieve with its submissions in relation to Acholi traditional justice, and what role, in its own pleading, such traditional justice system should play in the context of the pronouncement of the sentence on Dominic Ongwen.[33] In this context, the LRVs submit that a hypothetical, future and uncertain participation of Dominic Ongwen in an unspecified traditional justice mechanism could not and cannot constitute a mitigating circumstance under Rule 145 (2)(a) RPE. The fact that Dominic Ongwen himself has not expressed a wish to take part or initiate any such process only strengthens this conclusion. In its additional considerations the Chamber recalled and acknowledged the evidence received at trial including the testimonies of Defence witnesses D-0028, D-0087 and D-0114 in respect of the definition and purpose of the Acholi traditional justice mechanisms of *mato oput*.[34] The Defence does not challenge this evidence relied upon by the Chamber on the definition and purpose of traditional justice mechanism, but rather argues that if the Chamber had allowed the Prime Minister of Ker Kwaro Acholi to testify it would have assisted the Chamber in its understanding of traditional justice mechanisms, and Acholi culture and beliefs.[35] It is submitted that this premise is purely speculative.

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acknowledge that the Defence request was to assist the Chamber in its understanding of the Acholi cultural beliefs and practices in its assessment of the personal circumstances of the Appellant as a mitigating factor; and e) failure to apply the principle of complementarity in the Sentencing Decision in sentencing. The Defence asserts these errors negatively and materially affected and caused a disproportionate sentence against the Appellant.

[32] Sentencing Decision, paras 15-26.
[33] Sentencing Decision, para. 25.
[34] Sentencing Decision, para. 29.
[35] Defence Appeal Brief, paras 104-109.

Moreover, the Defence has failed to show how different the Prime Minister's evidence would be from that of the Defence witnesses.

38. Finally, the LRVs submit that the Defence's attempt in the Appeal Brief to suggest that the evidence of Professor Tim Allen and Professor Musisi leads to a conclusion that "*mato oput* holds no value in the Acholi community and that only Western ideas of retribution are sufficient to address the crimes for which the Appellant has been convicted"[36] is incorrect. This reasoning of the Defence is not only unfortunate, but also ignores the fact that African states were active participants in the discussions leading to the formulation of the Rome Statute and are therefore equal owners of this formal international criminal accountability mechanism.

### iv) Observations on Ground 4: Alleged error in law and in procedure regarding sentencing Dominic Ongwen on both war crimes and crimes against humanity for the same underlying conduct

39. The Defence alleges that the Chamber rendered impermissible concurrent sentences for crimes against humanity ad war crimes based on the same conduct in deciding on the joint sentence.[37]

40. However, the Trial Chamber has explained 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, the Chamber does not consider, in the concrete circumstance of the case, any such issue to weigh noticeably in the present determination."[38] The Chamber noted further the large amount of distinct criminal conducts underlying the different crimes of which Dominic Ongwen was found guilty and assessed that a joint sentence corresponding to the highest individual sentence pronounced, as proposed by the Prosecution, would not reflect the full culpability of Dominic Ongwen. [39]

41. The Chamber recalled the gravity of the crimes, as was also highlighted by the LRVs, and found that while a sentence of life in imprisonment would be appropriate, it decided against it as a result of the Appellant's own personal circumstances and experience of abduction.[40] The Chamber thus observed that the

[36] Sentencing Decision, para. 103.
[37] Defence Appeal Brief, paras 114-122.
[38] Sentencing Decision, para. 382, see ftn. 691.
[39] Sentencing Decision, para. 382.
[40] Sentencing Decision, paras 384-391.

determination of a joint sentence by the Chamber is characterised by its exercise of discretion necessary to reflect the total culpability of the Appellant.[41] The Appellant moreover does not argue that the Chamber erred in its exercise of discretion in imposing a sentence of 25 years.

