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Criminal
Court

**Original: English**

**No.: ICC-02/04-01/15 A2**
**Date: 15 December 2022**

**THE APPEALS CHAMBER**

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

**SITUATION IN UGANDA**

**IN THE CASE OF THE PROSECUTOR v. DOMINIC ONGWEN**

**Public document**

**Judgment**
**on the appeal of Mr Dominic Ongwen against the decision of Trial Chamber IX of 6 May 2021 entitled "Sentence"**

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

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Association of Defence Counsel Practicing before the International Courts and Tribunals (ADC-ICT)

Siobhán Mullally, UN Special Rapporteur on Trafficking in Persons, especially women and children

**REGISTRY**

**Registrar**
Mr Peter Lewis

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The Appeals Chamber of the International Criminal Court,

In the appeal of Mr Dominic Ongwen against the decision of Trial Chamber IX entitled "Sentence" of 6 May 2021 (ICC-02/04-01/15-1819-Red),

After deliberation,

By majority, Judge Ibáñez Carranza partly dissenting,

*Delivers* the following

# JUDGMENT

The "Sentence" of Trial Chamber IX is confirmed.

## REASONS

## I. KEY FINDINGS

1. The Appeals Chamber observes that by stipulating that a trial chamber "*may* […] hold a further hearing", article 76(2) of the Statute allows for either a bifurcated system or the possibility of the sentence being pronounced together with the conviction decision.

2. An accused person's right to translations under article 67(1)(f) of the Statute and rule 144 of the Rules is circumscribed by the requirement of fairness. Rule 144(2) of the Rules refers to the translation being provided "as soon as possible". As the need for such translation being provided "soon" is qualified by "as possible", the assessment of this need will necessarily depend on the specific circumstances of the case, including the stage of the proceedings.

3. While the right to receive a translation of a conviction decision prior to the rendering of a sentencing decision is not absolute, the Appeals Chamber considers that, generally, when circumstances permit, translation of relevant parts of the conviction decision can be provided to the convicted person in the course of the sentencing proceedings.

4. Regarding mental capacity as a ground for excluding criminal responsibility (article 31(1)(a) of the Statute) and as a mitigating circumstance (rule 145(2)(a)(i) of the Rules), while the factual basis relevant to the enquiry both under article 31(1)(a) of the Statute and under rule 145(2)(a)(i) of the Rules may be the same, the latter has a lower threshold. Indeed, unlike under article 31(1)(a) of the Statute, "circumstances *falling short* of constituting grounds for exclusion of criminal responsibility" may meet the requirements of rule 145(2)(a)(i) of the Rules. Furthermore, the provisions of this rule do not require that a mental disease or defect "destroys" the person's relevant capacity.

5. After having concluded in the conviction decision that the ground for excluding criminal responsibility under article 31(1)(a) of the Statute, regarding mental capacity, is not established, a trial chamber may consider the issue of mental capacity again in the sentencing proceedings. If it relies on the same evidence, a trial chamber must be mindful of the different standard of proof and the lower threshold under rule 145(2)(a)(i) of the Rules.

6. The discretion of a trial chamber when determining the sentence, and especially when examining evidence on the person's character, is not constrained by the same rules as when determining the person's guilt or innocence. Rather, a trial chamber, in its discretion, may rely on any factor provided that such factors do not infringe on the convicted person's rights. A trial chamber may, for instance, rely on the person's conduct during trial proceedings, ascertained primarily through the trial judges' perception of the person.

7. When the victims are of very young age, this may be a factor that could be considered either as part of the gravity assessment or as an aggravating factor (but not towards both) when determining the appropriate sentence for the crimes of conscription of children under the age of 15 years and their use in hostilities.

## II. INTRODUCTION

8. This judgment concerns Mr Ongwen's sentence. Convicting Mr Ongwen on 62 counts of crimes against humanity and war crimes,[1] the Trial Chamber, by majority,

[1] Conviction Decision, para. 3116.

imposed a joint sentence of 25 years of imprisonment.[2] It also deduced from the joint sentence the time that Mr Ongwen spent in detention between 4 January 2015 and the pronouncement of the sentence on 6 May 2021.[3]

9. The Appeals Chamber notes that in the Sentencing Decision, the Trial Chamber considered, *inter alia*, the novel issue of the appropriate penalty for a person who was also a victim of serious crimes. The issue had been raised by the Prosecutor and the Defence. The Prosecutor argued that the circumstances of Mr Ongwen's childhood warranted a reduction of the prison sentence by approximately one-third.[4] The Defence submitted that those circumstances "surely [could not] go unnoticed by the Chamber as a mitigating factor".[5] In its determination of individual sentences, the Trial Chamber decided to give "certain weight" to the mitigating circumstances relating to Mr Ongwen's childhood, his abduction as a child by the LRA, the interruption of his education, the killing of his parents, and his socialisation in the extremely violent environment of the LRA.[6]

10. The Trial Chamber considered the possibility of imposing life imprisonment, as recommended by the legal representatives of the participating victims.[7] Nevertheless, it decided not to impose life imprisonment, given the individual circumstances of Mr Ongwen, including his childhood and his abduction and integration into the LRA at the age of 9 years.[8]

11. In addition, the Trial Chamber addressed the arguments related to Mr Ongwen's childhood experience and the conditions under which he functioned within the LRA in two other contexts. First, it examined the question of whether Mr Ongwen suffered from a substantially diminished mental capacity, and concluded that the mitigating circumstance of substantially diminished mental capacity, under rule 145(2)(a)(i) of the Rules, did not apply.[9] Second, the Trial Chamber considered the argument that

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[2] Sentencing Decision, p. 138.
[3] Sentencing Decision, p. 138.
[4] Sentencing Decision, paras 9, 88.
[5] Sentencing Decision, para. 67.
[6] Sentencing Decision, paras 87-88.
[7] Sentencing Decision, para. 383.
[8] Sentencing Decision, paras 386-388.
[9] Sentencing Decision, paras 90-100.

Mr Ongwen sustained duress throughout his time in the LRA, and concluded that the mitigating circumstance of duress, under rule 145(2)(a)(i) of the Rules, was not applicable.[10]

12. It is with respect to these two latter contexts that the Defence challenges the Trial Chamber's findings, under grounds 7 and 8 of its appeal. The Defence does not challenge the Trial Chamber's above-mentioned decision to give some weight to Mr Ongwen's individual circumstances related to his abduction as a child. The Appeals Chamber will therefore not examine whether the Trial Chamber exercised its discretion properly when taking into account the individual circumstances of Mr Ongwen related to his abduction. The Appeals Chamber nevertheless takes note of the Trial Chamber's approach to this novel issue.

13. The Appeals Chamber also notes the oral submissions of the parties and participants on this issue.[11] It notes the observations of some of the *amici curiae*, who submit that "some former child soldiers lack criminal responsibility because the crimes they commit are caused by the harms inflicted upon them by the means and purposes of others".[12] The Appeals Chamber takes note of the view of other *amici* that "[Mr] Ongwen, in light of his age of abduction into the LRA, should be considered a child soldier to this day",[13] and that this "should have been considered overwhelmingly mitigating".[14]

14. The Appeals Chamber further notes Mr Ongwen's personal statement on the issue of his abduction as a child.[15] The Appeals Chamber acknowledges the difficult circumstances of Mr Ongwen's childhood and the Trial Chamber's reliance on these individual circumstances when determining the sentence, as well as the Trial Chamber's observation that the present case presents "a unique situation of a perpetrator who willfully and lucidly brought tremendous suffering upon his victims, but who himself had previously endured grave suffering at the hands of the group of

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[10] Sentencing Decision, paras 106-111.
[11] T-263, p. 47, lines 10-17, p. 68, line 8 to p. 69, line 13; T-266, p. 24, line 1 to p. 25, line 6, p. 35, lines 11-14, p. 45, lines 8-16; T-267, p. 27, lines 4-10.
[12] Observations of Gerry *et al.*, para. 38. *See also* Observations of Special Rapporteur Mullally, para. 16.
[13] Observations of Clarke *et al.*, para. 8.
[14] Observations of Clarke *et al.*, para. 39.
[15] T-267, p. 35, line 4 to p. 40, line 2.

which he later became a prominent member and leader".[16] Mindful of the scope of the present appeal, the Appeals Chamber considers that while Mr Ongwen's individual circumstances were a relevant consideration in determining his sentence, the fact that Mr Ongwen was convicted of crimes of "extreme gravity" was also a relevant factor.[17] Indeed, the Trial Chamber took the latter into account by observing that the individual circumstances of Mr Ongwen "in no way justifie[d] or rationalise[d] the heinous crimes he willfully chose to commit as a fully responsible adult".[18]

15. With regard to the Defence's appeal against the sentence imposed on Mr Ongwen, initially, in its Notice of Appeal, the Defence raised twelve grounds of appeal.[19] However, in its Appeal Brief, the Defence did not pursue ground of appeal 9, and thus ultimately raised eleven grounds of appeal.[20] The Defence alleges that the Trial Chamber violated Mr Ongwen's fair trial rights, abused its discretion and/or committed errors of law, fact and procedure.[21] In this respect, the Defence requests that the Appeals Chamber overturn the Trial Chamber's findings, quash the individual sentences affected, order that the joint sentence be of no more than 20 years of imprisonment or remand the matters to the Trial Chamber for a new sentencing proceeding.[22] In particular, the Defence raises the following grounds of appeal:

i. alleged errors related to the failure to provide an Acholi translation of the Conviction Decision (ground of appeal 1);

ii. alleged errors in reliance on "testimonial evidence" submitted by the Victims (ground of appeal 2);

iii. alleged errors in failing to consider the Acholi traditional justice system as a mitigating factor (ground of appeal 3);

iv. alleged errors in sentencing Mr Ongwen for both crimes against humanity and war crimes for the same underlying conduct (ground of appeal 4);

v. alleged legal error in relying on events outside the temporal scope of the charges (ground of appeal 5);

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[16] Sentencing Decision, para. 388.
[17] Sentencing Decision, para. 384.
[18] Sentencing Decision, para. 388.
[19] Notice of Appeal.
[20] Appeal Brief.
[21] *See e.g.* Appeal Brief, pp. 6, 22, 30, 39, 42, 46, 51, 66, 71, 75, 81.
[22] *See e.g.* Appeal Brief, paras 57, 112, 122, 150, 188, 214, 235, 261.

vi. alleged errors regarding circumstances of family life (ground of appeal 6);

vii. alleged errors in the Trial Chamber's failure to rule on mental incapacity as a mitigating or personal circumstance (ground of appeal 7);

viii. alleged errors by disregarding evidence on duress as a mitigating circumstance (ground of appeal 8);

ix. alleged errors in the Trial Chamber's reliance on Mr Ongwen's personal statement (ground of appeal 10);

x. alleged error in the Trial Chamber's reliance on "aggravating circumstances" when determining the joint sentence (ground of appeal 11); and

xi. alleged error in the Trial Chamber's reliance on "actions and/or mental states" necessary to establish guilt as aggravating circumstances (ground of appeal 12).

16. As grounds of appeal 7 and 10 relate to Mr Ongwen's alleged substantially diminished mental capacity and his current state of mental health as mitigating circumstances, the Appeals Chamber will consider them together.

17. Mr Ongwen also filed an appeal against his conviction, which gave rise to his sentence. The Appeals Chamber has already considered that appeal and confirmed the Conviction Decision.[23] In the present judgment, the Appeals Chamber will refer to some of its findings made in the Conviction Appeal Judgment.

18. For the reasons set out in this judgment, the Appeals Chamber unanimously rejects 10 of the 11 grounds of appeal and confirms these aspects of the Sentencing Decision. Regarding ground of appeal 12, the Appeals Chamber rejects it by majority, Judge Ibáñez Carranza partly dissenting only with respect to the allegation of double-counting of the factor of multiplicity of victims. While the Majority confirms the Sentencing Decision in this respect, Judge Ibáñez Carranza would reverse the joint sentence of 25 years of imprisonment and remand the matter to the Trial Chamber for it to determine a new sentence.

[23] Conviction Appeal Judgment, p. 15.

19. For ease of reference, an annex containing the designations of terms used and materials cited in this judgment is appended.[24]

## III. RELEVANT PROCEDURAL HISTORY

20. On 4 February 2021, the Trial Chamber convicted Mr Ongwen of crimes against humanity and war crimes on 62 counts.[25]

21. On 6 May 2021, the Trial Chamber, by majority, Judge Pangalangan partially dissenting, sentenced Mr Ongwen to a total period of imprisonment of 25 years as a joint sentence, and ordered that the time between 4 January 2015 and 6 May 2021 be deducted from the total period of imprisonment.[26]

22. On 2 June 2021, the Appeals Chamber granted a request of the Defence for an extension of time,[27] and extended the time limits for the filing of the notice of appeal and the appeal brief to 28 June 2021 and 26 August 2021, respectively.[28]

23. On 28 June 2021, the Defence filed its Notice of Appeal.[29]

24. On 20 August 2021, the Appeals Chamber issued a decision on the modalities of victim participation, holding, *inter alia*, that the two groups of participating victims could file their observations, not exceeding 50 pages.[30]

25. On 26 August 2021, the Defence filed its Appeal Brief.[31]

26. On 26 October 2021, the Prosecutor filed his response to the Appeal Brief.[32]

27. On 26 October 2021, Victims Group 1 and Victims Group 2 filed their respective observations on the Appeal Brief.[33]

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[24] *See* Annex 2: Table of designations and cited materials.
[25] Conviction Decision, para. 3116.
[26] Sentencing Decision, pp. 138-139.
[27] Defence Request for Extension of Time for Notice of Appeal.
[28] Decision on Second Extension of Time for Notice of Appeal, p. 3, para. 10.
[29] Notice of Appeal.
[30] Decision on Victims' Observations.
[31] Appeal Brief.
[32] Prosecutor's Response.
[33] Victims Group 1's Observations, Victims Group 2's Observations.

28. Between 14 and 18 February 2022, the Appeals Chamber held hearings, on a partially virtual basis, during which it received submissions from the parties and participants, including a number of *amici curiae*, *inter alia*, on the Defence's appeal against the Sentencing Decision.[34] These oral submissions were guided by the questions posed by the Appeals Chamber in its directions issued on 28 January 2022.[35]

## IV. STANDARD OF REVIEW

29. Article 81(2)(a) of the Statute provides that "[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".

30. The Appeals Chamber recalls that its primary task in an appeal against a sentencing decision is to review whether a trial chamber made any errors in sentencing the convicted person.[36] In this respect, the Appeals Chamber has previously noted that

> [its] role 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.[37]

31. The Appeals Chamber considers that pursuant to article 78(1) of the Statute and rule 145 of the Rules, trial chambers have broad discretion in the determination of an appropriate sentence.[38] 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

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[34] T-263; T-264; T-265; T-266; T-267.
[35] Directions on the Conduct of the Hearing, p. 17. *See also* Revised Directions on the Conduct of the Hearing, pp. 9-10.
[36] *Bemba et al.* Sentencing Appeal Judgment, para. 21, *referring to* *Lubanga* Sentencing Appeal Judgment, para. 39; *Ntaganda* Sentencing Appeal Judgment, para. 20.
[37] *Lubanga* Sentencing Appeal Judgment, para. 39; *Ntaganda* Sentencing Appeal Judgment, para. 20.
[38] *Bemba et al.* Sentencing Appeal Judgment, para. 22, *referring to* *Lubanga* Sentencing Appeal Judgment, para. 40; *Ntaganda* Sentencing Appeal Judgment, para. 21.

> discretion was exercised based on 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.[39]

32. With respect to an exercise of discretion based upon an alleged erroneous interpretation of the law, an alleged incorrect conclusion of fact or an alleged abuse of discretion, the Appeals Chamber will apply the standard of review with respect to errors of law, errors of fact and an abuse of discretion as set out below.

## A. Error of law

33. Regarding errors of law, the Appeals Chamber has previously found that

> [it] will not defer to the Trial Chamber's interpretation of the law. Rather, it will arrive at its own conclusions as to the appropriate law and determine whether or not the Trial Chamber misinterpreted the law. If the Trial Chamber committed such an error, the Appeals Chamber will only intervene if the error materially affected the Impugned Decision.[40]

## B. Error of fact

34. Regarding errors of fact, "the Appeals Chamber will determine whether a trial chamber's factual findings were reasonable in the particular circumstances of the case".[41] The Appeals Chamber has held that "[it] will not disturb a trial chamber's factual finding only because it would have come to a different conclusion".[42] Rather, it "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 record".[43]

## C. Abuse of discretion

35. Where a discretionary decision allegedly amounts to an abuse of discretion, the Appeals Chamber has stated the following:

> Even if an error […] has not been identified, an abuse of discretion will occur when the decision is so unfair or unreasonable as to 'force the conclusion that the Chamber failed to exercise its discretion judiciously'. The Appeals Chamber will also consider whether the first instance Chamber gave weight to extraneous or

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[39] *Lubanga* Sentencing Appeal Judgment, para. 44; *Bemba et al*. Sentencing Appeal Judgment, para. 24; *Ntaganda* Sentencing Appeal Judgment, para. 23.
[40] *Lubanga* Appeal Judgment, para. 18; *Bemba et al*. Sentencing Appeal Judgment, para. 22; *Ntaganda* Sentencing Appeal Judgment, para. 25.
[41] *Ntaganda* Sentencing Appeal Judgment, para. 27.
[42] *Lubanga* Appeal Judgment, para. 21; *Ntaganda* Sentencing Appeal Judgment, para. 28.
[43] *Ntaganda* Sentencing Appeal Judgment, para. 29.

irrelevant considerations or failed to give weight or sufficient weight to relevant considerations in exercising its discretion. The degree of discretion afforded to a Chamber may depend upon the nature of the decision in question.[44]

### D. Material effect

36. Where an error is established, the material effect of this error on a trial chamber's decision will have to be assessed, pursuant to article 83(2) of the Statute.[45] Importantly, an error and its materiality must not be assessed in isolation; rather, the Appeals Chamber must consider the impact of the error in light of the other relevant findings relied upon by a trial chamber for its decision on sentencing. In this regard, a sentence is materially affected when it is demonstrated that a trial chamber's exercise of discretion led to a disproportionate sentence.[46]

### E. Substantiation of arguments

37. Regulation 58(2) of the Regulations requires the appellant to refer to "the relevant part of the record or any other document or source of information as regards any factual issue" and "to any relevant article, rule, regulation or other applicable law, and any authority cited in support thereof" as regards any legal issue. It also stipulates that the appellant must, where applicable, identify the finding or ruling challenged in the decision, with specific reference to the page and paragraph number. In addition to these formal requirements, an appellant is required to present cogent arguments that set out the alleged error and explain how a trial chamber erred.[47] Furthermore, in light of article 83(2) of the Statute, an appellant is required to demonstrate how the error materially affected the impugned decision. Whether an error or the material effect of that error has been sufficiently substantiated will be determined on a case-by-case basis.[48]

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[44] *Kenyatta* OA5 Judgment, para. 25 (footnotes omitted); *Ntaganda* Sentencing Appeal Judgment, para. 31.
[45] *Lubanga* Sentencing Appeal Judgment, para. 45; *Bemba et al*. Sentencing Appeal Judgment, para. 25; *Ntaganda* Sentencing Appeal Judgment, para. 32.
[46] *Lubanga* Sentencing Appeal Judgment, para. 45; *Ntaganda* Sentencing Appeal Judgment, para. 32.
[47] *See* *Lubanga* Appeal Judgment, paras 30-33; *Ntaganda* Sentencing Appeal Judgment, para. 33.
[48] *Lubanga* Appeal Judgment, para. 31; *Ntaganda* Sentencing Appeal Judgment, para. 33.