42. Furthermore, the Defence fails to explain in specific terms what was the actual error in the Chamber's determination of the joint sentence. The sole argument presented by the Defence is that "Dominic Ongwen should not have been sentenced on 18 of the 36 overlapping crimes against humanity and war crimes based on the exact same conduct."[42] Specifically, that "18 of the 36 convictions should not have been the subject of sentencing".[43] This proposition goes directly against Article 78(3) of the Statute which requires the Chamber to determine an individual sentence for each of the crimes and then on that basis, a joint sentence.

**v) Observations on Ground 5: The Chamber's alleged error in law regarding taking into account actions as aggravating circumstances which happened outside the scope of the charged period**

43. The Defence alleges material errors committed by the Chamber in considering actions committed by the Appellant outside of the scope of the charged period, which they argue, resulted in a disproportionate sentence.[44]

44. The Appellant submits that the Chamber relied on conduct of the Appellant prior to the establishment of the Court to sentence the Appellant. This assertion is misleading primarily because the Appellant uses imprecise language and conjecture to argue that the Chamber referred to evidence of the Appellant's prior conduct, and speculates that this played a role in the sentence imposed on the Appellant.[45]

45. The LRVs submit that the Appellant was only convicted and sentenced for the crimes that occurred within the temporal and geographical scope of the charges,[46] while criminal conduct that occurred outside of the charging period was solely considered as relevant for evidentiary considerations or as relevant for context.

[41] Sentencing Decision para. 392.
[42] Defence Appeal Brief, para. 122; See also paras 113, 117, 119.
[43] Defence Appeal Brief, para. 117.
[44] Defence Appeal Brief, para. 123.
[45] Defence Appeal Brief, para. 129-134.
[46] Trial Judgment, paras 3026, 3034, 3043, 3049, 3055, 3062, 3068, pp. 1068-1076.

46. Furthermore, the Defence fails to substantiate how the Chamber used prior alleged conduct in account when determining the sentence against the Appellant, despite admitting that Rule 145(2)(b)(i) RPE does not appear in the Sentencing Decision, but rather states that "it is obvious that the Chamber used prior alleged conduct … when determining the sentence against the Appellant to his detriment."[47]

47. The LRVs assert that this type of conjecture from the Defence cannot be allowed to stand. The Defence provide no facts to substantiate their argument save to say that the Sentencing Decision 'reads as if' the Chamber took into account prior alleged conduct as an aggravating circumstance when determining the sentence.[48]

48. Indeed, the LRVs submit that the Chamber has no need to take into account actions of the Appellant outside of the charged period as there is ample evidence within the record of the case of SGBC both indirectly and directly perpetrated by Dominic Ongwen.

49. The Chamber specifically recalled the evidence relating to witnesses P-0101, P-0099 and P-0226, as their evidence had illustrated that the Appellant was, by the late 1990's, a significant member of the LRA with some status. P-0101, upon abduction, ended up in his household and was raped by the Appellant; P-0099 became the Appellant's so called wife sometime after her abduction; and soldiers under the Appellant's command abducted P-0226.[49]

50. The Defence's opposition to discussion of forced 'marriages' and the children of the Appellant, and in particular the Chamber's statement that the bearing of children fathered by Dominic Ongwen constituted a significant continuing imposition of forced 'marriage' is irrelevant. The Chamber is clearly outlining the parameters of the crime of forced marriage, and therefore, the fact that not all such children were conceived during the narrower timeframe of the crime of forced marriage for which Dominic Ongwen was convicted for under Count 50 is extraneous to the Defence's argument that this was used as an aggravating factor in the determination of the Appellant's sentence.

51. The allegation that the Chamber repeats the arguments on sexual and gender based violence,[50] in its determination of sentence is unsubstantiated and without merit especially in light of the preceding observation. There is a plethora of evidence on the record of the case demonstrating the Appellant's involvement in

[47] Defence Appeal Brief, para. 128.
[48] Defence Appeal Brief, page 43.
[49] Sentencing Decision, para. 80
[50] Defence Appeal Brief, para. 133-134.

the commission of both direct and indirect SGBC, including forced marriage, rape and sexual slavery. Therefore, the Appeals Chamber should reject this ground in its entirety.

52. Thus, the LRVs submit that the ground, as framed is but a mere disagreement with the Chamber and there are no errors of law, fact or procedure identified that would materially affect the outcome of the sentencing decision.

### vi) Observations on Ground 6: The Chamber's alleged error in law and in fact concerning the mitigating and/or personal circumstance of the Appellant's family life in the Sentencing Decision

53. Rule 145 (1)(b) and (c) RPE imposes on the Chamber a duty to balance all relevant factors whether mitigating, or aggravating and consider the personal circumstances of the Appellant as well as considering the extent of damage to victims and their families.

54. Essentially the Defence disagree with the Chamber and argue that the personal circumstances of the Appellant's family life were not taken into consideration as a mitigating factor in the Appellant's sentence.

55. The LRVs agree with the Chamber that 'it would be improper and even cynical, in the circumstances of the present case, to consider his fatherhood as a circumstance somehow warranting mitigation of his sentence.'[51] It is highly questionable whether the Appellant, if allowed to return to Coorom, would be able to support his children given that he did not appear to make use of the chance to contact or take care of his children when he was in Uganda.

56. Indeed, the Defence fails to articulate how the Appellant has contributed to his family in the past, be it economically or emotionally, nor does it provide any indication as to how the Appellant will be able to financially support his family, or whether such support would even be welcome given the circumstances in which his children were conceived.

57. Furthermore, the participating victims in this case, as has been communicated to the Court by the LRVs, have strongly objected to any suggestion that the

[51] Sentencing Decision, para. 123.

Appellant's sentence be reduced and are vehemently opposed to Dominic Ongwen's return to Uganda, and in particular to their communities.

58. Thus, in conclusion, the LRVs object to this ground of appeal which presents no error of law, fact or procedure that materially would have affected the outcome of the sentencing decision, but rather presents a mere disagreement with the decision of the Chamber.

### vii) Observations on Ground 7: The Chamber's alleged error in law and in fact concerning the assessment of the Appellant's mental state did not meet the threshold provided for in Rule 145(2)(a)(i) of the Rules

59. The Defence disagree with the Chamber's assessment that the Appellant's 'current mental health cannot be taken into account as a mitigating circumstance with respect to his sentencing.'[52] The Appellant goes on to argue that this was a material error that resulted in a disproportionate sentence against the Appellant.

60. According to the Defence, the Chamber's conclusion that the Appellant did not suffer from a substantially diminished mental capacity was based on 1) an incorrect legal standard and 2) rejection of Defence expert witness evidence, the report from Professor de Jong and exclusive reliance on Prosecution evidence.[53]

61. The Chamber in dismissing the Appellant's arguments that he suffered from substantially diminished mental capacity, found that:

a. A mitigating circumstance explicitly provided for under Rule 145(2)(a)(i) of the rules.

b. 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

c. The question of substantially diminished mental capacity, like the question of mental disease and defect under Article 31(1)(a) of the

[52] Defence Appeal Brief, para. 151, citing the Sentencing Decision at para. 96.
[53] Defence Appeal Brief, para. 152.

Statute, must be determined by reference to the time of the relevant conduct.[54]

62. In particular, the Defence faults the Chamber for applying the beyond reasonable doubt standard when determining whether substantially diminished mental capacity should be taken into account as a mitigating factor.[55]

63. The LRVs posit that even if the Chamber had reassessed the factors under the balance of probabilities standard, the Defence do not expound on how the Chamber would have arrived at a materially different conclusion. Therefore, the Defence fail to show that a materially different outcome would have been reached had the Chamber adopted a different standard.

64. In the Sentencing Decision, the Chamber observed that, in accordance with international criminal jurisprudence, the question of health of a convicted person is mitigating only in exceptional cases and need to be automatically taken into consideration at sentencing or considered mitigating as such. The Chamber further found that there was nothing in the available information, including from the detention facility or the Appellant's submissions, from which it could be concluded that exceptional circumstances exist and warrant such consideration.[56]

65. It is recalled here that the Chamber, in agreeing with the Prosecution, noted that the management of the health of a convicted person is a matter that relates to his care during sentence as opposed to being a matter for consideration of sentence.[57] Moreover, the Appellant does not argue that the Chamber erred in this conclusion.