# V. MERITS

## A. Ground of appeal 1: Alleged errors related to the failure to provide an Acholi translation of the Conviction Decision

38. The Defence submits that the Trial Chamber violated Mr Ongwen's fair trial rights by issuing, *inter alia*, the Sentencing Decision before providing him with an Acholi translation of the Conviction Decision.[49]

### *1. Summary of the submissions*

#### (a) The Defence's submissions

39. The Defence submits that the Trial Chamber committed legal and procedural errors and thereby violated Mr Ongwen's fair trial rights by not allowing him to have an Acholi translation of the Conviction Decision prior to the issuance of the Scheduling Decision, the Decision on Leave to Appeal the Scheduling Decision and the Sentencing Decision.[50] The Defence also challenges (i) the manner in which the Trial Chamber, in the Decision on Leave to Appeal the Scheduling Decision, interpreted article 76(2) of the Statute and (ii) the weight the Trial Chamber accorded to the interpretation into Acholi of an "extensive summary" of the main findings in the Conviction Decision during the delivery of that decision.[51]

40. The Defence further submits that, because Mr Ongwen can speak and understand only Acholi, he could not be "put on notice of the potential use of aggravating facts proven" in the Conviction Decision.[52] The Defence argues that he was also not able to assist his defence team in "finding evidence in mitigation for the sentencing proceedings".[53] The Defence adds that the Trial Chamber "failed to accommodate the Appellant's mental disabilities" by not providing him with the Acholi translation and by not granting him sufficient time "to participate meaningfully in his defence".[54]

41. Finally, the Defence contends that the violation of Mr Ongwen's rights "seriously imperils the integrity" of the Sentencing Decision, and it therefore requests that the

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[49] Appeal Brief, paras 7, 18, 53, 57.
[50] Appeal Brief, paras 1, 7, 18, 53, 57.
[51] Appeal Brief, paras 45-48.
[52] Appeal Brief, paras 40, 41, 56. *See also* para. 42.
[53] Appeal Brief, paras 42-43, 56.
[54] Appeal Brief, paras 49-50.

Appeals Chamber vacate the Sentencing Decision and "order a new sentencing proceeding".[55]

### (b) The Prosecutor's submissions

42. The Prosecutor submits that the first ground of appeal should be rejected, as Mr Ongwen's rights, including his fair trial rights, were not violated.[56] Referring to article 67(1)(f) of the Statute and rule 144(2)(b) of the Rules, which guarantee the right to receive translations of documents where it is "necessary to meet the requirements of fairness", the Prosecutor argues that, since in accordance with article 76 of the Statute, the sentence can be pronounced together with the conviction decision, Mr Ongwen was not entitled to receive a translation of the Conviction Decision prior to the sentencing proceedings.[57] The Prosecutor adds that even if there are separate sentencing proceedings, the scope of such proceedings is limited and does not "necessitate that a convicted person receive a translation of the whole conviction decision into a language that he or she fully understands".[58]

### (c) The Victims' observations

43. Victims Group 1 submit that the Defence's first ground of appeal is an attempt to re-litigate issues raised during the sentencing proceedings that were addressed and decided upon by the Trial Chamber.[59]

44. Victims Group 2 argue that the Defence cannot raise in the present appeal "earlier unsuccessful grievances against rulings it was not authorised to appeal" and that, therefore, the Defence's arguments against the Scheduling Decision and the Decision on Leave to Appeal the Scheduling Decision should be dismissed *in limine* as inadmissible.[60]

45. Victims Group 2 further submit that the Defence does not show how the Trial Chamber committed an error of procedure when issuing the Sentencing Decision, as it does not show how the Trial Chamber failed to determine what is "necessary to meet

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[55] Appeal Brief, para. 57.
[56] Prosecutor's Response, paras 14-15, 17-39.
[57] Prosecutor's Response, paras 18-22.
[58] Prosecutor's Response, para. 21.
[59] Victims Group 1's Observations, paras 15-17.
[60] Victims Group 2's Observations, paras 18-19.

the requirements of fairness" under article 67(1)(f) of the Statute.[61] They argue that Mr Ongwen's defence team is fluent in English and Acholi, and that he was provided with Acholi interpretation throughout the entire trial which allowed him to instruct his team "without any discernible impediments".[62]

*2. Procedural background*

46. On 4 February 2021, the day of the delivery of the Conviction Decision, the Trial Chamber issued the Scheduling Decision, in which it: (i) decided to hold a hearing under article 76(2) of the Statute in order "to hear further submissions and any additional evidence relevant to the appropriate sentence to be imposed" on Mr Ongwen; and (ii) set out the related procedural calendar, including an opportunity for the parties and participants to make written submissions on the sentence, "leading to the hearing […] and to the imposition of the sentence on [Mr] Ongwen".[63]

47. On 10 February 2021, the Defence sought leave to appeal the Scheduling Decision, arguing, *inter alia*, that the Trial Chamber violated Mr Ongwen's rights by failing to provide him with an Acholi translation of the Conviction Decision.[64] It also stated that it "called a representative of the Registry's Language Service Section on 5 February 2021 [… and] was told that the translation of the Judgment into Acholi ha[d] not begun".[65] Referring to "its email of 4 February 2021", the Defence indicated that "after discussing the issue with the Client," it requested that an Acholi translation of the Conviction Decision be provided and that Mr Ongwen be given time to read it.[66]

48. On 22 February 2021, the Trial Chamber rendered the Decision on Leave to Appeal the Scheduling Decision. It noted that the "issue of translation of the Trial Judgment into Acholi", raised by the Defence in its Request for Leave to Appeal the Scheduling Decision, was "not a matter addressed as such" in the Scheduling Decision.[67] Nonetheless, the Trial Chamber considered that "in spite of this matter not having been dealt with explicitly in the Impugned Decision, it could nevertheless be

[61] Victims Group 2's Observations, para. 25.
[62] Victims Group 2's Observations, paras 22-24, 29.
[63] Scheduling Decision, paras 2-4, p. 6.
[64] Request for Leave to Appeal the Scheduling Decision.
[65] Request for Leave to Appeal the Scheduling Decision, para. 17.
[66] Request for Leave to Appeal the Scheduling Decision, para. 18.
[67] Decision on Leave to Appeal the Scheduling Decision, para. 8.

stated to arise out of the Impugned Decision by way of being implicit in it, as asserted by the Defence".[68]

49. The Trial Chamber then rejected the Request for Leave to Appeal the Scheduling Decision, finding that pursuant to rule 144 of the Rules, "the right to receive translations of Court documents is not absolute but subject to a concrete assessment of the necessity of such translations to meet the requirements of fairness".[69]

*3. Determination by the Appeals Chamber*

**(a) Preliminary matter**

50. The Appeals Chamber notes that Victims Group 2 request that the Defence's first ground of appeal be dismissed as inadmissible to the extent that it is directed against the Scheduling Decision and the Decision on Leave to Appeal the Scheduling Decision.[70] The Appeals Chamber observes that in the introductory part of the Appeal Brief, the Defence indeed submits that its appeal is directed not only against the Sentencing Decision, but also against the Scheduling Decision and the Decision on Leave to Appeal the Scheduling Decision.[71] Notwithstanding the aforementioned, the Appeals Chamber notes that under the present ground of appeal, the Defence only "disputes […] interpretations" given by the Trial Chamber in the Decision on Leave to Appeal the Scheduling Decision,[72] for the purpose of demonstrating that Mr Ongwen's fair trial rights were violated in the proceedings leading to the issuance of the Sentencing Decision.

51. The Appeals Chamber notes that this is an appeal under article 81(2)(a) of the Statute, which addresses the question of whether the sentence imposed on Mr Ongwen by the Trial Chamber is disproportionate in light of the crimes for which he was convicted. However, under article 83(2) of the Statute, in an appeal against the Sentencing Decision, the Defence may, *inter alia*, raise issues that, in its view, rendered "the proceedings appealed from unfair in a way that affected the reliability of the […]

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[68] Decision on Leave to Appeal the Scheduling Decision, para. 8.
[69] Decision on Leave to Appeal the Scheduling Decision, para. 9.
[70] Victims Group 2's Observations, paras 18-19.
[71] Appeal Brief, paras 1, 53. *See also* Notice of Appeal, para. 1.
[72] Appeal Brief, paras 45-48.

sentence".[73] Accordingly, the Defence may raise arguments relating to the fairness of a decision rendered in the course of sentencing proceedings, provided that the alleged unfairness affected the reliability of the sentence.

52. The Appeals Chamber notes that the Defence does raise some of these issues in the present ground of appeal. Therefore, the Appeals Chamber finds that it is appropriate for the Defence to refer to the Scheduling Decision and the Decision on Leave to Appeal the Scheduling Decision when raising an alleged unfairness in relation to the Sentencing Decision. As a result, the Appeals Chamber considers that the Appeal Brief is properly directed against the Sentencing Decision in this regard.

53. Accordingly, Victims Group 2's request for dismissal *in limine* of the Defence's first ground of appeal is rejected.

### (b) Scope of the right to translation of documents under article 67(1)(f) of the Statute and rule 144 of the Rules

54. The Defence challenges the Trial Chamber's interpretation of article 76(2) of the Statute, which led it to conclude, in the Decision on Leave to Appeal the Scheduling Decision, that no issue relating to an Acholi translation of the whole Conviction Decision arose with respect to the sentencing proceedings.[74] In support of its contention that Mr Ongwen had a right to receive an Acholi translation of the Conviction Decision at the sentencing proceedings, the Defence refers to article 67(1)(a), (b), (e) and (f) of the Statute, rule 144(2)(b) of the Rules and regulation 40(6) of the Regulations, as well as to provisions of international and regional human rights instruments.[75]

55. In the Decision on Leave to Appeal the Scheduling Decision, the Trial Chamber held that article 76 of the Statute[76] "envisages that the appropriate sentence can be

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[73] *See also* *Lubanga* Sentencing Appeal Judgment, para. 39: "At the outset, the Appeals Chamber notes that article 83 (2) and (3) of the Statute clarifies that, with respect to appeals against sentencing decisions, the Appeals Chamber's primary task is to review whether the Trial Chamber made *any errors* in sentencing the convicted person" (emphasis added).
[74] Appeal Brief, paras 45-47, *referring to* Decision on Leave to Appeal the Scheduling Decision, para. 9.
[75] Appeal Brief, paras 7, 19-36, 51, 53, 57, fns 60, 62-63, 65-67, 69, 72-74, 85, 89, 91-94.
[76] Article 76 reads as follows:

1. In the event of a conviction, the Trial Chamber shall consider the appropriate sentence to be imposed and shall take into account the evidence presented and submissions made during the trial that are relevant to the sentence.
2. Except where article 65 applies and before the completion of the trial, the Trial Chamber may on its own motion and shall, at the request of the Prosecutor or the accused, hold a further

pronounced together with the decision on the conviction […], 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".[77] In the view of the Trial Chamber, the "decision to separate the conviction and sentence" falls within a trial chamber's discretion and "does not have as its *ratio* to give the convicted person […] the possibility to make submissions on sentencing in response to the conviction".[78] The Trial Chamber concluded that the question 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".[79]

56. The Defence argues that article 76(2) of the Statute and rule 143 of the Rules support "a bifurcated system between a trial judgment and sentencing".[80] The Appeals Chamber observes that by stipulating that a trial chamber "*may* […] hold a further hearing",[81] article 76(2) allows for either a bifurcated system or the possibility of the sentence being pronounced together with the conviction decision. Although in practice, separate sentencing proceedings have been preferred, joint proceedings with one decision are also possible. It was therefore not unreasonable for the Trial Chamber to rely on this consideration when determining whether the sentencing proceedings could be conducted before Mr Ongwen was provided with an Acholi translation of the entire Conviction Decision.

57. Turning to the scope of the right under rule 144 of the Rules, the Trial Chamber held that "the right to receive translations of Court documents is not absolute but subject to a concrete assessment of the necessity of such translations to meet the requirements of fairness".[82] The Appeals Chamber observes that article 67(1)(f) of the Statute

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hearing to hear any additional evidence or submissions relevant to the sentence, in accordance with the Rules of Procedure and Evidence.

3. Where paragraph 2 applies, any representations under article 75 shall be heard during the further hearing referred to in paragraph 2 and, if necessary, during any additional hearing.
4. The sentence shall be pronounced in public and, wherever possible, in the presence of the accused.

[77] Decision on Leave to Appeal the Scheduling Decision, para. 9.
[78] Decision on Leave to Appeal the Scheduling Decision, para. 9.
[79] Decision on Leave to Appeal the Scheduling Decision, para. 9.
[80] Appeal Brief, para. 46.
[81] Emphasis added.
[82] Decision on Leave to Appeal the Scheduling Decision, para. 9.

provides that the accused person shall be entitled "[t]o have, free of any cost, the assistance of a competent interpreter and such translations *as are necessary to meet the requirements of fairness*, if any of the proceedings of or documents presented to the Court are not in a language which the accused fully understands and speaks".[83] Rule 144(2)(a) stipulates that "copies of the […] decisions" listed under rule 144(1), including the decision on the accused's criminal responsibility, "shall be provided *as soon as possible*".[84] Rule 144(2)(b) of the Rules further specifies that an accused person is to be provided with copies of such decisions "in a language he or she fully understands or speaks, *if necessary to meet the requirements of fairness under article 67, paragraph 1 (f)*".[85]

58. The Appeals Chamber has previously found, in the context of the Defence's preparation of its notice of appeal, that article 67(1)(f) "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 of a notice of appeal".[86] It also held that the "language of this provision requires a chamber to determine what is 'necessary to meet the requirements of fairness'".[87] Thus, an accused person's right to translations under article 67(1)(f) of the Statute and rule 144 of the Rules is circumscribed by the requirement of fairness. Rule 144(2) of the Rules refers to the translation being provided "as soon as possible". As the need for such translation being provided "soon" is qualified by "as possible", the assessment of this need will necessarily depend on the specific circumstances of the case, including the stage of the proceedings. The Appeals Chamber also recalls the holding of the ECtHR that

> the right to an interpreter (article 6(3)(e) of the ECHR) does not relate to translation of all documents, but only those necessary for the defendant to be acquainted with the case in order to allow his or her defence, and that translation of the final judgment itself is not necessary when a convicted person understands,

[83] Emphasis added.
[84] Emphasis added.
[85] Emphasis added.
[86] Decision on Extension of Time for Notice of Appeal, para. 10. *See also* Decision on Second Extension of Time for Notice of Appeal, para. 8.
[87] Decision on Extension of Time for Notice of Appeal, para. 10. *See also* Decision on Second Extension of Time for Notice of Appeal, para. 8.

through oral explanations and the assistance of legal counsel, the judgment sufficiently to lodge an appeal.[88]

59. In light of the above, the Appeals Chamber finds that the Trial Chamber's interpretation of rule 144 of the Rules is consistent with the jurisprudence of this Court and the ECtHR.[89] Therefore, the Appeals Chamber finds that, as a matter of law, the right to receive translation of a conviction decision under the Statute and the Rules is not, in principle, absolute for the purposes of sentencing, as long as the convicted person, assisted by his or her counsel, is sufficiently able to understand the conviction decision for those purposes.

60. Given the issue raised under this ground of appeal, the Appeals Chamber will now examine whether the Trial Chamber correctly determined that providing Mr Ongwen with an Acholi translation of the entire Conviction Decision for the purposes of the sentencing proceedings was not "necessary to meet the requirements of fairness".

#### (c) Whether providing Mr Ongwen with a translation of the Conviction Decision was necessary to meet the requirements of fairness

61. While, as stated above, the right to receive a translation of a conviction decision prior to the rendering of a sentencing decision is not absolute, the Appeals Chamber notes that, in the case at hand, Mr Ongwen would have benefited from having an Acholi translation of at least parts of the Conviction Decision. Indeed, many of the findings in the Sentencing Decision are based on the Trial Chamber's findings made in the Conviction Decision. Therefore, providing such translation to Mr Ongwen may have further assisted him in instructing his Defence team on sentencing issues. In this regard, the Appeals Chamber considers that, generally, when circumstances permit, translation of relevant parts of the conviction decision can be provided to the convicted person in the course of the sentencing proceedings.[90] However, for the reasons that follow, the

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[88] Decision on Extension of Time for Notice of Appeal, fn. 10 and references cited therein.
Article 6(3)(e) of the ECHR reads:
3. Everyone charged with a criminal offence has the following minimum rights: […]
(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.
[89] *See* Decision on Leave to Appeal the Scheduling Decision, para. 9.
[90] The Appeals Chamber notes that the translation of parts of conviction decisions for the purposes of sentencing has been ordered in other cases. In the *Lubanga* Case, the Defence of Thomas Lubanga Dyilo

Appeals Chamber does not find that the Trial Chamber erred, and that, as a result, the proceedings were unfair, within the meaning of article 83(2) of the Statute.

62. The Appeals Chamber has previously held that a chamber "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".[91] The Appeals Chamber considers this to be relevant for the present appeal.

63. When addressing and rejecting the Defence's argument that Mr Ongwen required an Acholi translation of the Conviction Decision in advance of the sentencing proceedings, the Trial Chamber noted that, "as part of the delivery of the [Conviction

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had argued that in the event of a conviction, it should be provided with "a translation into French of any important and necessary parts of the judgment" (*Lubanga* Translation Decision, para. 13). Trial Chamber I noted that Mr Lubanga had "either no, or limited, ability as regards reading English" and that the relevant working language for Mr Lubanga and his defence team was French (*Lubanga* Translation Decision, paras 18, 23). Trial Chamber I found that while it "is undoubtedly 'permissible' within the Rome Statute framework [to move to the sentencing and reparations phase (in the event of a conviction) if the parties and the participants have not been provided with a complete French translation of the conviction decision], […] there are concerns as to fairness. It is generally accepted that the Chamber would need to move to the next phase whatever the result, avoiding the delay that would be caused by waiting for the complete French translation". However, Trial Chamber I held that "certain minimum safeguards need to be in place to ensure that the accused and his counsel are able adequately to prepare for this next phase if the accused is convicted". Trial Chamber I concluded that in the event of a conviction it would still proceed with the sentencing once the English version of the conviction decision was notified, "having first ordered that any sections (identified by the defence) which it consider[ed] essential ha[d] been translated" into French (*Lubanga* Translation Decision, paras 20-21, 26). In the *Bemba et al*. Case, the defence of Narcisse Arido and Fidèle Babala Wandu requested a variation of the deadlines in the sentencing calendar in order to receive a French translation of the conviction decision. Mr Arido and Mr Babala indicated that they only fully understood French and that the defence team of Mr Babala was essentially francophone (*Arido*'s and *Babala*'s Request for Translation, paras 2, 4, 7, 16-17, 24). Shortly after the delivery of the conviction decision on 19 October 2016, Trial Chamber VII noted the Registry's submission that it had already provided French translation of sections of the conviction decision to the defence teams. In addition, Trial Chamber VII stated that "[b]eyond the translation of portions of the Judgment that have already been provided to the defence teams, the Chamber, in addition, facilitated that the defence teams profit further from assistance by the Registry. The Defence may work out other language assistance arrangements in cooperation with the Registry, such as by using French interpreters to translate portions of the Judgment, identified as relevant for the respective convicted person, as it is read aloud in his presence". Moreover, Trial Chamber VII found unreasonable the request to have a French translation of the entire conviction decision "in order to advance any sentencing submissions or evidence". It held that the "consideration of an appropriate sentence is derived from factual and legal conclusions in the judgment, all of which have been translated already. Sentencing is not the forum to challenge the way the Chamber reached its conclusions, as this would improperly transform the sentencing process into a request to reconsider the Judgment. Such challenges may instead be heard by the Appeals Chamber pursuant to Article 81(1) of the Statute" (*Bemba et al*. Translation Decision, paras 11-13; emphasis in original omitted). In the *Ntaganda* Case, Trial Chamber VI identified parts of the conviction decision that should be translated into Kinyarwanda for the convicted person, Bosco Ntaganda, before the filing of the Defence's submissions on sentencing (*Ntaganda* Translation Request, para. 3, fn. 2).

[91] Decision on Extension of Time for Notice of Appeal, para. 10. *See also* Decision on Second Extension of Time for Notice of Appeal, para. 8.

Decision] in open court on 4 February 2021", Mr Ongwen had "received the interpretation into Acholi of the verdict and of an extensive summary of the main findings and underlying reasons" of the Conviction Decision.[92] The Defence submits that this was not an "extensive" summary, noting that the Conviction Decision is 1,077-page long and it is summarised on 27 pages of a transcript.[93]

64. The Appeals Chamber notes that the summary of the reasons for the Conviction Decision read out on 4 February 2021 contains a detailed description of the crimes with which Mr Ongwen was charged, the circumstances, locations, dates and times of the charged incidents, and the means and manner of the commission of the crimes by Mr Ongwen and the LRA soldiers under his command during the period relevant to the charges.[94] It also describes Mr Ongwen's conduct and that of his subordinates, the harm suffered by the victims as a consequence of Mr Ongwen's crimes, as well as the verdict in relation to each crime charged.[95] The Appeals Chamber therefore finds that the Trial Chamber correctly relied on this summary of the reasons for the Conviction Decision in determining whether Mr Ongwen was disadvantaged in the sentencing proceedings on the basis that he had not been provided with an Acholi translation of the entire Conviction Decision.