66. The LRVs agree with the Chamber's findings that 'the health of a convicted person need not automatically be taken into account and poor health as such should not automatically be seen as a mitigating circumstance.'[58] Furthermore, the LRVs submit that the Appellant's mental health issues – which have been fully discussed during the course of this trial – can in no way be understood as constituting an exceptional circumstance that would warrant a reduction in his sentence.

67. The Chamber was fortified in its findings above by reason of its prior determinations on the lack of evidence to conclude that the Appellant suffered substantially diminished mental capacity on the one hand and the fact that it was impressed by the Appellant's personal statement at sentencing on the other

[54] Sentencing Decision, para. 92.
[55] Defence Appeal Brief, para. 153.
[56] Sentencing Decision, para. 103
[57] Ibid.
[58] Ibid.

wherein he spoke "lucidly" without a break for a period of an hour and forty-five minutes. The Chamber observed that:

> "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."[59]

68. The LRVs submit that the said findings of the Chamber are consistent with the Judgment which found, as submitted by the Prosecution experts, that the conduct of the Appellant during the charged period is incompatible with a person suffering from a mental disease as argued by the Defence experts.[60]

69. The Appellant faults the Chamber for not defining the exceptional standard and mental disabilities,[61] however it is submitted that this is not an error ion the findings of the Chamber. The Defence do not contest the determination of the Chamber in the Trial Judgment, where it excluded the possibility for the conclusion that the Appellant suffered a mental disease or defect pursuant to Article 31 (1). Yet, the Appellant's submissions on the alleged substantially diminished mental capacity was based on the same evidence, with was nothing in the form of additional information from which the Chamber would readily have been inclined to enter into deliberations on the exceptional standard. As such, any arguments on this issue are rendered moot and of no material value to the sentencing decision.

70. For the forgoing reasons, the LRVs object to this ground. The ground as framed is but a mere disagreement with the Chamber. There is no error of law, procedure or fact identified.

### viii) Observations on Ground 8: The Chamber's alleged error in law and in fact concerning the expert testimony of Professor Kristof Titeca, Dr Eric Awich Ochen and Major Pollar Awich

[59] Sentencing Decision, para. 104.
[60] Trial Judgment, para. 2521.
[61] Defence Appeal Brief, para. 171.

71. The LRVs submit that the Appellant's framing of this ground of appeal is an attempt to re-litigate the Chamber's findings on the defence of duress which are better suited to the Defence's appeal of the Trial Judgment.

72. Therefore, the LRVs object to this ground of appeal. The ground as framed is but a mere disagreement with the Chamber. There is no error of law, procedure or fact identified.

73. Pursuant to Article 81(2)(b) the Appellant is required to identify the error in law and fact from the sentencing decision. The Appellant must also establish and how the alleged error materially affected the sentencing decision necessitating the intervention of the Appeals Chamber.

74. The LRVs submit that there is nothing in the submissions of the Appellant that identifies in the Sentencing Decision the alleged error of law or fact that was occasioned by the Chamber with regard to the testimonies of Professor Kristof Titeca, Dr Eric Awich Ochen and Major Pollar Awich. The Appellant simply alleges errors of law by alluding to evidence it adduced at trial to argue that the said evidence was rejected by the Chamber without substantiating this allegation in the Sentencing Decision.[62]

75. The intervention of the Appeals Chamber is thus not warranted in respect of this ground and in accordance with the standard of appellate review. The Chamber did not find that the Appellant was under a constant state of duress while with the LRA, and therefore there is no way that it can constitute a mitigating factor in his sentence.

### ix) Observations on Ground 9: The Chamber's alleged error in law concerning the four (4) deaths at Pajule IDP Camp and the threshold for multiple victims pursuant to Rule 145(2)(b)(iv) RPE

76. The LRVs submit that the Appellant appears to have abandoned this ground in its Sentencing Appeal Brief given that it has been omitted. For this reason, the LRVs make no further submissions.

[62] Defence Appeal Brief, paras 192-203.