65. Furthermore, the Appeals Chamber finds no merit in the Defence's submission that it was not "put on notice of the potential use of aggravating facts proven" in the Conviction Decision.[96] The Appeals Chamber notes that the Defence was able to present extensive submissions on mitigating and aggravating circumstances in the Defence Sentencing Brief and during the sentencing hearing held on 14 and 15 April 2021.[97]

66. In its Sentencing Brief, the Defence made submissions, *inter alia*: on deterrence, retribution and rehabilitation in the determination of Mr Ongwen's sentence,[98] and on

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[92] Decision on Leave to Appeal the Scheduling Decision, para. 10.
[93] Appeal Brief, para. 48.
[94] T-259, p. 4, line 16 to p. 31, line 12.
[95] T-259, p. 4, line 16 to p. 31, line 12.
[96] Appeal Brief, para. 41.
[97] Sentencing Decision, para. 7; Order on Sentencing Hearing Schedule, para. 8, p. 5; T-260; T-261. *See also* Scheduling Decision, p. 6.
[98] Defence Sentencing Brief, paras 14-55.

factors listed in article 78(1) of the Statute[99] and rule 145(1)(b) and (c), and 145(2)(a)(i) of the Rules, including on Mr Ongwen's time spent in the LRA, his "[s]ignificantly diminished mental capacity", the "[d]uress caused by Joseph Kony", Mr Ongwen's "education", "social and economic situation", "age and military education", "family situation" and "good character", the lives that Mr Ongwen "saved while in the LRA", the acts he performed which "demonstrat[ed] his good character in the LRA", and his "[g]eneral reputation" provided by former LRA persons.[100]

67. Moreover, in relation to its preparation for the sentencing hearing, the Defence submitted one witness statement, two pieces of non-testimonial documentary evidence, a prior recorded testimony of seven witnesses, two letters and live testimony of three expert witnesses and their prior recorded testimony, in support of its submissions on factors listed in rule 145(1)(b) and (c), and 145(2)(a)(i) of the Rules.[101] The Trial Chamber "recognised the submission into evidence"[102] of documentary evidence and allowed the introduction of the prior recorded testimony of ten witnesses pursuant to rule 68(2)(b) of the Rules for the purposes of the sentencing hearing.[103] During the sentencing hearing, the Defence discussed aggravating circumstances put forward by the Prosecutor, responded to the Victims' submissions and made submissions on the gravity of the crimes and mitigating circumstances.[104]

68. In light of the above, the Appeals Chamber considers that, contrary to the Defence's contention, it was "put on notice of the potential use of aggravating facts proven" and was able to make submissions and introduce evidence in relation to potential mitigating and aggravating circumstances. Accordingly, the Defence's arguments in this regard are rejected.

69. In addition, the Defence argues that Counsel for Mr Ongwen should not be expected to translate decisions to Mr Ongwen, and that Counsel for Mr Ongwen

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[99] Defence Sentencing Brief, paras 56, 63.
[100] Defence Sentencing Brief, paras 64-80, 85-174.
[101] Request for Additional Evidence, paras 7, 10, 12, 15, 21, 26, 29, 33, 37, 41, 44, 48; Annex A to Addendum to Request for Additional Evidence.
[102] Decision on Additional Evidence, p. 15.
[103] Decision on Additional Evidence, para. 6, pp. 15-16; Sentencing Decision, para. 5.
[104] *See* T-261, p. 42, line 16 to p. 44, line 22, p. 45, line 15 to p. 56, line 8, p. 57, line 11 to p. 68, line 19.

"speaks Langi", rather than Acholi.[105] The Appeals Chamber has already found that Mr Ongwen was assisted throughout the proceedings by his Defence team, which included members who are "fluent in English and Acholi".[106] In any event, the Defence fails to identify rulings of the Trial Chamber in which the burden of translating decisions to Mr Ongwen was allegedly placed on the Defence, and it does not explain how this alleged burden affected Mr Ongwen's ability to participate in the sentencing proceedings.

70. Regarding the Defence's argument that Mr Ongwen did not have adequate time to prepare his defence,[107] the Appeals Chamber notes that on 11 March 2021, the Defence requested an extension of time to file its Sentencing Brief, raising, *inter alia*, the issues of the lack of an Acholi translation of the Conviction Decision, Mr Ongwen's mental disabilities and his need to have "additional time to read and review material because of his disabilities".[108] The Trial Chamber rejected the request on 19 March 2021 and found that the Defence had "been accorded ample time to prepare its written submissions", that "such time remain[ed] more than sufficient for this purpose", and was satisfied that Mr Ongwen suffered no prejudice "from the envisaged sentencing calendar".[109] The Appeals Chamber observes that the Defence does not challenge these findings, nor does it present any arguments in support of its claim that Mr Ongwen did not have adequate time to prepare his defence. Therefore, the Appeals Chamber finds that the Defence fails to substantiate its argument. Accordingly, the argument is dismissed.

71. The Appeals Chamber further notes the Defence's reliance on the right to be informed of the charges, set out in article 67(1)(a) of the Statute.[110] However, it is unclear how an Acholi translation of the Conviction Decision would, at the stage of the sentencing proceedings, serve to inform Mr Ongwen of the nature, cause and content

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[105] Appeal Brief, para. 51. *See also* Defence Request to Change Date of the Closing Brief, para. 14.
[106] Decision on Extension of Time for Notice of Appeal, para. 11, *referring, inter alia, to* Decision of Prosecution's Request under Rule 68(2)(b), para. 28; Decision on Disclosure Regime, paras 33-35; Decision on Leave to Appeal the Scheduling Decision, para. 10; Decision on the Defence Request for Findings on Fair Trial Violations, paras 9, 17, 20; Confirmation Decision, para. 22.
[107] Appeal Brief, paras 42-43.
[108] Request for Extension of Time to File Sentencing Brief, paras 4, 23.
[109] Decision on Request for Extension of Time to File Sentencing Brief.
[110] Appeal Brief, paras 7, 19.

of the charges against him within the meaning of this provision. The Appeals Chamber also notes that Mr Ongwen was informed of the charges in a language he "fully understands and speaks" through various means in advance of his trial.[111] The Defence's argument is thus rejected.

72. The Defence further argues that the Trial Chamber did not provide a "safeguard" similar to the Appeals Chamber's decision allowing the Defence to seek variation of the grounds of appeal after receiving and reviewing the full Acholi translation of the Conviction Decision.[112] The Appeals Chamber finds that this argument is based on a misunderstanding of the scope of the sentencing phase of the trial proceedings, as compared to the scope of the appellate proceedings. Notably, a convicted person appealing a conviction decision will usually require more familiarity with that decision for the purposes of formulating grounds of appeal than a convicted person participating in the sentencing proceedings requires to be able to prepare his or her submissions on the sentence. The Appeals Chamber also notes that in the Decision on Extension of Time for Notice of Conviction Appeal, to which the Defence refers, it did not extend the time limit for filing the notice of appeal against the Conviction Decision until the completion of the Acholi translation of that decision. In fact, the Appeals Chamber found the Defence's request for such extension to be unreasonable.[113] It is thus unclear how that decision of the Appeals Chamber is relevant to the present argument of the Defence. This argument is therefore rejected.

73. Finally, the Defence submits that Mr Ongwen's mental disabilities required him to have an Acholi translation of the Conviction Decision, and sufficient time to read the translation in order to "participate meaningfully in his defence".[114] The Appeals Chamber notes that this argument is based on the assumption that Mr Ongwen was entitled to receive an Acholi translation of the entire Conviction Decision, the reading of which would require time. However, as noted by the Appeals Chamber in the Decision on Extension of Time for Notice of Appeal, Mr Ongwen was able to follow "all hearings in real-time through Acholi interpretation – including the oral summary

[111] For instance, the Acholi Translation of Confirmation Decision was notified on 13 December 2017.
[112] Appeal Brief, para. 52.
[113] Decision on Extension of Time for Notice of Appeal, para. 10.
[114] Appeal Brief, paras 49-50.

of the reasons for the Conviction Decision – and he had, throughout the trial proceedings, the assistance of a Defence team 'whose members, including [the lead] counsel, [are] fluent in English and Acholi'".[115] Therefore, the issue of time required for reading at the stage of sentencing did not arise and accordingly, these arguments are rejected. This is without prejudice to the issue of whether any mental disabilities of Mr Ongwen warranted mitigation under rule 145 of the Rules, which will be discussed under ground of appeal 7 below.

#### (d) Conclusion

74. In light of the above, the Appeals Chamber does not find that the Trial Chamber erred and that the proceedings were unfair on the basis that the Acholi translation was unavailable prior to the issuance of the Sentencing Decision. Accordingly, the Appeals Chamber rejects the first ground of appeal.

## B. Ground of appeal 2: Alleged errors in reliance on "testimonial evidence" submitted by the Victims

75. The Defence submits that the Trial Chamber erred in admitting and using in the Sentencing Decision "testimonial evidence" submitted by the legal representatives of victims regarding the proposed mitigating circumstance of the Acholi traditional justice system.[116]

### *1. Summary of the submissions*

76. The Defence submits that the Trial Chamber "unlawfully admitted and used testimonial evidence" submitted by the legal representatives of victims, which was prejudicial to Mr Ongwen and "negatively affected" the Sentencing Decision.[117] The Defence argues that the Trial Chamber should not have allowed the legal representatives to submit this testimonial evidence, consisting of anonymous testimony, and thereafter erred by using such evidence to dismiss the Defence's submissions on the Acholi traditional justice system as a mitigating circumstance,[118] which violates Mr Ongwen's fair trial rights.[119] The Defence contends that the Trial Chamber "stripped

[115] Decision on Extension of Time for Notice of Appeal, para. 11.
[116] Appeal Brief, para. 58.
[117] Appeal Brief, para. 58.
[118] Appeal Brief, paras 73-74, 84.
[119] Appeal Brief, paras 77, 80, 82, 84.

[Mr Ongwen] of his right to challenge testimonial evidence" by allowing the legal representatives to submit that evidence through the bar.[120] The Defence thus requests that the Appeals Chamber order the Trial Chamber "to expunge the testimonial evidence" presented by the legal representatives and "remand" to the Trial Chamber the issue of whether the Acholi traditional justice system qualifies as a mitigating circumstance for Mr Ongwen.[121]

77. The Prosecutor submits that the Defence "misrepresents" the Sentencing Decision and "misunderstands how the Trial Chamber treated the submissions [of the legal representatives of victims]".[122] He argues that the Defence merely repeats the submissions it previously made before the Trial Chamber[123] and fails to show how the alleged errors would have materially affected the Sentencing Decision.[124]

78. Victims Group 1 contend that it is misleading for the Defence to argue that the Trial Chamber relied on testimonial evidence submitted by the legal representatives of victims to reject the Defence's submissions on the Acholi traditional justice system.[125] They observe that the Trial Chamber referred to the views and concerns of participating victims in the context of considerations that were only additional to its finding under article 23 of the Statute that it was "precluded from introducing 'unregulated penalties or sentencing mechanisms not otherwise foreseen in the legal framework of the Court'".[126]

79. Victims Group 2 submit that, as stated by the Trial Chamber, the views and concerns presented by the participating victims are not evidence in nature, and that the Trial Chamber never treated them as such.[127] Victims Group 2 argue that, even if the Trial Chamber erred, its error would not have materially affected the Sentencing Decision, as "the principal reasoning behind the rejection of the Defence's arguments

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[120] Appeal Brief, para. 75.
[121] Appeal Brief, paras 83-84.
[122] Prosecutor's Response, paras 54, 60, 62.
[123] Prosecutor's Response, paras 57-59.
[124] Prosecutor's Response, paras 64-65.
[125] Victims Group 1's Observations, para. 29.
[126] Victims Group 1's Observations, paras 30-31.
[127] Victims Group 2's Observations, paras 32-34.

advocating for the traditional justice mechanisms is anchored in the clear wording of article 77 of the Statute".[128]

*2. Relevant parts of the Sentencing Decision*

80. When discussing the Defence's argument that Mr Ongwen's sentence should be short in order to allow him to undergo traditional justice rituals,[129] the Trial Chamber noted "as relevant and important" the submissions of the legal representatives of victims, which quoted the views of the following three participating victims: (i) the first victim "opposed the use of *mato oput*" (an Acholi traditional ritual); (ii) the second victim "opined that such process was not suitable because of the nature" of the crimes for which Mr Ongwen was convicted; and (iii) the third victim, who sat on the *Ker Kwaro* Acholi council, "noted that *mato oput* was not possible because [Mr] Ongwen did not admit to his crimes", and was of the view that the "Ker Kwaro Acholi and other organisations and leaders should not intervene in this issue".[130]

81. With respect to the Defence's argument that the views of victims quoted in the legal representatives of victims' submissions made at the sentencing hearing constituted testimonial evidence, the Trial Chamber held:

> 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.[131]

82. The Trial Chamber therefore rejected the Defence's request "to expunge from the record or disregard" the quotes of the views of victims.[132]

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[128] Victims Group 2's Observations, paras 36-39.
[129] Sentencing Decision, paras 15-43.
[130] Sentencing Decision, para. 38, *referring to* T-260, p. 48, lines 6-25.
[131] Sentencing Decision, para. 13. *See also* para. 38.
[132] Sentencing Decision, para. 13.

*3. Determination by the Appeals Chamber*

83. The Defence challenges the admission of what it refers to as "testimonial evidence" submitted by the legal representatives of victims.[133] The Appeals Chamber notes that the Defence previously made the same argument before the Trial Chamber. During the sentencing hearing on 15 April 2021, the Defence objected to submissions made by the legal representatives of victims[134] on the ground that direct quotes of the views and concerns of victims regarding the Acholi traditional justice system constituted testimonial evidence and should be expunged from the record.[135]

84. As summarised above, the Trial Chamber rejected the Defence's request, noting that the submission by the legal representatives of the views and concerns of the victims participating in the proceedings, even in the form of direct quotes, did not constitute evidence and did not "underlie any finding of fact".[136] The Trial Chamber clarified that, given "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 [Mr] Ongwen was convicted, it is appropriate to refer directly to the submissions of the victims as expression of their will and opinion".[137]

85. The Appeals Chamber finds no error in the Trial Chamber's conclusion. The Appeals Chamber recalls that submissions advanced by a party in the proceedings do not constitute evidence.[138] The Defence's reference to articles 64(2), (6)(d), (9)(a)-(b),

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[133] Appeal Brief, para. 58.
[134] T-260, p. 48, lines 6 to 25 ("Victims [*sic*] a/05601/15 noted, and I quote, '*Mato oput* happens only when there is acceptance. If I as the victim refuses, it cannot be conducted. I want him imprisoned so that he suffers like the rest of us. We do not want *mato oput*'. Victim a/05207/15 noted that *mato oput* cannot be utilised for the crimes that [Mr] Ongwen committed, including the abuse of young girls and women and other atrocious acts. She went on to state, 'If it was a single crime, we would resort to possible use of *mato oput*, but because of the nature of the crimes Mr Ongwen committed, we cannot consider the use of *mato oput*.' Victim a/05270/15, who sits on the Ker Kwaro Acholi council also noted as follows: '*Mato oput* is very important, but if there is no admission, then *mato oput* cannot happen. *Mato oput* happens when the two clans convene and admit that they are ready to engage in this ritual of *mato oput*. And it happens when they have offered compensation and they meet the requirement […] but for Ongwen's case, it is hard. Ker Kwaro shouldn't come in. I am a member of the council, but they shouldn't barge in. Did they consult the victims? We were harmed and they weren't here. Will they pay? Each of the four locations has its own clans. So they shouldn't impose themselves. They should let him remain there. What will Lamogi do for us? I have rejected it and I am not happy with their actions, along with religious leaders. They shouldn't intrude. Did their children die? Were their property destroyed?'").
[135] T-261, p. 38, line 8 to p. 39, line 10, p. 48, lines 4-8.
[136] Sentencing Decision, paras 13, 38.
[137] Sentencing Decision, para. 38 (footnotes omitted).
[138] *Bemba et al.* Decision on Arido's Request for Additional Evidence, para. 18.

67(1)(e) and 69(1)-(4) of the Statute, rules 64(1)-(2), 66(1), (3) and 68(2)(a), (2)(b)(ii)-(iii), (d)(ii)-(iii) of the Rules and provisions of international legal instruments[139] to demonstrate that the quotes of views of the victims were evidence, is inapposite. The Appeals Chamber observes in this regard that article 68(3) of the Statute[140] and rule 91 of the Rules[141] allow victims to present their views and concerns through the legal representatives of the victims. These provisions do not prescribe a specific manner in which these views and concerns can be communicated during the proceedings, other than that they have to be presented "in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial".[142] The fact that the legal representatives opted to use direct quotes rather than, for instance, summarising and paraphrasing the views and concerns of the victims, simply reflects a choice in the manner of presentation and does not transform them into evidence.

86. Turning to the Defence's argument that the Trial Chamber erroneously relied on the quotes of victims' views and concerns included in the submissions of the legal representatives to reach its conclusion that the Acholi traditional justice system should not be considered as a mitigating factor,[143] the Appeals Chamber notes that the Defence makes a similar argument under ground of appeal 3.[144] The Appeals Chamber finds it more appropriate to address this argument under that ground of appeal.

#### *4. Conclusion*

87. In light of the above, the Appeals Chamber finds that the Defence has not demonstrated that the Trial Chamber erred in referring in the Sentencing Decision to

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[139] Appeal Brief, paras 66-72.
[140] Article 68(3) of the Statute reads as follows: "Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence".
[141] *See* in particular rule 91(2) of the Rules: "A legal representative of a victim shall be entitled to attend and participate in the proceedings in accordance with the terms of the ruling of the Chamber and any modification thereof given under rules 89 and 90. This shall include participation in hearings unless, in the circumstances of the case, the Chamber concerned is of the view that the representative's intervention should be confined to written observations or submissions. The Prosecutor and the defence shall be allowed to reply to any oral or written observation by the legal representative for victims".
[142] Article 68(3) of the Statute.
[143] Appeal Brief, paras 73, 82-84.
[144] Appeal Brief, para. 110.

the quotes of views and concerns of the victims presented as part of the submissions of the legal representatives of victims, and accordingly rejects ground of appeal 2.

## C. Ground of appeal 3: Alleged errors in failing to consider the Acholi traditional justice system as a mitigating factor

88. The Defence submits that the Trial Chamber erred in law and in fact "when it rejected and failed to objectively consider in this case the Acholi Traditional Justice System and its practices".[145]

### *1. Summary of the submissions*

89. The Defence submits that the Trial Chamber "failed to apply the principle of complementarity" and "to view *Mato Oput* from the lens of complementarity" as a mitigating factor.[146] It adds that in light of this principle, Mr Ongwen should be given "some form of suspension of the sentence".[147] The Defence further avers that the Trial Chamber failed to correctly appreciate the "relevant cultural beliefs and practices" of Mr Ongwen by disregarding the Defence's submissions on social rehabilitation and reintegration and by not considering these cultural beliefs as a personal circumstance of Mr Ongwen.[148] The Defence further submits that the Trial Chamber's errors were caused by its "biased view of traditional justice mechanisms", because it: (i) relied on the testimony of non-Acholi persons, namely expert witnesses Tim Allen and Seggane Musisi;[149] and (ii) "refused to hear from witnesses well placed to inform conclusions on traditional justice mechanisms",[150] in particular, D-0160.[151] In respect of D-0160, the Defence argues that the Trial Chamber's refusal to hear this witness "resulted in a lack of information regarding *Mato Oput* and unjustified, exclusive reliance on the views and concerns of victims".[152]

90. Finally, the Defence argues that these errors "negatively and materially affected" the Sentencing Decision and resulted in a "disproportionate sentence" for

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[145] Appeal Brief, para. 85.
[146] Appeal Brief, paras 85-86.
[147] T-266, p. 69, lines 11-12.
[148] Appeal Brief, paras 90-94, 97, 99.
[149] Appeal Brief, paras 100-103, 105, 110-111.
[150] Appeal Brief, para. 100. *See also* paras 88, 96, 106-109, 111; T-267, p. 6, lines 7-9.
[151] Appeal Brief, paras 100, 107-110; T-267, p. 6, line 24 to p. 7, line 2. *See also* T-266, p. 62, lines 20-24.
[152] Appeal Brief, para. 109. *See also* paras 73, 82-84.

Mr Ongwen.[153] It therefore requests that the Appeals Chamber remand this "ground" to the Trial Chamber and "order it to review properly all of the material submitted to the Chamber by D-0042, D-0060, D-0114 and D-0133", and to call witnesses that were proposed by the Defence for the sentencing hearing.[154]

91. The Prosecutor submits that the Defence does not "directly dispute" the Trial Chamber's legal holding regarding article 77 of the Statute.[155] He also submits that the Defence's argument that the Acholi traditional justice system should have been considered as "a matter of 'complementarity'", and as a mitigating factor should be summarily dismissed, because the Defence did not make this argument before the Trial Chamber during the sentencing proceedings.[156] In addition, the Prosecutor contends that there is "no basis" in the present case for the application of the principle of complementarity and argues that what the Defence is requesting is "effectively impunity".[157] The Prosecutor argues that, in any event, the Defence does not "explain how the mere existence of traditional justice mechanisms could 'mitigate' [Mr Ongwen's] guilt or constitute a relevant 'personal circumstance'".[158]

92. With respect to the Trial Chamber's alleged bias in relying on the evidence of non-Acholi persons, the Prosecutor contends that the Defence's argument is based merely on the "ethnicity or national origin" of the experts and "is nothing but a disagreement" with the Trial Chamber's assessment of the evidence.[159]

93. Victims Group 1 submit that "*mato oput* is wholly inapplicable within the context of this case",[160] recalling that victims "have vehemently opposed the possibility of *mato oput*".[161] Victims Group 1 further aver that the Defence does not argue that the Trial Chamber's findings regarding articles 23 and 77 of the Statute amount to an error; rather it "makes allegations of factual errors which do not arise from the Sentencing Decision

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[153] Appeal Brief, paras 83, 85, 89, 94, 98-99, 102, 104-105, 108, 110-111.
[154] Appeal Brief, para. 88. *See also* para. 112.
[155] Prosecutor's Response, para. 70.
[156] Prosecutor's Response, paras 71-72.
[157] T-266, p. 72, lines 5-17.
[158] Prosecutor's Response, para. 73.
[159] Prosecutor's Response, para. 79.
[160] T-266, p. 55, lines 11-15.
[161] T-266, p. 55, lines 19-20, p. 74, lines 23-25.

in light of the Chamber's findings".[162] They also argue that the Defence fails to substantiate any error in the Trial Chamber's conclusion on the Acholi traditional justice system and misrepresents the evidence of expert witnesses Allen and Musisi.[163]

94. Victims Group 2 submit that the Trial Chamber correctly found that its powers at the sentencing stage are limited to the identification of a penalty from among those prescribed in article 77 of the Statute.[164] They also submit that victims opposed the possibility of *Mato Oput*.[165] Furthermore, they argue that, contrary to the Defence's argument, the Trial Chamber "had the benefit of receiving further information on the traditional justice mechanisms through Defence's witnesses" and did not rely only on the two experts' evidence and the victims' submissions.[166]

*2. Relevant parts of the Sentencing Decision*

95. In addressing the Defence's submissions that Mr Ongwen should be referred to traditional Acholi justice mechanisms (including *Mato Oput*) and, as such, be sentenced to time served or a maximum sentence of 10 years,[167] the Trial Chamber discussed the suggested incorporation of the Acholi traditional justice system into the Court's statutory framework. The Trial Chamber, however, concluded that in light of articles 23 and 77 of the Statute, it was precluded from incorporating this traditional justice system into the legal framework of the Court.[168] While reaching this conclusion, the Trial Chamber considered that "in light of the submissions received and the evidence on the record" in relation to the efficiency of the Acholi traditional justice system and its rituals, it was "appropriate to express […] additional considerations" on the Acholi traditional justice system.[169] It did so, "because it may appear from the Defence submissions, if taken at face value, that the Chamber is insensitive to established

[162] Victims Group 1's Observations, para. 36.
[163] Victims Group 1's Observations, paras 35, 37-38.
[164] Victims Group 2's Observations, paras 36-39, 41, 46; T-266, p. 56, line 16 to p. 57, line 3.
[165] T-266, p. 56, lines 14-15, p. 73, lines 5-6.
[166] Victims Group 2's Observations, para. 44.
[167] Sentencing Decision, para. 15.
[168] Sentencing Decision, paras 26-27, *referring to* *Bemba et al.* Sentencing Appeal Judgment, para. 77 (footnote omitted). *See also* paras 41, 43.
[169] Sentencing Decision, para. 27.

cultural norms and processes".[170] The Trial Chamber clarified that "this is not the case".[171]

*3. Determination by the Appeals Chamber*

96. The Defence's main argument under this ground of appeal is that the Trial Chamber erred in law and in fact "when it rejected and failed to objectively consider in this case the Acholi Traditional Justice System and its practices".[172] In considering the Defence's submissions on the incorporation of the Acholi traditional justice system into the Court's statutory framework on the sentencing regime, the Trial Chamber discussed articles 23 and 77 of the Statute. It noted that article 23 "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".[173] In light of these provisions, the Trial Chamber found that "[a]ny 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*".[174]

97. The Trial Chamber also referred to the Appeals Chamber's holding in the *Bemba et al*. Case that the powers of a trial chamber are limited by the identified set of penalties provided under the Statute.[175] As noted above, the Trial Chamber concluded that "[i]n light of the principle of legality", it was "precluded from introducing 'unregulated penalties or sentencing mechanisms not otherwise foreseen in the legal framework of the Court'".[176] It was of the view that "it could thus reject solely on this ground any attempt on the part of the Defence to have the Chamber, in the determination of the appropriate sentence, impose on [Mr] Ongwen – or otherwise envisage him undergoing – a 'traditional justice process' in replacement of, or in addition to, a term of imprisonment as required by Article 77 of the Statute".[177] However, as recalled above,

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[170] Sentencing Decision, para. 27.
[171] Sentencing Decision, para. 27.
[172] Appeal Brief, para. 85.
[173] Sentencing Decision, para. 26.
[174] Sentencing Decision, para. 26.
[175] Sentencing Decision, para. 26, *referring to* *Bemba et al.* Sentencing Appeal Judgment, para. 77.
[176] Sentencing Decision, para. 26 (footnotes omitted).
[177] Sentencing Decision, para. 27.

the Trial Chamber found it appropriate to express additional considerations on the Acholi traditional justice system.[178]

98. It is thus clear that the Trial Chamber's rejection of the Defence's request to incorporate the Acholi traditional justice system into the sentencing regime before the Court was based on its interpretation of articles 23 and 77 of the Statute. However, while the Defence submits that the Trial Chamber erred in rejecting the Acholi traditional justice system and its practices and failing to consider it in the present case,[179] it does not challenge the Trial Chamber's interpretation of articles 23 and 77 of the Statute. Rather, the Defence contests the Trial Chamber's "additional considerations" on the Acholi traditional justice system. Specifically, it argues that the Trial Chamber failed to apply the principle of complementarity to that traditional justice system.[180] The Defence further contends that the Trial Chamber failed to correctly appreciate the relevant cultural beliefs and practices of Mr Ongwen as a personal circumstance, and held a biased view of the Acholi traditional justice system.[181]

99. As recalled above, the Trial Chamber explained that it made its additional considerations in order to address arguments raised by the Defence on the Acholi traditional justice system and its practices.[182] It heard testimonial evidence "in relation to traditional justice mechanisms in Northern Uganda, and in particular in relation to the Acholi ritual of *mato oput*".[183] It also noted the observations of the victims, assessed the evidence of expert witnesses Allen and Musisi and considered the Defence's submissions.[184] The Trial Chamber concluded that it was "unpersuaded by the Defence's claim that imposing a sentence under Article 76 of the Statute would run counter to the culture of the people of Northern Uganda",[185] and that there was "also nothing in the facts underlying the Defence submissions […] which would bear upon the determination of the sentence for [Mr] Ongwen".[186]

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[178] Sentencing Decision, para. 27.
[179] Appeal Brief, para. 85.
[180] Appeal Brief, para. 86. *See also* para. 81, fn. 150.
[181] Appeal Brief, paras 90-111.
[182] Sentencing Decision, para. 27.
[183] Sentencing Decision, para. 29.
[184] Sentencing Decision, paras 30-40.
[185] Sentencing Decision, para. 41.
[186] Sentencing Decision, para. 43.

100. When making these additional considerations, the Trial Chamber reiterated that its ultimate conclusion was based on articles 23 and 77 of the Statute.[187] As recalled above, it found that article 23 "preclude[d] incorporation in any manner of elements of traditional justice into the sentence imposed on [Mr] Ongwen".[188] In light of this finding, the Appeals Chamber is of the view that these additional considerations do not constitute the basis of the Trial Chamber's determinative legal finding that the Acholi traditional justice system cannot be incorporated into the Court's statutory framework on the sentencing regime.

101. As the Defence does not challenge the Trial Chamber's interpretation of articles 23 and 77 of the Statute or its conclusion reached thereon, this ground of appeal lacks the potential of affecting the Sentencing Decision. In other words, even if an error were to be found in the Trial Chamber's additional considerations, such an error would not materially affect the Sentencing Decision, as those additional considerations have no bearing on the Trial Chamber's conclusion.

102. Accordingly, the Appeals Chamber dismisses this ground of appeal on this basis.

103. In any event, the Appeals Chamber finds that, even if the Defence had properly alleged an error in the Trial Chamber's legal finding that it was precluded from incorporating the Acholi traditional justice system into the Court's statutory framework on the sentencing regime, this ground of appeal would still be rejected for the following reason: as held by the Appeals Chamber in the *Bemba et al*. Case, "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 […] limited to the identification of the appropriate penalty among the ones listed in the Statute and a determination of its *quantum*".[189] Moreover, the Court's regime of penalties and sentencing is "directly and explicitly constrained by the principle of legality under article 23 of the Statute", which encapsulates the principle of *nulla poena sine lege*.[190] Consequently, the Trial Chamber correctly found that it was

[187] Sentencing Decision, paras 41, 43.
[188] Sentencing Decision, para. 41.
[189] *Bemba et al.* Sentencing Appeal Judgment, para. 77 (footnotes omitted).
[190] *Bemba et al.* Sentencing Appeal Judgment, para. 77.

precluded from incorporating a penalty not foreseen in the legal framework of the Statute.

104. While the determinative conclusion relevant to this ground of appeal is the legal finding of the Trial Chamber rejecting the incorporation of the Acholi traditional justice system into the Court's statutory framework – as noted above, the Defence does not challenge this finding – the Trial Chamber expressed additional considerations on this traditional justice system. In this context and irrespective of its above considerations, the Appeals Chamber finds it appropriate to address the Defence's arguments challenging these additional considerations.

105. The Appeals Chamber will therefore address in turn the Defence's arguments regarding the Trial Chamber's alleged (i) failure to apply the principle of complementarity;[191] and (ii) failure to correctly appreciate the relevant cultural beliefs and practices of Mr Ongwen as a personal circumstance,[192] as well as the Trial Chamber's alleged biased view of the Acholi traditional justice system.[193]

#### (a) Alleged failure to apply the principle of complementarity

106. The Defence submits that the Trial Chamber failed to apply the principle of complementarity to the Acholi traditional justice system and its rituals, and argues that this principle is not limited to article 17 of the Statute because it is "enshrined both in paragraph 10 of the Preamble and Article 1 of the Rome Statute".[194] The Defence asserts that allowing Mr Ongwen to undergo the Acholi rituals would enable "the Court to see [the Acholi traditional justice system and its rituals] as a reason to lessen a sentence through the complementarity principle" and permit a suspension of the sentence imposed on Mr Ongwen.[195] The Prosecutor contends that the Defence failed to raise these arguments before the Trial Chamber, and seeks a summary dismissal of

[191] Appeal Brief, paras 85-89.
[192] Appeal Brief, paras 90-99.
[193] Appeal Brief, paras 100-111.
[194] Appeal Brief, para. 86. *See also* para. 81; T-267, p. 6, lines 9-17.
[195] Appeal Brief, para. 81; T-266, p. 69, lines 11-12.

these arguments.[196] In reply, the Defence avers that this issue was raised at trial at paragraph 733 of its Closing Brief,[197] which reads, in relevant part, as follows:

> [i]n the event that the Court finds Mr Ongwen guilty, that punishment [should] be suspended and […] the Court should: a. **ORDER** Mr Ongwen to be placed under the authority of the Acholi justice system to undergo the Mato Oput process of Accountability and Reconciliation as the final sentence for the crimes for which he is convicted.[198]

107. During the hearing, the Defence argued that "[m]erely because the magic word 'complementarity' was not written down [this] does not mean that [the principle of complementarity] was not expressed" at trial.[199] When asked by the Presiding Judge about the legal basis for the application of the principle of complementarity in relation to the *Mato Oput* practices,[200] the Defence stated that "whatever sentence that [Mr Ongwen] should serve, we are saying give him some form of suspension of the sentence. Let him go to Acholi and save his life so he's cleansed, [and …] if some people raise specific issues for him to […] undergo the *mato oput* itself, it can be done. And then the man integrates with the society".[201] According to the Defence, this would allow Mr Ongwen "to be rehabilitated back into the community",[202] as he has already been in detention "for about seven to eight years".[203]

108. The Appeals Chamber considers that, contrary to the Defence's contention, its request made at paragraph 733 of the Closing Brief does not raise any issue related to the principle of complementarity; rather, and as correctly noted by the Trial Chamber, it pertains to "a referral to the traditional justice system [that] should be ordered by the Chamber *in lieu* of the sentence".[204] The argument in regard to complementarity was, however, not raised during the sentencing proceedings. Hence, the Appeals Chamber finds that the Defence only raised that argument for the first time on appeal.[205] As a result, the Trial Chamber did not have the opportunity to consider this argument and

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[196] Prosecutor's Response, para. 71.
[197] T-266, p. 15, lines 2-9.
[198] Defence Closing Brief, para. 733 (emphasis in original).
[199] T-266, p. 15, lines 12-16.
[200] T-266, p. 69, lines 3-6.
[201] T-266, p. 69, lines 11-15.
[202] T-266, p. 70, lines 17-18. *See also* T-266, p. 68, lines 19-21.
[203] T-266, p. 71, line 14.
[204] Sentencing Decision, para. 25 (emphasis in original), *referring to* Defence Closing Brief, para. 733.
[205] *See also* Prosecutor's Response, para. 71.

make a finding. The Appeals Chamber recalls that if it were to address the substance of arguments that could have reasonably been raised before the first-instance chamber, but were raised for the first time only on appeal, this "would exceed the scope of its review", as there would be no finding from the trial chamber to review.[206]

109. In any event, while respectful of the cultural beliefs advanced by the Defence and mindful of their significance, the Appeals Chamber considers that the question of incorporation of the Acholi traditional judicial system into the Court's statutory framework has no bearing on complementarity or admissibility matters. Indeed, this question does not relate to any of the grounds for the inadmissibility of a case before the Court as prescribed by article 17 of the Statute.[207] Equally important, if there had been any issue regarding the admissibility of Mr Ongwen's case before this Court, this question should have been raised "prior to or at the commencement of the trial", pursuant to article 19(4) of the Statute, rather than at the appellate stage.[208] Therefore, the Defence's argument is rejected.

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[206] *See* *Lubanga* OA15 / OA16 Judgment, para. 109; *Ongwen* OA3 Judgment, para. 45.

[207] Article 17 of the Statute reads as follows:

> 1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:
>
> (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
>
> (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
>
> (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
>
> (d) The case is not of sufficient gravity to justify further action by the Court.
>
> 2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:
>
> (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;
>
> (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
>
> (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.
>
> 3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

[208] Article 19(4) of the Statute reads as follows:

> The admissibility of a case or the jurisdiction of the Court may be challenged only once by any person or State referred to in paragraph 2. The challenge shall take place prior to or at the

110. In addition, the Defence's request for a suspension of the sentence has no legal basis. The Appeals Chamber recalls in that regard its holding in the *Bemba et al.* Sentencing Appeal Judgment that "there exists no explicit provision in the legal framework of the Court providing for the possibility of a trial chamber to pronounce a conditionally suspended sentence or suspend the operation of a sentence of imprisonment", and that it is an error for a trial chamber to impose such a suspended sentence.[209] Accordingly, this argument is dismissed *in limine*.

### (b) Alleged failure to correctly appreciate Mr Ongwen's relevant cultural beliefs and practices and alleged biased view of the Acholi traditional justice system

111. The Defence contends that the Trial Chamber held a biased view of the Acholi traditional justice system because it relied on the testimony of non-Acholi persons, namely expert witnesses Allen and Musisi,[210] while refusing to hear witnesses who were "well placed to inform conclusions" on the Acholi traditional justice mechanisms, in particular witness D-0160, who is the Prime Minister of *Ker Kwaro* Acholi and "one of the highest authorities" in the Acholi traditional justice system.[211] According to the Defence, this witness would have provided additional information relevant to the Trial Chamber's "unanswered questions" on the "efficiency", the "degree of acceptance" and the "comprehensive definition" of this traditional justice system.[212]

112. With respect to expert witness Allen, the Defence avers that the Trial Chamber erred in fact in only accepting his testimony regarding his concerns about Acholi rituals while not considering the witness's prior statement on the "importance and regularity of rituals and imprecise translation of Acholi terms into English terms".[213]

113. For the reasons that follow, the Appeals Chamber finds no merit in these submissions. The Defence's contention that the Trial Chamber relied on the evidence

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commencement of the trial. In exceptional circumstances, the Court may grant leave for a challenge to be brought more than once or at a time later than the commencement of the trial. Challenges to the admissibility of a case, at the commencement of a trial, or subsequently with the leave of the Court, may be based only on article 17, paragraph 1 (c).

[209] *Bemba et al.* Sentencing Appeal Judgment, paras 74, 78-80. *See also* the Prosecutor's submissions, T-266, p. 71, line 25 to p. 72, line 4.
[210] Appeal Brief, paras 100-103, 105, 110-111.
[211] Appeal Brief, paras 100, 106-109, 111.
[212] Appeal Brief, para. 108.
[213] Appeal Brief, para. 102, *referring to* T-28, p. 74, lines 17-24.

of expert witnesses Allen and Musisi to "seemingly conclude that *Mato Oput* holds no value in the Acholi community and that only Western ideas of retribution are sufficient to address the crimes for which [Mr Ongwen] has been convicted", despite the evidence of D-0160 showing that "*Mato Oput* is deeply embedded [in] Acholi society",[214] misrepresents the Trial Chamber's findings. Indeed, the Defence takes expert witness Allen's evidence and the Trial Chamber's assessment of this evidence out of context.

114. With respect to expert witness Allen's evidence, the Trial Chamber observed the witness's "scepticism about *mato oput*, noting that 'somewhat romantic associations that some activists directed towards those rituals ha[ve] been set to one side'".[215] The Appeals Chamber observes that the Defence singles out this one statement of the witness without taking into account the full explanation he proffered during his testimony. A review of his explanation shows that there is no contradiction with the Trial Chamber's assessment of the witness's evidence. In this regard, the witness stated that "[m]ato oput in particular was foregrounded as a way of bringing back […] people into the community and providing forgiveness".[216] The witness further stated that:

> Even in my work at the time I was rather skeptical about this and caused some controversy by suggesting that those rituals were never intended for such a purpose. I think over time the somewhat romantic associations that some activists directed towards those rituals has been set to one side. Rituals of course are hugely important and one sees them occurring all the time. But by and large these rituals make someone a social person. They don't mean forgiveness in the way that is necessarily suggested by the English term. In many ways the point of mato oput was to make somebody, if you like, a human being again from a period when somebody had been outside of normal relations. Following mato oput, then there would be a period of compensation. So it was a rather different kind of process that was associated with it than was ascribed to it by activists.[217]

115. Following this explanation, expert witness Allen stated that he had "real concerns about the emphasis on Acholi rituals as being a kind of solution to the Lord's Resistance Army".[218] He clarified that "[i]t somehow suggested that the Acholi people have different ideas about terrible events to other people and are prepared to accept them and have mechanisms for dealing with them that make them less significant or important.

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[214] Appeal Brief, paras 103-104, fn. 180, *referring, inter alia, to* UGA-D26-0015-1812, at 1820-1824.
[215] Sentencing Decision, para. 32.
[216] T-28, p. 74, lines 11-12.
[217] T-28, p. 74, lines 13-24.
[218] T-28, p. 74, line 25 to p. 75, line 1.

That has never been my experience".[219] The witness added that "Acholi people suffer just as much as anyone else from terrible events".[220] It is therefore in this context that the witness stated that he was "always rather skeptical about [these rituals] and time has shown that they are of relatively less significance than [what] was suggested at the time".[221] This is also consistent with the Trial Chamber's assessment of the witness's testimony.