### x) Observations on Ground 10: The Chamber's alleged error in law concerning the use of Appellant's unsworn statement in the determination of the joint sentence

#### a) Sub-ground 1: *The Appellant's unsworn statement reflected a moment of clarity and is not reflective of his mental state*

77. The Defence argue that the Appellant suffers from diagnosed metal disabilities and that the Appellant's unsworn statement reflected a moment of clarity and is not reflective of his mental state.[63] The LRVs submit that this a bid to assert that the Chamber failed to observe that the Appellant's closing statements had been made during a lucid moment and discounted medical evidence to the contrary.[64]

78. The Defence points to evidence submitted during the hearings to establish that the Appellant is plagued by mental disability. Further, that the Defence posit that the Chamber erred in finding that the Appellant's coherent and lengthy oral submissions on sentencing run counter to their claim that the Appellant laboured under significantly diminished mental capacity, which they considered to factored in his favour as a mitigating circumstance.[65]

79. The Defence merely resubmits the arguments made in their submissions on sentencing regarding the Appellants alleged mental incapacities,[66] based on the same evidence that the Chamber, in its sentencing decision, considered to be unsubstantiated.[67]

80. Moreover, the Defence mischaracterize the Chamber's finding concern the Appellant's closing submissions. The Chamber, while observing that poor health should not automatically be seen as a mitigating circumstance except in extreme and exceptional cases,[68] found the Appellants oral submission to be remarkably articulate and failed to display mental health issues of sufficient gravity to warrant consideration as a mitigating factor in sentencing.

81. The Defence appear to proffer a new theory to the effect that the Appellant's purported mental incapacities are spasmodic.[69] The Defence assertion concerning

[63] Defence Appeal Brief, para. 206.
[64] Defence Appeal Brief, para. 208.
[65] Sentencing Decision, para. 104.
[66] Defence Appeal Brief, para. 206.
[67] Sentencing Decision, para. 100.
[68] Sentencing Decision, para. 103.
[69] Defence Appeal Brief, para. 207.

the Appellant's wavering lucidity is a pronouncement that cannot be reasonably deduced from the evidence.

82. The Defence, in essence, offer mere disagreement with the Chamber's finding that the evidence offered by the Defence to the support alleged diminished mental incapacity as a mitigating circumstance had been found to be deficient. The Defence fail to disclose any error in the Chamber's application of the law in this respect.

**b) Sub-ground 2:** *The Chamber failed to use the proper standard to assess the Appellant's mental state.*

83. The Defence refer to their arguments in Ground 7 to support this sub-ground of appeal. Likewise, the LRVs apply the same response to Ground 7 as provided above.

**c) Sub-ground 3:** *The Chamber improperly used the content of the Appellant's unsworn statement against him for the purpose of the Joint Sentence*

84. The Defence, in making this assertion, point to the Chamber's observation of the fact the Appellant, in his oral submission on sentencing failed to show any remorse for the victim of his crimes and instead focused on his own suffering.[70]

85. The Defence claim that the Chamber, in making this observation, used the Appellant's unsworn statement against him and, in so doing, imposed the higher sentence of 25 years' imprisonment as opposed to the 20 years proposed by the Prosecution.

86. The Defence claim is based on two faulty premises, the first is that the Chamber, in the absence of arguments to the contrary, was bound to observe a 20-year sentence and had added 5 years after counting the Appellant's unsworn statement against him. This is a purely speculative assumption in how the Chamber exercised it discretion in arriving at the joint sentence. Nothing in the findings of the Chamber is cited to support that conclusion.