116. Furthermore, the Trial Chamber noted that expert witness Allen's observations were "based on extensive work in the field, and therefore valuable".[222] It further found that they were "corroborated by Professor Musisi, who referred during his testimony to 'traditional reconciliatory mechanisms', but also expressed a strong reservation about them, stating that their use was 'an idealistic wish of the elders as keepers of the custom, of the culture, of the society in which they live'".[223] The Trial Chamber noted that "Professor Musisi was well placed to make this observation", given "his background".[224]

117. Moreover, the Appeals Chamber observes that in considering the Acholi traditional justice system, the Trial Chamber also relied on other evidence. It took into account a recent judgment from the High Court of Uganda referred to by the Defence during the sentencing proceedings, and the claims made by the participating victims which "conform[ed] to the testimonies of Professor Allen and Professor Musisi reporting skepticism towards traditional justice mechanisms".[225] As the Defence does not challenge these findings, and in light of the above analysis, the Appeals Chamber finds that the Defence fails to show an error in the Trial Chamber's reliance on the evidence of these expert witnesses. Accordingly, this argument is rejected.

118. The Defence further contends that the Trial Chamber erred in refusing to hear the witnesses it had proposed for the sentencing hearing, namely D-0114, D-0133 and

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[219] T-28, p. 75, lines 1-4; Sentencing Decision, para. 32.
[220] T-28, p. 75, lines 4-5; Sentencing Decision, para. 32.
[221] T-28, p. 75, lines 6-7.
[222] Sentencing Decision, para. 33. Regarding the witness's experience of the region of Northern Uganda and South Sudan, *see* T-28, p. 5, line 21 to p. 6, line 11.
[223] Sentencing Decision, para. 33, *referring to* T-178, p. 26, lines 15-22.
[224] Sentencing Decision, para. 33, *referring to* Conviction Decision, para. 602.
[225] Sentencing Decision, paras 34, 40.

D-0160.[226] In this context, the Defence refers to the Decision on Additional Evidence, issued by the Trial Chamber with respect to a Defence request for the submission of evidence under rule 68(3) of the Rules. In that decision, having regard to (i) the "scope and subject-matter of the prior recorded testimony" of the witnesses sought to be introduced under rule 68(3) of the Rules, as well as (ii) the fact that both D-0114 and D-0133 had already testified before it in the course of the trial,[227] the Trial Chamber did not "consider that the proper conduct of the proceedings demand[ed] that the witnesses be subject to examination by the Prosecution, the legal representatives of victims or the Chamber itself".[228] In the Trial Chamber's view, the prior recorded testimony from those witnesses should rather be introduced under rule 68(2)(b) of the Rules "without the need for any such examination".[229] The Trial Chamber further noted that the material regarding D-0114 and D-0133 had been obtained very recently and that absent any indication to the contrary on the part of the Defence, the Trial Chamber was satisfied that there was no need for the Defence "to conduct any further examination of the witnesses to elicit information besides that already recorded in the prior recorded testimony".[230]

119. The Appeals Chamber observes that the Defence does not challenge these findings and only speculates that D-0114, D-0133 and D-0160 were better placed to inform the Trial Chamber's conclusions on the Acholi traditional justice mechanisms, and that D-0160 would have been able to provide additional information to the Trial Chamber's "unanswered questions".[231] Therefore, the Appeals Chamber finds that the Defence fails to show an error in the Trial Chamber's decision not to hear the live testimony of these three witnesses at the sentencing hearing, and accordingly, this argument is rejected.

120. In addition, the Defence's argument that the Trial Chamber did not attempt "to understand and consider the statements, reports and letters submitted by the Defence", in support of its arguments regarding the Acholi traditional justice system, is also

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[226] Appeal Brief, paras 88, 96, 100, 106-108, 111-112.
[227] *See* Conviction Decision, paras 607, 612. The Appeals Chamber notes that D-0133's oral testimony at trial was mainly about his experience as a former child soldier. *See* Conviction Decision, para. 612.
[228] Decision on Additional Evidence, para. 20.
[229] Decision on Additional Evidence, para. 20.
[230] Decision on Additional Evidence, para. 20.
[231] Appeal Brief, para. 108.

without merit.[232] The Trial Chamber considered letters of Acholi leaders and the prior recorded testimony of, *inter alia*, D-0160, submitted by the Defence in support of its contention about the "efficiency of traditional justice mechanisms, their widespread acceptance in Northern Uganda and the desirability of making use of them in the present case".[233] The Trial Chamber noted that D-0160 discussed "the applicability of traditional justice mechanisms to the case of [Mr] Ongwen".[234] However, it considered that the Defence "did not provide a comprehensive definition of any such mechanism", and that the letters of Acholi leaders and witness statements, including that of D-0160, only referred to "Acholi traditional justice mechanisms as an established fact, and a clear possibility in the present case, without further detail".[235]

121. The Trial Chamber also referred to the evidence of D-0028, D-0087 and D-0114.[236] The Appeals Chamber observes that D-0028 and D-0114 are both Acholi,[237] and that D-0087 stated that he worked "with *Ker Kwaro* Acholi" in "interclan disputes".[238] As noted by the Trial Chamber, all three witnesses provided a detailed description of the Acholi traditional and cultural practices, including *Mato Oput* rituals.[239]

122. In that regard, D-0028 explained, in great detail, the Acholi ritual of *Mato Oput*. The Trial Chamber noted that he provided a definition of this process ,which "serves to reconcile members of two clans where a member of one clan kills a member of the other, and that its essential elements are payment of compensation (referring in his testimony to livestock) and a ritual of reconciliation intended to prevent revenge killings".[240] During the witness's testimony, the Presiding Judge highlighted that while the Trial Chamber had heard other witnesses on the issue of *Mato Oput*, D-0028's testimony was the most "detailed and went […] into the specificities", which allowed

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[232] Appeal Brief, para. 92.
[233] Sentencing Decision, para. 28.
[234] Sentencing Decision, para. 28, *referring, inter alia, to* UGA-D26-0015-1812.
[235] Sentencing Decision, para. 28.
[236] Sentencing Decision, para. 29.
[237] T-180, p. 10, lines 7-11 (D-0028 stated that he is from the "Pageya clan" of the Acholi people); T-247, p. 82, lines 10-11 (D-0114 stated that he comes from Northern Uganda and he is "an Acholi").
[238] D-0087: T-184, p. 16, lines 15-18.
[239] Sentencing Decision, para. 29, *referring to* D-0028: T-181, p. 59, line 8 to p. 62, line 20; D-0087: T-184, p. 21, line 3 to p. 22, line 3; D-0114: T-247, p. 29, line 15 to p. 30, line 18.
[240] Sentencing Decision, para. 29. *See also* T-181, p. 58, line 25 to p. 62, line 20.

the Trial Chamber to "see how complex the whole process [was]".[241] D-0114 and D-0087 also provided similar evidence on the *Mato Oput* process.[242] The Defence's argument on this point is therefore rejected.

123. The Defence further submits that the Trial Chamber should be ordered to "review properly" the evidence of D-0042, D-0060, D-0114, and D-0133, which, according to the Defence, will allow the Court to "give attention to the culture of those who are from the region".[243] The prior recorded testimony of these witnesses was introduced under rule 68(2)(b) of the Rules as additional evidence for sentencing purposes.[244] While the Trial Chamber did not expressly refer to the prior recorded testimony of D-0042, D-0060 and D-0114 in relation to the issue of the Acholi traditional justice system,[245] it considered the prior recorded testimony of D-0133.[246] The Appeals Chamber notes that D-0060 and D-0114 do not provide any specific information about the *Mato Oput* process.[247] On the other hand, D-0042 and D-0133[248] provide similar information on *Mato Oput* rituals and the reconciliation process to that provided by expert witness Allen, D-0028 and D-0114 in their live testimony, such as the traditional ritual of *nyono tongweno* or stepping on an egg,[249] the ceremony of preparing and drinking a bitter drink known as *oput*,[250] and the slaughtering of livestock.[251] Accordingly, the Appeals Chamber finds that the Defence fails to show any error on the part of the Trial Chamber.

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[241] T-181, p. 62, lines 21-25.
[242] Sentencing Decision, para. 29. *See also* T-247, p. 29, line 15 to p. 31, line 13; T-184, p. 21, line 3 to p. 22, line 3.
[243] Appeal Brief, paras 88, 112. *See also* UGA-D26-0015-1878; UGA-D26-0015-1835; UGA-D26-0015-1907; UGA-D26-0015-1889.
[244] Decision on Additional Evidence, pp. 15-16.
[245] The Trial Chamber referred to the prior recorded testimony of D-0060 and D-0114 in section II.A.2.ii. of the Sentencing Decision in relation to "other mitigating circumstances alleged by the Defence". *See* Sentencing Decision, paras 113-115. D-0060's live testimony in court did not provide any information on the *Mato Oput* rituals. *See* Conviction Decision, paras 596-597; T-197. D-0042 testified in court as a mental health expert witness on the "possible presence of mental disease or defect". *See* Conviction Decision, para. 593; T-250; T-251; T-255.
[246] Sentencing Decision, para. 16, fn. 31. The Trial Chamber also referred to the prior recorded testimony of D-0133 in section II.A.2.ii. of the Sentencing Decision in relation to "other mitigating circumstances alleged by the Defence". *See* Sentencing Decision, para. 116.
[247] UGA-D26-0015-1835, at 1835; UGA-D26-0015-1907, at 1907.
[248] D-0133's live testimony in court did not provide any specific information about the *Mato Oput* rituals. *See* Conviction Decision, para. 612; T-203; T-204.
[249] Sentencing Decision, para. 29; UGA-D26-0015-1889, at 1897; UGA-D26-0015-1878, at 1886; T-247, p. 29, line 16 to p. 30, line 3; T-28, p. 74, lines 9-11.
[250] UGA-D26-0015-1878, at 1886; T-247, p. 30, lines 12-18; T-181, p. 61, lines 15-19.
[251] UGA-D26-0015-1889, at 1897; T-247, p. 31, lines 6-8; T-181, p. 60, line 18 to p. 61, line 14.

124. Therefore, in light of the evidence relied upon by the Trial Chamber, as described above, the Appeals Chamber finds that, contrary to the Defence's contention, the Trial Chamber had sufficiently detailed information before it, which allowed it to form a comprehensive understanding of the Acholi traditional justice system and its rituals in reaching conclusions on the Defence's submissions. The Trial Chamber's considerations also show its detailed appreciation of the "relevant cultural beliefs and practices" raised by the Defence. As recalled above, the Trial Chamber rejected the Defence's request regarding the application of the Acholi traditional justice system into the Court's statutory framework on the basis of articles 23 and 77 of the Statute. As a result, the Appeals Chamber rejects, as unfounded, the Defence's arguments (i) that the Trial Chamber erred in giving no weight to the value of the traditional justice system and to "social rehabilitation and reintegration as a personal circumstance" of Mr Ongwen;[252] (ii) that the Trial Chamber impermissibly relied on the "views and concerns of victims";[253] and (iii) that, upon remand, the Trial Chamber should "review properly all of the material" related to D-0042, D-0060, D-0114 and D-0133.[254]

125. Finally, regarding the Defence's argument that the Trial Chamber disregarded its submissions on social rehabilitation and reintegration, and failed to correctly appreciate Mr Ongwen's "relevant cultural beliefs and practices" as a personal circumstance,[255] the Appeals Chamber finds this contention to be without merit. The Trial Chamber noted the Defence's request that a maximum sentence of 10 years should be imposed on Mr Ongwen[256] and that he should be allowed to go through the Acholi traditional justice system.[257] As highlighted above, the Trial Chamber discussed in considerable detail the Defence's submissions and the supporting evidence, despite having already rejected the Defence's plea to have the Acholi traditional justice system incorporated into the Court's statutory framework.[258] The Defence's argument is therefore rejected.

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[252] Appeal Brief, paras 90-99, 104-108.
[253] Appeal Brief, paras 73, 82-84, 109-110.
[254] Appeal Brief, paras 88, 112.
[255] Appeal Brief, paras 90-94, 97, 99.
[256] Sentencing Decision, para. 15, *referring to* Defence Sentencing Brief, paras 182-183.
[257] Sentencing Decision, para. 16, *referring to* Defence Sentencing Brief, paras 27-39.
[258] Sentencing Decision, paras 18, 28-43.

#### (c) Conclusion

126. In light of the above, the Appeals Chamber finds that the Defence fails to show any error in the Trial Chamber's finding that the Acholi traditional justice system cannot be incorporated into the Court's statutory framework. Accordingly, ground of appeal 3 is rejected.

## D. Ground of appeal 4: Alleged errors in sentencing Mr Ongwen for both crimes against humanity and war crimes for the same underlying conduct

127. Under ground of appeal 4, the Defence argues that the Trial Chamber erred in sentencing Mr Ongwen for both war crimes and crimes against humanity based on the same underlying conduct.[259] It submits that these errors materially affected the Sentencing Decision and resulted in a disproportionate sentence for Mr Ongwen.[260]

### *1. Summary of the submissions*

128. The Defence submits that the Trial Chamber erred in sentencing Mr Ongwen for both 18 crimes against humanity and 18 war crimes relating to the same underlying conduct.[261] The Defence contends that war crimes and crimes against humanity based on the same conduct are not distinct offences, and that sentencing Mr Ongwen twice for the same conduct violated the principle of *ne bis in idem*.[262] It argues that, although the Trial Chamber acknowledged the need to avoid double-counting, it "avoided addressing the issue" by erroneously viewing the overlap as not having a significant bearing on the determination of the joint sentence.[263]

129. The Prosecutor submits that the Trial Chamber correctly sentenced Mr Ongwen for war crimes and crimes against humanity based on the same underlying conduct.[264] He avers that the Defence misunderstands the two-step sentencing process under article 78(3) of the Statute, which requires a trial chamber to determine an individual sentence for every crime for which a person is convicted, before determining the joint

[259] Appeal Brief, paras 113-122.
[260] Appeal Brief, p. 39.
[261] Appeal Brief, paras 113, 122; T-266, p. 16, line 9 to p. 17, line 3.
[262] Appeal Brief, paras 117-118.
[263] Appeal Brief, paras 115-116, 119; T-266, p. 16, lines 13-17.
[264] Prosecutor's Response, para. 93.

sentence.[265] The Prosecutor argues that the Defence overlooks the fact that the Trial Chamber expressly took into account the factual overlap between the two sets of crimes and "reasonably found the extent of any overlap to have no practical impact on the joint sentence, given the circumstances of the case".[266] He contends that the Defence's arguments are premised on its incorrect view, set out in its appeal against the Conviction Decision, that war crimes and crimes against humanity based on the same conduct are not distinct offences and that cumulative convictions violate the principle of *ne bis in idem*.[267] The Prosecutor also submits that the Defence fails to show the material impact of the alleged error on the Sentencing Decision.[268]

130. Victims Group 1 reiterate the Trial Chamber's findings relevant to its determination of the joint sentence and note that the Defence does not argue that the Trial Chamber erred, when, in the exercise of its discretion, it imposed a sentence of 25 years.[269] Victims Group 1 further argue that the Defence "fails to explain in specific terms" the actual error in the Trial Chamber's determination of the joint sentence.[270]

*2. Relevant parts of the Sentencing Decision*

131. In the Sentencing Decision, in its determination of the individual sentences for each crime, the Trial Chamber noted that

> certain crimes for which [Mr] Ongwen was convicted were qualified simultaneously as both war crimes and crimes against humanity on the basis of the same conduct (entirely or essentially, in the case of torture), distinguished only by the circumstances of the corresponding contextual elements. Given the overlap of the underlying facts, the Chamber addresses below jointly the relevant factors and circumstances applicable to such facts underlying a war crime and a crime against humanity at the same time. This is done solely for the purpose of streamlined written reasoning. Indeed, contrary to the submission by the Defence that, for those 36 instances in which [Mr] Ongwen was convicted of overlapping war crimes and crimes against humanity based on the same underlying facts, the Chamber shall enter individual sentences "per act, not per count" and thus "only […] on 18 of the 36 counts", the Chamber recalls that Article 78(3) of the Statute mandates that separate sentences be pronounced for each of the crimes of which the person was convicted. The Chamber is mindful of the relevant factual overlap between the two sets of crimes, but considers that this aspect shall be taken

[265] Prosecutor's Response, paras 91, 93; T-266, p. 26, line 16 to p. 28, line 5.
[266] Prosecutor's Response, paras 91, 95; T-266, p. 28, line 25 to p. 29, line 25; T-266, p. 30, lines 21-23.
[267] Prosecutor's Response, paras 97-98.
[268] Prosecutor's Response, paras 92, 101-102; T-266, p. 30, line 2 to p. 31, line 2.
[269] Victims Group 1's Observations, paras 40-41; T-266, p. 39, line 22 to p. 40, line 1.
[270] Victims Group 1's Observations, para. 42.

> account [*sic*] in the context of the determination of the appropriate joint sentence.[271]

132. Later on, in its determination of the joint sentence, the Trial Chamber held:

> 379. […] [T]he Chamber does not consider any [instances of concurrence or partial overlap in the factual basis of certain crimes] – considered individually or in combination – to have a significant bearing in the determination of the joint sentence in the present case, given the strikingly large number of distinct convictions, holding entirely different factual basis, which have been pronounced by the Chamber. […]
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> 381. In other words, [Mr] Ongwen was convicted for a large number of crimes which he committed by way of a number of distinguishable criminal conducts (including several for which the highest individual sentence of 20 years of imprisonment is pronounced), each carrying its own distinct blameworthiness not otherwise absorbed within any other crime and corresponding individual sentence(s).
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> 382. Thus, and 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 circumstances of this case, any such issue to weigh noticeably in the present determination. […].[272]

*3. Determination by the Appeals Chamber*

133. The Appeals Chamber notes that the Defence premises its arguments on the view that cumulative convictions for crimes against humanity and war crimes based on the same conduct are impermissible, as well as its contention that the principle of *ne bis in idem* "undergirds the analysis of concurrences".[273] However, the Appeals Chamber has already considered and rejected these arguments, which the Defence raised in its appeal against the Conviction Decision.[274]

134. The Defence further appears to challenge the fact that the Trial Chamber determined individual sentences separately for each of the 18 counts of war crimes and crimes against humanity based on the same conduct.[275] The Appeals Chamber recalls that article 78(3) of the Statute reads in its relevant part: "When a person has been convicted of more than one crime, the Court shall pronounce a sentence for each crime

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[271] Sentencing Decision, para. 146 (footnote omitted). *See also* paras 183, 221, 256, 285, 334, 376.
[272] Sentencing Decision, paras 379, 381-382 (footnotes omitted).
[273] Appeal Brief, paras 117-118.
[274] Conviction Appeal Judgment, paras 1623, 1626, 1628, 1660.
[275] Appeal Brief, paras 113, 117, 122.

and a joint sentence specifying the total period of imprisonment". Therefore, the Trial Chamber correctly found that this provision "mandates that separate sentences be pronounced for each of the crimes of which the person was convicted",[276] and thereafter imposed individual sentences in relation to each of these crimes.[277]

135. The Defence further argues that the Trial Chamber used the same conduct to sentence Mr Ongwen for war crimes and crimes against humanity.[278] The Appeals Chamber notes that the Trial Chamber was aware of this factual overlap. The Trial Chamber noted that some of the crimes of which Mr Ongwen was convicted "were qualified simultaneously as both war crimes and crimes against humanity on the basis of the same conduct (entirely or essentially, in the case of torture), distinguished only by the circumstances of the corresponding contextual elements".[279] The Trial Chamber emphasised that it was mindful of the overlap and that "this aspect [would] be taken account [*sic*] in the context of the determination of the appropriate joint sentence".[280] The Appeals Chamber finds no error in the Trial Chamber's approach, which is, as explained above, in accordance with article 78(3) of the Statute.

136. Indeed, in its determination of the individual sentences, the Trial Chamber was aware of the factual overlap; it "addresse[d] […] jointly the relevant factors and circumstances applicable to such facts underlying a war crime and a crime against humanity at the same time".[281] Subsequently, when deciding on the joint sentence, the Trial Chamber reiterated "the need to take [the overlap] into due account to prevent that [Mr Ongwen] be punished beyond his actual culpability".[282]

137. The Appeals Chamber therefore finds no merit in the Defence's argument that the Trial Chamber counted the same conduct twice with respect to the 18 pairs of war crimes and crimes against humanity. The Trial Chamber was aware of the factual overlap and the need to take it into account in the determination of the joint sentence.

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[276] Sentencing Decision, para. 146.
[277] Sentencing Decision, pp. 133-138.
[278] Appeal Brief, paras 114, 117.
[279] Sentencing Decision, para. 146.
[280] Sentencing Decision, para. 146.
[281] Sentencing Decision, para. 146.
[282] Sentencing Decision, para. 379.

The Defence does not point to any finding of the Trial Chamber that would suggest the contrary.

138. The Defence further argues that the Trial Chamber "avoided addressing the issue of duplicative war crimes and crimes against humanity", as it viewed the overlap as not having a significant bearing on the joint sentence.[283] The Appeals Chamber is unable to accept the Defence's contention. As indicated above, there is nothing to suggest that the Trial Chamber "avoided addressing" the question of the factual overlap between war crimes and crimes against humanity. The Trial Chamber expressly referred to 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".[284]

139. Furthermore, in the finding to which the Defence refers, the Trial Chamber noted that it did not "consider any such overlap – considered individually or in combination – to have a significant bearing in the determination of the joint sentence in the present case".[285] It is clear that the Trial Chamber acknowledged in this sentence that it took the overlap into account, but that its impact was not significant. This was because of the "strikingly large number of distinct convictions, holding entirely different factual basis, which ha[d] been pronounced by the Chamber".[286] Contrary to the Defence's suggestion,[287] the Trial Chamber clearly provided "a reasoned determination" of the joint sentence, with which the Defence merely disagrees without showing any error or abuse of discretion. The Appeals Chamber therefore rejects this argument.

140. Finally, the Appeals Chamber notes that the allegations, included in a footnote and concerning "other pairs of crimes [sexual slavery and rape; and sexual slavery and forced marriage] based on the same underlying conduct that similarly should not have been the subject of double sentencing",[288] fall outside the scope of the appeal. This is because these allegations were not explicitly set out in the Notice of Appeal,[289] and the

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[283] Appeal Brief, paras 116, 119.
[284] Sentencing Decision, para. 382.
[285] Sentencing Decision, para. 379.
[286] Sentencing Decision, para. 379.
[287] Appeal Brief, para. 119.
[288] Appeal Brief, fn. 196.
[289] Notice of Appeal.

Defence introduces them in the Appeal Brief, without complying with the procedure set out in regulation 61 of the Regulations.[290]

141. No reasons are provided that would in any way justify the late addition of these allegations to the appeal. As a result, the Appeals Chamber will not delve into these submissions any further.[291]

#### *4. Conclusion*

142. Accordingly, the Appeals Chamber rejects ground of appeal 4.

## E. Ground of appeal 5: Alleged error in relying on events outside the temporal scope of the charges

143. Under this ground of appeal, the Defence submits that the Trial Chamber erred in law by relying on events, as aggravating circumstances, that took place outside of the temporal scope of the charges, "to the detriment and prejudice" of Mr Ongwen.[292] It requests the Appeals Chamber to either reduce the sentence or remand the matter to the Trial Chamber for reconsideration.[293]

#### *1. Summary of the submissions*

144. The Defence submits that despite the fact that Mr Ongwen has no record of criminal convictions, "[a] plain English reading" of the Sentencing Decision suggests "that alleged conduct which happened before the temporal jurisdiction of the Court was taken into account as aggravating circumstances".[294] In support of its argument, the Defence refers to several passages in the Sentencing Decision.[295]

145. The Prosecutor submits that the Defence's arguments "misrepresent the Sentencing Judgment and misunderstand the context in which the Chamber referred to [Mr] Ongwen's criminal conduct prior to 1 July 2002".[296] He further submits that the Defence "fails to show" the material impact of the alleged error.[297]

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[290] Appeal Brief, fn. 266.
[291] *See* Conviction Appeal Judgment, para. 111.
[292] Appeal Brief, para. 123.
[293] Appeal Brief, para. 136.
[294] Appeal Brief, paras 127, 129; T-266, p. 18, line 20 to p. 20, line 4.
[295] Appeal Brief, paras 130-133.
[296] Prosecutor's Response, para. 105; T-266, p. 51, line 19 to p. 52, line 9.
[297] Prosecutor's Response, para. 106.

146. Victims Group 1 contend that the Defence's submissions are "misleading", as it "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".[298] They argue that "criminal conduct that occurred outside of the charging period was solely considered as relevant for evidentiary considerations or as relevant for context".[299]

147. Victims Group 2 submit that the allegations advanced by the Defence "are untrue", arguing that "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".[300] They further contend that the contested facts were considered as relevant to the aggravating circumstance of the particular defencelessness of victims and to the gravity of the crime of forced marriage, and that these circumstances "fall perfectly within the scope of the charged period and the elements of the respective crimes".[301]

*2. Relevant parts of the Sentencing Decision*

148. In the section entitled "[Mr] Ongwen's abduction as a child", the Trial Chamber noted, *inter alia*, "that by the late 1990s, [Mr] Ongwen was already a significant member of the LRA with some status" and that he adapted into the LRA, "including with its violent methods", referring in this context to the abduction and rape of P-0101 in 1996, as well as the abduction of P-0099 and P-0226 in 1998.[302]

149. Elsewhere, in setting out the factors and circumstances specifically related to the sexual and gender-based crimes directly committed by Mr Ongwen, the Trial Chamber considered the fact that the victims of the crimes "were particularly defenceless within the meaning of Rule 145(2)(b)(iii)" as an aggravating factor.[303] In doing so, the Trial Chamber noted that "P-0226 was only around seven years old when abducted and around 12 years old when becoming [Mr] Ongwen's so-called 'wife'" and that four

[298] Victims Group 1's Observations, para. 44. *See also* paras 46-47.
[299] Victims Group 1's Observations, para. 45.
[300] Victims Group 2's Observations, paras 49, 52 (emphasis in original).
[301] Victims Group 2's Observations, paras 54-55.
[302] Sentencing Decision, paras 80, 84.
[303] Sentencing Decision, para. 287.

other women, including P-0099 and P-0101, "were of an age between approximately 19 and 21 years old at the time relevant to the crimes committed against them of which [Mr] Ongwen was found guilty under the charges brought against him".[304]

150. Specifically in relation to the crime of forced marriage as an inhumane act under article 7(1)(k) of the Statute, the Trial Chamber considered the "[f]actual consequences arising (also) from the imposition of these 'marriages'" as informing the gravity of the crime.[305] In this regard, it noted "the continuing nature […] of the features of at least some of these forced 'conjugal' relationships", considering that the association between Mr Ongwen and some of the victims "is exacerbated by the fact that, as part, and consequence of this imposition of forced marriage, children fathered by [Mr] Ongwen were also born to P-0099, P-0101, P-0214 and P-0227".[306] The Trial Chamber considered that

> [i]nsofar as the bearing of children fathered by [Mr] Ongwen constitutes a consequence, and a significant part of the (continuing) imposition, as a matter of fact, of a forced 'marriage' on the women concerned, it is of no relevance for the point made here by the Chamber that not all such children were actually conceived during the specific, narrower timeframe of the crime of forced marriage of which [Mr] Ongwen was convicted under Count 50.[307]

*3. Determination by the Appeals Chamber*

151. For the reasons that follow, the Appeals Chamber finds no merit in the arguments raised by the Defence under ground of appeal 5. At the outset, the Appeals Chamber recalls its findings made in the determination of ground of appeal 6 in the Conviction Appeal Judgment on the possibility to rely on evidence outside the scope of the charges.[308]

152. In this case, while it is correct that in the Sentencing Decision the Trial Chamber noted certain events that occurred outside the temporal scope of the charges, it did not consider crimes allegedly committed prior to the temporal scope of the charges as

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[304] Sentencing Decision, para. 287.
[305] Sentencing Decision, para. 292.
[306] Sentencing Decision, para. 292.
[307] Sentencing Decision, fn. 548.
[308] Conviction Appeal Judgment, section VI.B.5.(c)(ii) (Alleged erroneous reliance on evidence of facts falling outside the scope of the charges).

aggravating circumstances within the meaning of rule 145(2)(b)(i) of the Rules, as suggested by the Defence.[309]

153. Rule 145(2)(b)(i) of the Rules requires the Court to take into account, "as appropriate", as an aggravating circumstance, "[a]ny relevant prior criminal convictions for crimes under the jurisdiction of the Court or of a similar nature". The Trial Chamber did not refer to rule 145(2)(b)(i) of the Rules in any part of its assessment and it is clear from the Sentencing Decision that none of the events preceding the period relevant to the charges were considered as a "prior criminal conviction". Rather, the Trial Chamber discussed them in the context of (i) the "specific circumstances" of Mr Ongwen's abduction and early experience in the LRA, (ii) the aggravating circumstance of particularly defenceless victims, and (iii) the gravity of the crime of forced marriage.

154. First, in the Sentencing Decision, the Trial Chamber referred to the abduction and rape of P-0101 in 1996, as well as the abduction of P-0099 and P-0226 in 1998, when discussing Mr Ongwen's abduction as a child and his early experience in the LRA.[310] Indeed, the Trial Chamber referred to these events, among other considerations, in support of its finding "that by the late 1990s, [Mr] Ongwen was already a significant member of the LRA with some status".[311] It referred again to the abduction and rape of P-0101 and the fact that Mr Ongwen made her his wife "already in 1996" to illustrate its finding "that whereas during the first years following his abduction, [Mr] Ongwen's stay in the LRA was extremely difficult, he was soon noticed for his good performance as a commander – already in the mid-1990s".[312] The Trial Chamber also noted "[h]is adaption into the LRA, including with its violent methods".[313]

155. Furthermore, the Appeals Chamber notes that, ultimately, the Trial Chamber considered Mr Ongwen's abduction and early experience in the LRA to constitute "special circumstances", warranting a reduction of the sentence.[314] The Appeals Chamber therefore finds no error in the Trial Chamber's reference to, and consideration

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[309] Appeal Brief, paras 128-129.
[310] Sentencing Decision, paras 80, 84.
[311] Sentencing Decision, para. 80.
[312] Sentencing Decision, para. 84.
[313] Sentencing Decision, para. 84.
[314] Sentencing Decision, para. 88.

of, the events concerning P-0101, P-0099 and P-0226, that took place in 1996 and 1998, when assessing the impact of Mr Ongwen's abduction and early experience in the LRA on the sentence imposed.

156. Second, the events concerning P-0101, P-0099 and P-0226 that occurred outside the temporal scope of the charges were also considered in the context of the Trial Chamber's finding that the victims of the sexual and gender-based crimes directly committed by Mr Ongwen, and for which he was convicted,[315] were particularly defenceless, which the Trial Chamber found to constitute an aggravating circumstance under rule 145(2)(b)(iii) of the Rules.[316] In order to reach its conclusion, the Trial Chamber noted that "all seven women [including P-0099, P-0101 and P-0226] were abducted and suffered the crimes under consideration at a young age, with some of them being only children at that time", referring in this regard to the age of the victims when they were abducted and when they became Mr Ongwen's so-called "wives".[317]

157. The Trial Chamber also noted that Mr Ongwen "was obviously aware of the fact that the seven girls were of a young age, making them particularly defenceless with respect to the crimes committed against them; in fact he even intended the girls abducted by, or distributed to him to be of such young and vulnerable age".[318] As correctly noted by the Prosecutor,[319] it is thus clear that the reference to the date of the abductions and when the victims became so-called "wives" was made in the context of determining the state of defencelessness of the victims and Mr Ongwen's awareness of their young age. The Appeals Chamber finds no error in the Trial Chamber's determination.

158. Third, the Trial Chamber referred to the fact that P-0099, P-0101, P-0214 and P-0227 gave birth to children fathered by Mr Ongwen as a relevant consideration for

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[315] Forced marriage as an other inhumane act as a crime against humanity (count 50); torture as a crime against humanity and as a war crime (counts 51 and 52); rape as a crime against humanity and as a war crime (counts 53 and 54); sexual slavery as a crime against humanity and as a war crime (counts 55 and 56); enslavement as a crime against humanity (count 57); forced pregnancy as a crime against humanity and as a war crime (counts 58 and 59); and outrages upon personal dignity (count 60) (Sentencing Decision, para. 284).
[316] Sentencing Decision, para. 287.
[317] Sentencing Decision, para. 287.
[318] Sentencing Decision, para. 287.
[319] Prosecutor's Response, para. 113.

its assessment of the gravity of the crime of forced marriage directly committed by Mr Ongwen.[320] In this regard, the Trial Chamber discussed the "[f]actual consequences arising (also) from the imposition of these 'marriages'", referring to "the continuing nature, beyond the period of time of the established crime and even to date, of the features of at least some of these forced 'conjugal' relationships".[321] The Trial Chamber found that the association between Mr Ongwen and the victims was "exacerbated by the fact that, as part, and consequence of this imposition of forced marriage, children fathered by [Mr] Ongwen were also born to P-0099, P-0101, P-0214 and P-0227", and considered that this "further perpetuates the continuing bond between [Mr] Ongwen and his victims, extending beyond the psychological and social pressure created by the (forced) 'marriage' itself".[322]

159. In a footnote, the Trial Chamber acknowledged "that not all such children were actually conceived during the specific, narrower timeframe of the crime of forced marriage of which [Mr] Ongwen was convicted under Count 50".[323] However, it found this to be "of no relevance", given that "the bearing of children fathered by [Mr] Ongwen constitutes a consequence, and a significant part of the (continuing) imposition, as a matter of fact, of a forced 'marriage' on the women concerned".[324]

160. The Appeals Chamber notes that although the Trial Chamber did not specifically exclude from its consideration the births that took place before the time period relevant to the charges, its reference to the births considered as a "consequence of this imposition of forced marriage"[325] makes it clear that the Trial Chamber was only considering births that occurred *after* the time period relevant to the charges. Indeed, the births that occurred before the forced marriages, of which Mr Ongwen was convicted, could not have been considered as consequences of these crimes.

161. In this context, the Appeals Chamber recalls its finding in its judgment on the appeal against the Conviction Decision regarding the continuing nature of the crime of

[320] Sentencing Decision, para. 292.
[321] Sentencing Decision, para. 292.
[322] Sentencing Decision, para. 292.
[323] Sentencing Decision, fn. 548.
[324] Sentencing Decision, fn. 548.
[325] Sentencing Decision, para. 292.

forced marriage as well as its findings on the correctness of the Trial Chamber's reliance on evidence of acts that occurred outside the temporal scope of the charges in its determination of the sexual and gender-based crimes directly committed by Mr Ongwen.[326] It also recalls that although "conduct after the offence must not be taken into account for its own sake […] because the convicted person is not punished for it", such conduct "may inform the assessment of the gravity of the crime or offence or the convicted person's culpability or give rise to an aggravating circumstance".[327] The Appeals Chamber further recalls that "[a]s the person is sentenced for these offences – and only for these offences – there must be a sufficiently proximate link" between the conduct considered and the crimes for which the person has been convicted.[328]

162. In the Appeals Chamber's view, the Trial Chamber properly explained the relevance of the birth of the children fathered by Mr Ongwen to the gravity of the crime of forced marriage. It correctly found that this circumstance "perpetuates the continuing bond" between Mr Ongwen and the victims, "extending beyond the psychological and social pressure created by the (forced) 'marriage' itself".[329] There is thus "a sufficiently proximate link" between these births and the crime of forced marriage of which Mr Ongwen was convicted.[330] There is nothing to suggest that these births were taken into account for their own sake. In these circumstances, the Appeals Chamber finds no error in the Trial Chamber's consideration of the fact that children fathered by Mr Ongwen were born to P-0099, P-0101, P-0214 and P-0227, even though some of them were born outside the temporal scope of the charges.

163. Finally, the Defence's argument that the Trial Chamber "discussed again" "the same and similar issues" in the section of the Sentencing Decision on the joint sentence[331] is without merit. Nothing in the paragraphs of the Sentencing Decision referred to by the Defence allows "one [to] reasonably assume that factors which occurred before the temporal jurisdiction of the Court played a role in the determination of the Joint Sentence".[332] The Appeals Chamber therefore finds that the Defence fails

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[326] Conviction Appeal Judgment, paras 1029, 1093.
[327] *Bemba et al*. Sentencing Appeal Judgment, para. 114.
[328] *Bemba et al*. Sentencing Appeal Judgment, para. 115.
[329] Sentencing Decision, para. 292.
[330] *See also* in this regard Conviction Appeal Judgment, para. 1093.
[331] Appeal Brief, para. 133.
[332] Appeal Brief, para. 133, *referring to* Sentencing Decision, paras 378, 384-385.

to identify any error in this respect. The Appeals Chamber also refers to its above conclusion that the Trial Chamber did not err in its consideration of the events outside of the temporal scope of the charges.

#### *4. Conclusion*

164. Having rejected the totality of the arguments advanced by the Defence, the Appeals Chamber rejects ground of appeal 5.

## F. Ground of appeal 6: Alleged errors regarding circumstances of family life

165. Under ground of appeal 6, the Defence submits that the Trial Chamber erred in law and in fact by rejecting the mitigating factor and personal circumstance of Mr Ongwen's family life.[333]

#### *1. Summary of the submissions*

##### (a) The Defence's submissions

166. The Defence argues that the Trial Chamber erred "by rejecting the mitigating factor and personal circumstance" of Mr Ongwen's family life, contrary to previous decisions of chambers of the Court, including in the *Katanga* Case.[334] Referring to the UN Children's Rights Convention and the UN Minimum Rules for Treatment of Prisoners, the Defence submits that Mr Ongwen and his children have the right to seek a family life.[335] It avers that Mr Ongwen's desire to maintain family relations with his children is demonstrated by his efforts to enforce his right to family life and by several visits from his children.[336]

167. The Defence submits that the Trial Chamber improperly used the facts that Mr Ongwen was convicted for sexual and gender-based crimes and that his children lived in the bush to deny him the mitigating factor or personal circumstance of his family life.[337] It contends that Mr Ongwen is the biological father of the children concerned living in the bush, irrespective of how they were conceived, and that they

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[333] Appeal Brief, paras 137-150.
[334] Appeal Brief, paras 137, 147-150.
[335] Appeal Brief, paras 138-141.
[336] Appeal Brief, para. 142.
[337] Appeal Brief, para. 143.

should not be deprived of paternal care.[338] The Defence further submits that Mr Ongwen is also the head-of-household in relation to his family in Coorom, who has been struggling, and that his cousin, upon whom the family relied, recently died.[339] It requests that the Appeals Chamber reverse the Trial Chamber's decision and remand the matter back with instructions to consider Mr Ongwen's family circumstances as a mitigating factor or a personal circumstance.[340]

**(b) The Prosecutor's submissions**

168. The Prosecutor argues that the Trial Chamber "correctly and reasonably" concluded that Mr Ongwen's family circumstances do not warrant mitigation of his sentence.[341] He submits that the Defence misunderstands the Trial Chamber's reasoning, as it did not reject Mr Ongwen's family circumstances because he had been convicted of sexual and gender-based crimes, but because he had failed to care for his children's wellbeing.[342] The Prosecutor avers that, in any event, it was reasonable for the Trial Chamber to consider the fact that some of Mr Ongwen's children were born out of rapes which occurred during the charged period.[343]

169. The Prosecutor submits that the Defence's "reliance on the Court's jurisprudence is inapposite", as in none of the decisions where the convicted person's family situation warranted mitigation of the sentence "did the chambers consider the person's failure to comply with their family duties during the charged period".[344] He also argues that the family situation of the convicted person is considered as a mitigating factor only in exceptional circumstances.[345] The Prosecutor submits that the legal instruments guaranteeing the right to family life or concerning the treatment of prisoners, on which the Defence relies, are irrelevant to the determination of sentence.[346]

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[338] Appeal Brief, paras 144-145.
[339] Appeal Brief, paras 146, 148.
[340] Appeal Brief, para. 150.
[341] Prosecutor's Response, paras 123, 134.
[342] Prosecutor's Response, paras 125-126.
[343] Prosecutor's Response, para. 127.
[344] Prosecutor's Response, para. 128.
[345] Prosecutor's Response, para. 129.
[346] Prosecutor's Response, paras 130-133.