87. The second revolves around the mischaracterization of the Chamber's finding concerning the Appellant's oral submissions. Far from using the Appellant's unsworn statement against him, the Chamber merely observed that the Appellant failed in his oral submissions to show remorse for the victims of his crimes. The Chamber also expressly stated, in the findings challenged by the Defence, that the

[70] Defence Appeal Brief, para. 211 referring to the Sentencing Decision at para. 394.

said failure to show remorse did not factor as an aggravating factor or an element impacting on the length of the sentence to be imposed.[71]

88. Consequently, alleged error in law argued by the Defence in this sub-ground of appeal simply do not arise from the Sentencing Decision. Therefore, the LRVs find that the Defence have failed to set out any error in law, fact or procedure under this ground of appeal

**xi) Observations on Ground 11: The Chamber's alleged error in law by increasing the Appellant's sentence from 20 years to 25 years in the joint sentence in Section II(B) of the Sentencing Decision**

89. The Defence argue that the Chamber abused its discretion in failing to provide sufficient reasoning for imposing the 25-year joint sentence and applied inappropriate criteria to arrive at the joint sentence.

90. The Defence argue that the Chamber abused its discretion by relying on an "extent of accumulation of individual sentences" criteria for arriving at the joint sentence.[72] This argument is based on a spurious interpretation of the relevant portion of the Sentencing Decision. Read in context, the Chamber, after having considered the individual sentences for each of the crimes, sought to determine the extent to which the numerous accumulate individual sentences should constitute the 'total period of imprisonment' as the joint sentence for all crimes, reflecting Dominic Ongwen's 'total culpability'.[73] This statement by the Chamber, merely describing the confluent statutory step, can hardly be said to have set out some form of criteria by which the Chamber arrived at the 25 year joint sentence.

91. Furthermore, the Defence fail to advance any argument to establish a connection or provide an explanation illustrating how the alleged criteria was applied to arrive at the joint sentence. The defence merely apply broad speculation on the Chambers application of its discretion based on selective misconstructions of portions Chamber's decision and a misreading of Article 78 (3).

92. In addition to the alleged improper criteria, the Defence also argue that the Chamber failed to provide sufficient reasons for arriving at the 25 year joint sentence.[74] This is without basis as the Chamber between paragraph 376 and 397

[71] Sentencing Decision, para. 394.
[72] Defence Appeal Brief, para. 230.
[73] Sentencing Decision, para. 375.
[74] Defence Appeal Brief, para. 229.

proceed to enumerate its considerations in arriving at the joint sentence. More markedly, the Defence fail to point to any specific aspects of the Chamber's finding to contend against the propriety of their reasoning.

93. The Defence merely make broad assertions, such as alleged double counting of relevant factors, failure to identify new aggravating factors or failure to balance all relevant factors,[75] without pointing to any concrete examples or providing any specific illustration of how the Chamber made these alleged errors or how the alleged errors may be conceived to have materially affected the Sentencing Decision.

94. The LRV's therefore find that the Defence failed to sufficiently substantiate any error in the Chamber's application of its discretion in the determination of the Joint sentence and, thereby fail to establish this ground of appeal.

### xii) Observations on Ground 12: The Chamber's alleged error in law and in procedure concerning the aggravating circumstances

#### a) **Sub-ground 1:** *The Chamber double-counted the 'discriminatory intent' as both a factor of the gravity of the crime and as an aggravating factor; and as an element of the common plan for Pajule and Odek*

95. The Defence argue that the Chamber The Chamber double-counted the 'discriminatory intent' as both a factor of the gravity of the crime and as an aggravating factor; and as an element of the common plan for Pajule and Odek.[76] To support this claim, the Defence point to portions of the Chamber's findings concerning the attacks on the IDP camps where the Chamber observes that the attacks were committed with motives of discrimination – within the meaning of Rule 145(2)(b)(v).[77]

96. For instance, with regards to the attack on Pajule, the Chamber further noted that this aspect of discrimination informed the Chamber's consideration of the gravity of the crimes under counts 1,2-3, 4-5, 8 and 9.[78] The Defence construes this description of factors that attend the Trial Chambers assessment of the individual crimes as suggesting that the discriminatory dimensions of the attack had been

[75] Defence Appeal Brief, paras 230 – 232.
[76] Defence Appeal Brief, para. 239.
[77] Sentencing Decision, paras 145, 185, 220 and 255.
[78] Sentencing Decision, para. 145.

considered as both an aggravating factor as well as a factor affecting the gravity of the crimes. [79]

97. However, this is a conflation of the Chamber's overall considerations with regards to the crimes related to the IDP camp attacks and its approach on the determination of the sentence for each of the individual crimes. For each count related to the attack on the IDP camps, with the exception of counts for the crime of persecution, the Chamber only factored the persecutory intent of the Appellant as an aggravating circumstance and not as a factor attending to their consideration of the gravity of the crimes.