### (c) The Victims' observations

170. Victims Group 1 submit that it is questionable whether Mr Ongwen would be able to support his children given that he did not appear to take the opportunity to contact or take care of his children when he was in Uganda.[347] They argue that the Defence fails to show how Mr Ongwen has contributed to his family economically or emotionally and questions whether any potential financial support "would even be welcome given the circumstances in which his children were conceived".[348] Victims Group 1 argue that the Defence fails to show any error that materially affected the Sentencing Decision and object to "any suggestion that the Appellant's sentence be reduced".[349]

171. Victims Group 2 submit that the decisions to which the Defence refers, concern circumstances that are not similar to the "unique circumstances of the present case", where "the so-called 'family' and children of the Appellant were a result of the sexual and gender-based crimes directly perpetrated by him".[350] Victims Group 2 argue that, according to the ECtHR jurisprudence, the fact that Mr Ongwen is the biological father "is not conclusive" with respect to whether or not "family life" exists, and that close personal ties need to be demonstrated.[351] They submit that in this case, the so-called "wives" of Mr Ongwen "never wanted to be married to him", nor to have children with him.[352] Victims Group 2 argue that the illegal conduct giving rise to "the establishment of a *de facto* family must be taken into account when assessing alleged violations of the right to family life".[353]

172. Victims Group 2 submit that the Defence fails to show an error and that, even if the Trial Chamber had erred, such an error could not have had any impact on the sentence.[354] They argue that if the Trial Chamber had agreed with the Defence's submission, it would have sent out a "dangerous message that rapists are protected by law or their sentence can be mitigated if a child is born out of their criminal conduct".[355]

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[347] Victims Group 1's Observations, para. 55.
[348] Victims Group 1's Observations, para. 56.
[349] Victims Group 1's Observations, paras 57-58.
[350] Victims Group 2's Observations, para. 57.
[351] Victims Group 2's Observations, paras 58-60; T-266, p. 57, lines 4-12.
[352] Victims Group 2's Observations, para. 60.
[353] Victims Group 2's Observations, para. 61.
[354] Victims Group 2's Observations, paras 61-62.
[355] Victims Group 2's Observations, para. 63.

*2. The relevant parts of the Sentencing Decision*

173. In the Sentencing Decision, the Trial Chamber addressed the Defence's arguments that Mr Ongwen's family circumstances should be recognised as a mitigating factor as follows:

> The Chamber considers that while [Mr] Ongwen may harbour certain notions about his responsibilities as a father, 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. The assumption that, if allowed to return to Coorom, [Mr] Ongwen would make a meaningful contribution to the lives of his children, thereby reducing also the economic pressure on his other relatives, places more faith in [Mr] Ongwen than justifiable on the basis of his prior behaviour. It cannot be overlooked that while, as a result of his rapes, children were born in the bush to women and girls abducted into the LRA and forced to live with him as so-called "wives", those children were then kept with their mothers in the same coercive environment. This was not inevitable, as [Mr] Ongwen had a realistic possibility of escaping or leaving the LRA. The Chamber does not believe that [Mr] Ongwen is genuinely motivated by the responsibility to take care of his children, when he so obviously and so cruelly failed to take care of them when he had the chance.[356]

174. As a result, the Trial Chamber decided not to consider Mr Ongwen's family circumstances as a mitigating circumstance.[357]

*3. Determination by the Appeals Chamber*

175. The Appeals Chamber notes that the Defence's general allegation that the Trial Chamber erred in rejecting Mr Ongwen's family circumstances as a mitigating or personal circumstance is based on the following main arguments: (i) that the Trial Chamber failed to take into account Mr Ongwen's right to family life; (ii) that the Trial Chamber's approach differs from that of other chambers of the Court and violates Mr Ongwen's right to seek a family life; (iii) that he made efforts to enforce his rights and that his family members require his support; and (iv) that the Trial Chamber improperly relied on his conviction for sexual and gender-based crimes to reject his family circumstances as a mitigating factor.

176. The Appeals Chamber will consider these arguments in turn.

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[356] Sentencing Decision, para. 123 (footnote omitted).
[357] Sentencing Decision, para. 124.

### (a) Whether the Trial Chamber failed to take into account Mr Ongwen's right to family life

177. The Defence argues that Mr Ongwen and his children have the right to seek a family life, as guaranteed by the UN Children's Rights Convention and the UN Minimum Rules for Treatment of Prisoners.[358] The Appeals Chamber observes, however, that the human rights instruments invoked by the Defence do not concern the determination of a convicted person's sentence and are thus not relevant to the present issue.

178. Furthermore, to the extent that the Defence may be understood to argue that Mr Ongwen's sentence adversely affects his right to family life, the Appeals Chamber notes that internationally recognised human rights acknowledge that a lawful detention "entails by its nature a limitation on private and family life".[359]

179. As a result, the Appeals Chamber finds that the Defence has not demonstrated that the Trial Chamber erred by failing to take into account Mr Ongwen's right to family life.

### (b) Whether the Trial Chamber's approach differs from that of other chambers of the Court

180. The Defence argues that the Trial Chamber's rejection of the circumstances of Mr Ongwen's family life as a mitigating factor was contrary to previous decisions of the Court.[360] The Appeals Chamber notes at the outset that the mere fact that a trial chamber takes an approach that is different from that of other trial chambers, does not, in and of itself, amount to an error of law. More importantly, however, the Appeals Chamber is of the view that the cases which the Defence refers to are not comparable to the present case.

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[358] Appeal Brief, paras 138-141.
[359] *Messina* Judgment, para. 61. *See also* *Ouinas* Decision, p. 277; *Lavents* Judgment, para. 139; *Van der Ven* Judgment, para. 68; *Kornakovs* Judgment, para. 134.
[360] Appeal Brief, paras 137, 147-150.

181. In the *Katanga* Case, to which the Defence refers,[361] Trial Chamber II attached limited weight to the family situation of Germain Katanga.[362] In particular, Trial Chamber II noted:

> [Mr Katanga] sees his family only twice a year and, according to the Defence, shows a keen interest, especially in the children's well-being and education. The Chamber notes the tender ages of some of the children and the fact that, for reasons beyond their control, they have to face the challenges of growing up far away from their father, and considers that his "[TRANSLATION] strong" family will ease Germain Katanga's reintegration.[363]

182. It follows that while in the *Katanga* Case, Trial Chamber II took note of Mr Katanga's "keen interest" in his children's well-being and education,[364] in the present case, the Trial Chamber was not persuaded that Mr Ongwen is "genuinely motivated by the responsibility to take care of his children".[365]

183. Similarly, in the *Bemba et al.* Sentencing Decision,[366] Trial Chamber VII did not consider family circumstances as a mitigating factor, but as "overall circumstances" of the convicted persons, while at the same time expressing no doubts as to their genuine motivation to take care of their children.[367]

184. Since the Trial Chamber did express doubts as to Mr Ongwen's motivation, the findings in the *Katanga* Case and in the *Bemba et al.* Case are of no relevance to this case.

### (c) Alleged failure to consider Mr Ongwen's family circumstances

185. The Defence submits that Mr Ongwen made efforts to enforce his right to family life, that he received several visits from his children,[368] that his children living in the bush should not be deprived of paternal care by their biological father,[369] and that he is

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[361] Appeal Brief, paras 147-149.
[362] *Katanga* Sentencing Decision, para. 144.
[363] *Katanga* Sentencing Decision, para. 85 (footnotes omitted).
[364] *Katanga* Sentencing Decision, para. 85.
[365] Sentencing Decision, para. 123 (footnote omitted).
[366] Appeal Brief, para. 149, fn. 249.
[367] *Bemba et al.* Sentencing Decision, paras 62, 66 (regarding Mr Fidèle Babala), 90, 96 (regarding Mr Narcisse Arido), 244, 248 (regarding Mr Jean-Pierre Bemba Gombo).
[368] Appeal Brief, para. 142.
[369] Appeal Brief, paras 144-145.

the head of household in relation to his family in Coorom.[370] The Defence argues that Mr Ongwen's "large family deserved consideration as a mitigating factor, or at the least, a personal circumstance of the Appellant".[371]

186. The Appeals Chamber notes that the Trial Chamber considered the Defence's submissions relating to Mr Ongwen's family circumstances and examined statements made by relatives of Mr Ongwen.[372] It also examined evidence regarding children potentially fathered by Mr Ongwen.[373] Therefore, if the Defence's contention is that the Trial Chamber failed to consider those facts and circumstances, it is incorrect.

187. Other than listing the factors which, in its view, "deserved consideration",[374] and which, as shown above, were duly considered by the Trial Chamber, the Defence does not identify any error in the Trial Chamber's conclusion that it was unable to accept "[t]he assumption that, if allowed to return to Coorom, [Mr] Ongwen would make a meaningful contribution to the lives of his children, thereby reducing also the economic pressure on his other relatives".[375]

188. Consequently, the Appeals Chamber rejects the Defence's arguments regarding the Trial Chamber's consideration of Mr Ongwen's specific family circumstances.

#### (d) Alleged improper reliance on Mr Ongwen's conviction for sexual and gender-based crimes

189. The Defence argues that, despite the fact that Mr Ongwen is the biological father of his children, the Trial Chamber improperly relied on the fact that he was convicted of sexual and gender-based crimes and the fact that his children lived in the bush "to negate the mitigating factor and personal circumstance of [his] family life with his children".[376]

190. In the impugned finding, the Trial Chamber found that it would "be improper and even cynical, in the circumstances of the present case, to consider [Mr Ongwen's]

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[370] Appeal Brief, paras 146, 148.
[371] Appeal Brief, para. 148.
[372] Sentencing Decision, paras 117, 120-121.
[373] Sentencing Decision, para. 122.
[374] Appeal Brief, para. 148.
[375] Sentencing Decision, para. 123.
[376] Appeal Brief, paras 143-144.

fatherhood as a circumstance somehow warranting mitigation of his sentence".[377] The Trial Chamber noted that "[i]t [could not] be overlooked that while, as a result of his rapes, children were born in the bush to women and girls abducted into the LRA and forced to live with him as so-called 'wives', those children were then kept with their mothers in the same coercive environment".[378] The Trial Chamber thus considered it relevant that it was Mr Ongwen who committed the rapes, resulting in the birth of those children, and who perpetuated their upbringing in a coercive environment. The Appeals Chamber finds no error in the Trial Chamber's reliance on these relevant facts to conclude that Mr Ongwen was not genuinely motivated to take care of his children.

191. In addition, the Appeals Chamber notes the argument of Victims Group 2, that biological fatherhood is not always determinative of whether or not "family life" exists.[379] The ECtHR's jurisprudence, upon which Victims Group 2 rely, concerns the question of whether the fact that a person is the biological father of another person constitutes, in and of itself, "a family link which would fall under the protection of Article 8 of the [ECHR] under its 'family life' head".[380] In this respect, the Appeals Chamber notes that article 78(1) of the Statute and rule 145(1)(b) of the Rules specifically refer to "the individual circumstances of the convicted person" as the circumstances relevant to the determination of the sentence. It is thus not required that the convicted person demonstrate "a family link" in order to establish mitigating circumstances. Therefore, the jurisprudence to which Victims Group 2 refer is not directly relevant. Nevertheless, the Appeals Chamber accepts that this jurisprudence lends further support to the view that it was not erroneous for the Trial Chamber to conclude that the biological fatherhood of Mr Ongwen was not determinative to establish "the individual circumstances", given that the children concerned were born out of rape.

192. The Appeals Chamber also notes that the Trial Chamber did not rely solely on Mr Ongwen's conviction for rape and forced marriage to dismiss his family circumstances as a mitigating circumstance. Rather, the Trial Chamber focused on the

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[377] Sentencing Decision, para. 123.
[378] Sentencing Decision, para. 123.
[379] Victims Group 2's Observations, paras 58-60.
[380] *Evers* Judgment, para. 52.

likelihood of Mr Ongwen making "a meaningful contribution to the lives of his children".[381] In this regard, the Trial Chamber emphasised Mr Ongwen's failure to take care of his children to explain its finding that Mr Ongwen was not "genuinely motivated by the responsibility to take care of his children".[382] The Appeals Chamber considers the Trial Chamber's findings regarding Mr Ongwen's motivation to be relevant to its determination of whether his family circumstances warranted mitigation of his sentence. Mr Ongwen's conviction for sexual and gender-based crimes was, in the circumstances of the present case, a relevant factor. The Appeals Chamber is also satisfied that the Trial Chamber correctly weighed Mr Ongwen's fatherhood against the factors calling into question the genuine nature of his motivation to take care of his children.

193. Similarly, the Appeals Chamber finds that it was appropriate for the Trial Chamber to rely on the fact that Mr Ongwen's children were born in the bush and that they were kept with their mothers in a coercive environment.[383] These facts were clearly relevant to the Trial Chamber's conclusion about the nature of Mr Ongwen's motivation to take care of his children. The Defence does not demonstrate any error in this respect. As a result, the Defence's arguments on this point are rejected.

#### (e) Conclusion

194. For the foregoing reasons, the Appeals Chamber rejects ground of appeal 6.

## G. Grounds of appeal 7 and 10: Alleged errors in the Trial Chamber's failure to rule on mental incapacity as a mitigating or personal circumstance, as well as its reliance on Mr Ongwen's personal statement

195. The Appeals Chamber will address grounds of appeal 7 and 10 together. Under ground of appeal 7, the Defence raises two issues regarding Mr Ongwen's mental state. Firstly, the Defence submits that the Trial Chamber erred in law and in fact when it found that Mr Ongwen did not suffer from a "substantially diminished mental capacity at the relevant time".[384] Secondly, the Defence argues that the Trial Chamber erred in

[381] Sentencing Decision, para. 123.
[382] Sentencing Decision, para. 123.
[383] Sentencing Decision, para. 123.
[384] Appeal Brief, paras 151-170.

finding that Mr Ongwen's current mental health could not be taken into account as a personal circumstance.[385]

196. Under ground of appeal 10, the Defence submits that the Trial Chamber erred in law by using Mr Ongwen's unsworn statement in the Sentencing Decision to "negate the mitigating factor and personal circumstance of substantially diminished mental capacity", resulting in an increase of the sentence from 20 to 25 years of imprisonment.[386]

*1. Summary of the submissions*

**(a) The Defence's submissions**

197. With respect to the first issue under ground of appeal 7, the Defence submits that the Trial Chamber erred by applying a "beyond reasonable doubt" standard instead of a "balance of probabilities" standard when considering the mitigating circumstance of "substantially diminished mental capacity".[387] Specifically, the Defence avers that the findings on "substantially diminished mental capacity" are based on conclusions in the Conviction Decision regarding article 31(1)(a) of the Statute – which were based on a "beyond reasonable doubt" standard.[388] Accordingly, the Defence argues that the Trial Chamber failed to reassess, under a "balance of probabilities" standard, the findings of: (i) the Prosecution's expert witnesses; and (ii) the Defence expert witnesses and Professor Joop T. de Jong (hereinafter: "Professor de Jong").[389]

198. The Defence also submits that the Trial Chamber erroneously relied on the evidence of the Prosecutor's experts and lay persons, while failing to consider the Defence experts' evidence regarding Mr Ongwen's mental health.[390] The Defence asserts that the Trial Chamber erroneously relied on the testimony of lay persons, without properly considering the cultural aspects of their observations, and in particular, the fact that in the relevant culture, mental illness is not commonly discussed and "some persons may interpret behaviours as spirit possession".[391] Further, the Defence submits

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[385] Appeal Brief, paras 151, 171-187.
[386] Appeal Brief, paras 205-214.
[387] Appeal Brief, paras 152-155, 167.
[388] Appeal Brief, paras 152, 155, 170; T-266, p. 20, lines 16-24.
[389] Appeal Brief, paras 156-164; T-266, p. 20, line 25 to p. 21, line 1.
[390] Appeal Brief, paras 168, 170; T-266, p. 20, lines 19-20.
[391] Appeal Brief, para. 169; T-267, p. 30, lines 16-22.

that the Trial Chamber failed to assess that it took measures to adjust the trial schedule as a factor indicating that Mr Ongwen "more likely than not suffered from a substantially diminished mental capacity".[392]

199. Regarding the second issue under ground of appeal 7, the Defence submits that the Trial Chamber failed to "articulate the 'exceptional circumstances' standard used to determine" whether Mr Ongwen's current mental state can be taken into account as a mitigating circumstance.[393] Further, the Defence avers that the Trial Chamber failed to consider his purported mental disabilities as a personal circumstance and in its assessment of personal circumstances as a mitigating factor, despite those disabilities being recorded in (i) the Defence requests for medical examinations; (ii) Professor de Jong's report and diagnoses; (iii) the Defence experts' reports and diagnoses; (iv) the reports from the Registry; and (v) information on Mr Ongwen's suicide attempts.[394]

200. Under ground of appeal 10, the Defence argues that the Trial Chamber erred by using Mr Ongwen's unsworn statement, which he made in court, against him and requests that the Appeals Chamber remand the issue to the Trial Chamber.[395] The Defence submits that Mr Ongwen's unsworn statement reflected a moment of clarity and is not representative of the diagnosed mental disabilities from which he suffers.[396] The Defence also asserts that the Trial Chamber failed to use the "balance of probabilities" standard to assess Mr Ongwen's mental state.[397] The Defence submits that the use of Mr Ongwen's unsworn statement, including its content, violated his right to remain silent.[398]

### (b) The Prosecutor's submissions

201. With regard to the first issue under ground of appeal 7, the Prosecutor argues that since Mr Ongwen was not found to have suffered from mental disease or defect at the time of the conduct, the Trial Chamber "did not need to venture into a further discussion

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[392] Appeal Brief, paras 155, 166, 170.
[393] Appeal Brief, paras 171-176.
[394] Appeal Brief, paras 177-187. *See also* T-266, p. 7, lines 7-10.
[395] Appeal Brief, paras 175, 205, 214.
[396] Appeal Brief, paras 206-208.
[397] Appeal Brief, para. 209.
[398] Appeal Brief, paras 175, 210-213.

on whether a mental disorder or disease 'was more likely than not'".[399] The Prosecutor submits that the Trial Chamber correctly articulated the "balance of probabilities" standard and there is no indication that the Trial Chamber did not apply it.[400]

202. The Prosecutor further avers that the Defence's criticisms of the Prosecution's expert witnesses "do not accurately represent the experts' ultimate conclusion that [Mr] Ongwen did not suffer from a mental disease or defect at the time he committed the crimes".[401] Moreover, he argues that the Defence fails to identify any error in the Trial Chamber's decision not to rely on the evidence of the Defence experts due to methodological concerns.[402] The Prosecutor adds that the Trial Chamber did not rely on Professor de Jong's report because he examined Mr Ongwen's health at the time of trial rather than at the time of his conduct.[403] In the Prosecutor's view, the Defence's arguments regarding the Trial Chamber's reliance on the evidence of lay persons are unfounded, as the Trial Chamber "did not consider the evidence of [those persons] for diagnoses of mental disease or defect" and it was well aware of the "cultural aspect of their testimony".[404] The Prosecutor further submits that the Trial Chamber "correctly and reasonably concluded" that Mr Ongwen's arguments related to the trial schedule were "untenable" and "opportunistic".[405]

203. With respect to the second issue raised by the Defence, the Prosecutor avers that the Trial Chamber's reference to an "exceptional circumstances" standard is clear and it demonstrates that "a person's health warrants mitigation only in very rare cases and that the management of a convicted person's health is primarily a matter for the enforcement of the sentence", which is not the case here.[406] The Prosecutor further argues that the Defence fails to show that the Trial Chamber disregarded any of the evidence available to it.[407]

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[399] Prosecutor's Response, para. 142.
[400] Prosecutor's Response, paras 140-141, 168; T-266, p. 33, lines 13-20.
[401] Prosecutor's Response, paras 144-145.
[402] Prosecutor's Response, para. 146.
[403] Prosecutor's Response, para. 147.
[404] Prosecutor's Response, paras 151-153.
[405] Prosecutor's Response, paras 149-150.
[406] Prosecutor's Response, paras 156-157.
[407] Prosecutor's Response, paras 159-160.