98. Accordingly, alleged double-counting does not arise from the Sentencing Decision and this sub-ground of appeal therefore fails.

**b) Sub-ground 2**: *The Chamber erred in factoring the high number of victims both as a factor of gravity and as an aggravating factor*

99. On this sub-ground, the Defence appear to make a similar conflation of the Chamber's overall considerations with regards to the crimes related to the IDP camp attacks and its approach on the determination of the sentence for each of the individual crimes. The Chamber, in determination of the sentence for the individual counts only factors the multiplicity of victims as an aggravating factor under Rule 145(2)(b)(iv) and is not counted as a factor attending to the gravity of the crimes.

100. The Defence, in their using the counts for the crimes of murder as an example, further conflate the Chamber's finding that the gravity of the crime of murdering civilians was high, with their finding that the multiplicity of victims was counted as an aggravating factor under Rule 145(2)(b)(iv).[80] Similar misconstructions are proffered by the Defence with regards to the crimes of torture and enslavement as exemplifications of the purported errors in law.[81]

101. This sub-ground therefore does not arise from the Sentencing Decision and therefore fails to disclose any appealable error in law.

**c) Sub-ground 3**: *The Chamber erred when double-counting the 'defencelessness' of children recruited into the LRA as an aggravating factor*

102. Analogous to sub-ground 2, the Defence conflate the Chamber's finding concerning the gravity of the crime of conscription of children under age 15,

[79] Defence Appeal Brief, paras 240-242.
[80] Defence Appeal Brief, paras 245-242.
[81] Defence Appeal Brief, paras 248 -249.

particularly with regards to their vulnerability, with the Chamber's finding that the particular defencelessness of the abducted children factored in aggravation within the meaning of Rule 145(2) (b) (iii) of the Rules.[82]

103. The Chamber clearly sets out that while the vulnerability do the victims is part of the gravity of the crimes, there are those victims who, by virtue of their particularly young age, qualify and being particularly defenceless for purposes of Rule 145(2) (b) (iii) .[83] The Chamber therefore sets out clear distinction of those factors it considered to amount to aggravating – i.e. the particularly young victims and the overall vulnerability of children under 15 as an aggravating circumstance.

104. The Defence moreover fail to illustrate how this distinction could be construed to amount to double counting and further how this materially impacted the determination of the Chamber regarding the joint sentence. This sub-ground therefore does not arise from the Sentencing Decision and the Defence fail thereby to disclose any appealable error in law.

**d) Sub-ground 4:** *The Chamber erred when double-counting essential elements of the mode of liability as aggravating factors*

105. The Defence argue 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. [84]This is an misconstruction of the Chamber's finding where it explicitly points to the multiplicity of victims and the motive of discrimination as aggravating circumstances.[85]

106. The Defence merely introduces this interpretation to the Chamber's findings without basing it on the actual text of the decision. This sub-ground simply does not arise from the Sentencing Decision and therefore fails to result in any appealable error of law.

## VI. Relief Sought

107. The LRVs submit that the Appellant has failed to demonstrate any material errors of law or fact or procedure in the Sentencing Decision.

[82] Defence Appeal Brief, paras 251-256.
[83] Sentencing Decision, paras 369-370.
[84] Defence Appeal Brief, para. 257.
[85] Sentencing Decision, para. 168.

108. The LRVs accordingly submit that the Appellant's appeal lacks merit and the Appeals Chamber is invited to dismiss the appeal for lack of merit. The LRVs request the Appeals Chamber to confirm the sentence of 25 years imposed on the Appellant by the Trial Chamber.

Respectfully submitted,

Joseph A. Manoba

Francisco Cox

Dated this 26th day of October 2021

At Kampala, Uganda and at Santiago, Chile.