204. Regarding ground of appeal 10, the Prosecutor avers that the Trial Chamber did not rely solely on Mr Ongwen's personal unsworn statement to determine the current state of his mental health and that it did not give any weight to that statement in determining his joint sentence. The Prosecutor submits that by choosing to make his statement, Mr Ongwen waived his right to silence.[408] He adds that the Trial Chamber's reliance on the unsworn statement did not violate Mr Ongwen's rights under article 67(1)(g) and (h) of the Statute.[409] Referring to ICTY and ICTR case law, the Prosecutor further submits that a trial chamber can consider and give due weight to an unsworn statement and it is allowed to consider such statement for the purposes of sentencing.[410]

#### (c) The Victims' observations

205. With respect to ground of appeal 7, Victims Group 1 posit that even if the Trial Chamber reassessed the factors under the "balance of probabilities" standard, the Defence does not demonstrate that the Trial Chamber would have arrived at a materially different conclusion.[411] They further submit that in this case, Mr Ongwen's mental health issues cannot be understood as constituting an "exceptional circumstance".[412]

206. Victims Group 2 submit that the Trial Chamber reassessed all relevant evidence upon which it previously relied for its findings under article 31(1)(a) of the Statute, using the "proper legal standard", and concluded that Mr Ongwen did not suffer from a substantially diminished mental capacity at the time of the relevant conduct.[413] Victims Group 2 further argue that the question concerning the adjustment of the trial schedule was "irrelevant and inconsequential" to the Trial Chamber's assessment, which related to the conduct at the relevant time.[414]

207. Regarding the Trial Chamber's decision not to rely on the Defence expert witnesses, Victims Group 2 argue that the "requirements for a fair trial do not impose on a court an obligation to accept an expert opinion merely because a party has

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[408] Prosecutor's Response, para. 199.
[409] Prosecutor's Response, paras 206-208.
[410] Prosecutor's Response, para. 209.
[411] Victims Group 1's Observations, para. 63.
[412] Victims Group 1's Observations, para. 66.
[413] Victims Group 2's Observations, paras 66-68; T-266, p. 46, lines 1-9.
[414] Victims Group 2's Observations, para. 70.

requested [so]".[415] Victims Group 2 further submit that the Trial Chamber defined the "exceptional circumstance" standard in a "clear" and "unequivocal" manner.[416] Victims Group 2 further submit that the Defence's arguments that the Trial Chamber erred by failing to consider Mr Ongwen's mental disabilities as a personal circumstance are based upon a false premise and, therefore, must be rejected.[417]

208. With respect to ground of appeal 10, Victims Group 1 aver that the Defence's argument that the Trial Chamber used Mr Ongwen's unsworn statement to impose an additional five years to the 20 years' imprisonment proposed by the Prosecutor is purely speculative.[418] Victims Group 1 further argue that the Trial Chamber expressly stated that it did not consider Mr Ongwen's failure to show remorse as an aggravating factor impacting the length of the sentence to be imposed.[419] Victims Group 2 argue that when determining the condition that constitutes a mitigating circumstance, "it is a typical exercise of a trial chamber's discretion" to observe "the appearance or the utterance of the convicted person when assessing his or her alleged ill-health".[420] In addition, Victims Group 2 posit that remorse or lack thereof, is a factor to be taken into account by a trial chamber when determining the appropriate sentence.[421]

### *2. Background and relevant parts of the Sentencing Decision*

209. On 5 December 2016, the Defence requested, pursuant to rule 135 of the Rules, that the Trial Chamber "[h]alt the opening of the trial" and "[o]rder a psychiatric and/or psychological examination" of Mr Ongwen to ensure that he understood the nature of the charges brought against him and, more broadly, that he was fit to stand trial.[422]

210. On 16 December 2016, the Trial Chamber rejected the request to order an examination of Mr Ongwen regarding the assessment of his fitness to stand trial, but

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[415] Victims Group 2's Observations, para. 71 (footnote omitted).
[416] Victims Group 2's Observations, paras 72-74. *See also* T-266, p. 46, line 23 to p. 47, line 1.
[417] Victims Group 2's Observations, para. 75.
[418] Victims Group 1's Observations, para. 86.
[419] Victims Group 1's Observations, para. 87.
[420] Victims Group 2's Observations, paras 83-84.
[421] Victims Group 2's Observations, para. 86.
[422] Defence Request of 5 December 2016 for a Stay of Proceedings, paras 1, 80.

granted, under rule 135 of the Rules, a psychiatric examination of Mr Ongwen's current mental condition.[423]

211. On 10 January 2019, the Defence requested a two-week adjournment of the proceedings so that two experts from the Defence could examine Mr Ongwen, and a further adjournment for an additional medical examination of Mr Ongwen's fitness to stand trial pursuant to rule 135 of the Rules.[424]

212. On 16 January 2019, the Trial Chamber rejected the request in part and granted a two-week adjournment so that Mr Ongwen could receive any necessary medical treatment.[425]

213. On 16 September 2019, the Defence requested, pursuant to article 64(2) of the Statute and rule 135 of the Rules, that the Trial Chamber order a psychiatric examination of Mr Ongwen "with a view to: making a diagnosis as to any mental condition or disorder that Mr. Ongwen may suffer at the present time that makes him unable to make an informed decision whether or not to testify in his defence".[426]

214. On 1 October 2019, the Trial Chamber rejected the request on the basis that there were no indications that would require a medical examination pursuant to rule 135 of the Rules.[427]

215. On 4 February 2021, the Trial Chamber rendered the Conviction Decision. In that decision, it made findings regarding, *inter alia*, the Defence's argument under article 31(1)(a) of the Statute that Mr Ongwen's criminal responsibility was excluded because he suffered from a mental disease or defect.[428] On the basis of the evidence of the Prosecutor's experts and the corroborating evidence heard at trial, the Trial Chamber found that "[Mr] Ongwen did not suffer from a mental disease or defect at the

[423] Decision on Defence's First Request for a Medical Examination, paras 28, 31, p. 18.
[424] Defence Request for Adjournment, paras 2, 5, 44.
[425] Decision on Request to Order an Adjournment, paras 11-12, 18, 20, p. 10.
[426] Defence's Third Request for a Medical Examination, paras 3, 27.
[427] Decision on Defence's Third Request for a Medical Examination, para. 29.
[428] Conviction Decision, para. 2450.

time of the conduct relevant under the charges" and that "[a] ground excluding criminal responsibility under Article 31(1)(a) of the Statute is not applicable".[429]

216. On 15 April 2021, Mr Ongwen gave a personal statement at the sentencing hearing.[430]

217. In the Sentencing Decision, in relation to the Defence's argument that Mr Ongwen suffered from a substantially diminished mental capacity at the material time, the Trial Chamber rejected this "proposed inference as entirely unconvincing" on the basis of

> the reliable expert evidence of Professor Mezey, Dr Abbo and Professor Weierstall-Pust, which goes precisely to the issue of [Mr] Ongwen's mental health at the relevant time, and in light of the multitude of corroborating information from the trial, as discussed extensively in the Trial Judgment.[431]

218. The Trial Chamber also stated, in relation to the Defence's proposal to rely on Professor de Jong's report:

> [C]onsidering that Professor De Jong's report was prepared for a different purpose, having as its object of examination [Mr] Ongwen's mental health at the time of the examination during the trial, and not at the time of his conduct relevant under the charges, the Chamber does not consider that it can rely on that report directly for its conclusions with respect to the issue at hand.[432]

219. The Trial Chamber concluded that the mitigating circumstance of substantially diminished mental capacity, under rule 145(2)(a)(i) of the Rules, did not apply.[433]

220. In relation to Mr Ongwen's personal statement at the hearing and his current mental health, the Trial Chamber stated:

> 103. In the view of the Chamber, and in line with international criminal tribunal jurisprudence to the effect that poor health is mitigating only in exceptional cases, the health of the convicted person at the time of sentencing need not automatically be taken into account and poor health as such should not automatically be seen as a mitigating circumstance. […] 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. But it is not necessary

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[429] Conviction Decision, para. 2580.
[430] T-261, p. 3, line 20 to p. 37, line 16.
[431] Sentencing Decision, para. 96.
[432] Sentencing Decision, para. 97 (footnotes omitted).
[433] Sentencing Decision, para. 100.

> in the present case to attempt to specify precisely in what cases that may be, as none of the information available to the Chamber as to [Mr] Ongwen's mental health at various times during his detention at the seat of the Court, or even the Defence submissions, point to anything exceptional.
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> 104. In fact, the Chamber finds itself greatly impressed by [Mr] Ongwen's personal statement in court during the sentencing hearing. [Mr] 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) […] [Mr] 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.
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> 105. Accordingly, the Chamber considers that [Mr] Ongwen's current mental health cannot be taken into account as a mitigating circumstance with respect to his sentencing.[434]

*3. Determination by the Appeals Chamber*

221. The Appeals Chamber notes that the Defence raises the following six issues under grounds of appeal 7 and 10: (i) the alleged error in failing to reassess the findings of the Prosecution's experts relied upon for the Conviction Decision; (ii) the alleged failure to reassess the evidence of the Defence expert witnesses and Professor de Jong; (iii) the alleged error in relying on the evidence of lay persons; (iv) the alleged failure to consider the adjustment of the trial schedule; (v) the alleged error in declining to consider Mr Ongwen's current mental health as a mitigating factor; and (vi) the alleged erroneous use of Mr Ongwen's unsworn statement to negate mitigating circumstances. The Appeals Chamber will examine them in turn.

**(a) Alleged failure to reassess the findings of the Prosecution's experts**

222. The Defence argues that the Trial Chamber ought to have reassessed the findings of the Prosecution's expert witnesses regarding Mr Ongwen's mental disorder under a "balance of probabilities" standard, rather than dismissing the mitigating circumstance of diminished mental capacity based on its findings made in the Conviction Decision.[435]

223. The Appeals Chamber recalls at the outset that said findings of the Trial Chamber made in the Conviction Decision concerned the question of whether a ground for excluding criminal responsibility under article 31(1)(a) of the Statute applied.[436] In

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[434] Sentencing Decision, paras 103-105 (footnotes omitted).
[435] Appeal Brief, paras 156-161.
[436] Conviction Decision, paras 2450-2580.

particular, the Trial Chamber considered the argument that pursuant to that provision, Mr Ongwen should not be criminally responsible due to "a mental disease or defect that destroy[ed] [his] capacity to appreciate the unlawfulness or nature of his […] conduct, or capacity to control his […] conduct to conform to the requirements of law".[437] By contrast, in the sentencing proceedings, the Trial Chamber considered the question of whether "[t]he circumstances falling short of constituting grounds for exclusion of criminal responsibility, such as substantially diminished mental capacity", under rule 145(2)(a)(i) of the Rules, applied.[438]

224. The Trial Chamber acknowledged the link between article 31(1)(a) of the Statute and rule 145(2)(a)(i) of the Rules: "As a 'circumstance[] falling short of constituting grounds for exclusion of criminal responsibility', [substantially diminished mental capacity] is linked to mental disease or defect under Article 31(1)(a) of the Statute".[439] While the factual basis relevant to both enquiries may be the same, the latter has a lower threshold.[440] Indeed, unlike under article 31(1)(a) of the Statute, "circumstances *falling short* of constituting grounds for exclusion of criminal responsibility"[441] may meet the requirements of rule 145(2)(a)(i) of the Rules. Furthermore, the provisions of this rule do not require that a mental disease or defect "destroys" the person's relevant capacity. It is sufficient to demonstrate that the person's mental capacity was "substantially diminished". It is also noted that article 31(1)(a) of the Statute concerns the person's

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[437] Article 31(1)(a) of the Statute; Conviction Decision, paras 2450, 2452.
[438] *See* Sentencing Decision, para. 92.
[439] Sentencing Decision, para. 92.
[440] *See Delalić et al.* Appeal Judgment, paras 582 ("[I]f the defendant raises the issue of *lack* of mental capacity, he is challenging the presumption of sanity by a plea of insanity. That is a defence in the true sense, in that the defendant bears the onus of establishing […] that, more probably than not, at the time of the offence he was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of his act or, if he did know it, that he did not know that what he was doing was wrong. Such a plea, if successful, is a complete defence to a charge and it leads to an acquittal." (footnote omitted, emphasis in original), 588 ("On the other hand, in many other countries where the defendant's total mental incapacity to control his actions or to understand that they are wrong constitutes a complete defence, his diminished mental responsibility does not constitute either a partial or a complete defence, but it is relevant in mitigation of sentence.") (footnote omitted), 590 ("[T]he relevant general principle of law upon which, in effect, both the common law and the civil law systems have acted is that the defendant's diminished mental responsibility is relevant to the sentence to be imposed and is not a defence leading to an acquittal in the true sense.").
[441] Emphasis added. The French version of this part of rule 145(2)(a)(i) of the Rules reads: "*Circonstances qui, tout en s'en approchant, ne constituent pas des motifs d'exonération de la responsabilité pénale*".

criminal responsibility, whereas rule 145(2)(a)(i) of the Rules applies to the determination of the appropriate sentence once the person has been convicted.

225. The Appeals Chamber also notes that in its assessment of mitigating circumstances, the Trial Chamber expressly referred to, and applied, a "balance of probabilities" standard.[442] Therefore, in light of the above-mentioned threshold under rule 145(2)(a)(i) of the Rules and the standard which the Trial Chamber applied to establish mitigating circumstances, the Appeals Chamber considers that the premise of the Defence's main argument underlying ground of appeal 7 is correct. Indeed, after having concluded in the conviction decision that the ground for excluding criminal responsibility under article 31(1)(a) of the Statute is not established, a trial chamber may consider the issue of mental capacity again in the sentencing proceedings. If it relies on the same evidence, a trial chamber must be mindful of the different standard of proof and the lower threshold under rule 145(2)(a)(i) of the Rules. It is therefore possible that a trial chamber rejects the ground for excluding criminal responsibility under article 31(1)(a) of the Statute and subsequently, when determining the sentence, finds that, based on the same evidence, the circumstance of substantially diminished mental capacity is established. This consideration will guide the Appeals Chamber's examination of the specific arguments of the Defence under ground of appeal 7.

226. The Defence refers to the evidence of Prosecution expert witnesses Dr Catherine Abbo (hereinafter: "P-0445") and Professor Roland Weierstall-Pust (hereinafter: "P-0447") that Mr Ongwen suffered traumatic events that may have impacted his mental health as an adult.[443] The Defence refers primarily to the following parts of their evidence.

227. In her report, P-0445 noted:

> From the time of his abduction, a very critical time for rewiring the brain to coming out of the bush, his wiring took a different turn as a result of the traumatic experiences and an unfavorable environment he lived in for over 25 years. [Mr Ongwen] suffers from mental illnesses […] according to available psychiatric reports. However, there is no evidence from the materials provided that these illnesses are directly linked to the crimes he allegedly committed. What

[442] Sentencing Decision, para. 54.
[443] Appeal Brief, paras 157-160.

> is however clear is the unfavourable environment over which he had no control as an abducted child growing into an adult negated his capacity to refrain from doing wrong because he was not presented with an alternative way of life in the bush, despite knowing that what he was doing was wrong.[444]

228. At trial, P-0445 testified about the traumatic environment in which Mr Ongwen lived from the age of 9 years:

> Mr Ongwen was in a traumatic environment. I think we all agree that the environment was traumatic. And when an individual is in a traumatic environment right from the age of say 9, they tend to be hypervigilant, they tend to want to […] mainly use the lower parts of the brain, which is for survival. And so that disadvantage of having been abducted at that young age, there is a possibility that […] the alleged crimes could have been committed because he was basically surviving, initially.[445]

229. In his First Report, P-0447 stated:

> There is no doubt that due to Mr. Ongwen's life in a war scenario, he was exposed to potentially traumatic events that could have preceded a psychopathological development and a later manifestation of a mental disorder.[446]

230. In the same report, P-0447 concluded that "there is no doubt that Mr. Ongwen experienced potentially traumatic events".[447] This expert witness also testified on the question of prolonged exposure to trauma that:

> in the case of Mr Ongwen it was […] not only exposure to one or two single incidents, but also this happened over years. So of course the breeding ground is there. That's why I expected, okay, if you have experienced this, it could have been possible to develop a mental disorder. But the development again is a second […] step. […] I do not doubt that it could have been a breeding ground for the development of a mental disorder.[448]

231. P-0447 also testified about whether Mr Ongwen developed mental health symptoms:

> [Mr Ongwen] was faced with things that could have potentially been traumatising. And the next question is, okay, if you experience this, do you also develop mental health symptoms? And I think that we find hints that support that maybe he suffered from one or the other symptom, which doesn't mean that a

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[444] P-0445's Report, UGA-OTP-0280-0732, at 0756.
[445] P-0445: T-166, p. 21, lines 6-12.
[446] P-0447's First Report, UGA-OTP-0280-0674, at 0697.
[447] P-0447's First Report, UGA-OTP-0280-0674,at 0700.
[448] P-0447: T-170, p. 23, lines 7-12.

> diagnosis is justified but, for example, intrusions or bad memories, or maybe also if he is affected when he speaks about his past, I think this all is something where I would say, okay, yes, it's plausible that he suffered at least from some symptoms.[449]

232. The Trial Chamber considered this evidence and concluded that Mr Ongwen "did not suffer from a mental disease or defect at the time of the conduct relevant under the charges".[450] The Trial Chamber recalled its finding made in the Conviction Decision and based, *inter alia*, on the evidence of P-0445 and P-0447, that "many of the actions undertaken by [Mr] Ongwen […] involved careful planning of complex operations, which is incompatible with a mental disorder".[451] It is noted that in this part of the Trial Chamber's determination of the matter it recalled its findings made in the Conviction Decision. As will be discussed further, the Trial Chamber also reassessed the evidence applying a "balance of probabilities" standard.

233. In particular, in the Conviction Decision, the Trial Chamber considered P-0445's evidence related to Mr Ongwen's abduction and possible disorders,[452] as well as her conclusion that Mr Ongwen "would seem to have matured developmentally against all odds with flexibility of moral reasoning which seem to have been not fully exercised before he becomes top commander".[453] The Trial Chamber also took note of P-0447's findings that Mr Ongwen "was exposed to potentially traumatic events that could have preceded a psychopathological development and a later manifestation of a mental disorder"[454] and that it was "plausible" that Mr Ongwen "'showed some signs of a mental disorder' during the period of the charges".[455] However, the Trial Chamber also considered the evidence of P-0447 that Mr Ongwen's suffering "from a trauma-related disorder is not sufficient to draw any conclusions about his capacity to appreciate the wrongfulness of his actions".[456] It noted P-0447's conclusion that "there is not sufficient evidence to justify the diagnosis of a manifest mental disorder during the period

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[449] P-0447: T-169, p. 74, lines 2-9.
[450] Sentencing Decision, para. 93, *referring to* Conviction Decision, para. 2580.
[451] Sentencing Decision, para. 93, *referring to* Conviction Decision, para. 2521.
[452] Conviction Decision, para. 2480, *referring to* P-0445's Report, UGA-OTP-0280-0732, at 0735; Conviction Decision, para. 2482, *referring to* P-0445's Report, UGA-OTP-0280-0732, at 0739, 0744-0751; P-0445: T-166, p. 21, lines 2-25.
[453] Conviction Decision, para. 2480, *referring to* P-0445's Report, UGA-OTP-0280-0732, at 0753.
[454] Conviction Decision, para. 2491, *referring to* P-0447's First Report, UGA-OTP-0280-0674, at 0697; P-0447: T-169, p. 18, lines 8-13.
[455] Conviction Decision, para. 2491, *referring to* P-0447's First Report, UGA-OTP-0280-0674, at 0698.
[456] Conviction Decision, para. 2490, *referring to* P-0447's First Report, UGA-OTP-0280-0674, at 0680.

between 2002 and 2005".[457] The Trial Chamber also considered P-0447's conclusion that it was "highly unlikely that [Mr Ongwen's] level of functioning was severely impaired, at least not for a longer period of time" and that "[h]e must have adapted to the war scenario".[458]

234. In the Sentencing Decision, the Trial Chamber concluded that "the results of the detailed evidentiary analysis of the possibility of mental disease or defect in [Mr] Ongwen are also incompatible with any consideration of substantially diminished mental capacity".[459] This conclusion shows that the Trial Chamber did not merely reiterate its findings made in the Conviction Decision. Rather, the Trial Chamber reassessed "the results of [its] detailed evidentiary analysis" in order to determine, under a "balance of probabilities" standard,[460] whether the evidence demonstrated that Mr Ongwen suffered from a substantially diminished mental capacity under rule 145(2)(a)(i) of the Rules.

235. Furthermore, the Trial Chamber noted that "the evidence establishes clearly that at all relevant times for the charges, [Mr] Ongwen did not suffer from a mental disease or defect".[461] It also found that "[t]he evidence indicates that he was in full possession of his mental faculties and exercised his role as commander effectively".[462] The Appeals Chamber notes that the Trial Chamber's reasoning in this respect is rather brief. The Trial Chamber seems to have assumed that its conclusions made in the Conviction Decision were clear, such that there was no need to elaborate on why they were "also incompatible with any consideration of substantially diminished mental capacity".[463] It would have been preferable for the Trial Chamber to indicate with more detail precisely how it reassessed the evidence under the different standard of proof and in relation to the different threshold. However, the Appeals Chamber finds no error, irrespective of this shortcoming.

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[457] Conviction Decision, para. 2491, *referring to* P-0447's First Report, UGA-OTP-0280-0674, at 0698; P-0447: T-169, p. 19, line 17 to p. 20, line 12.
[458] Conviction Decision, para. 2491, *referring to* P-0447's First Report, UGA-OTP-0280-0674, at 0698.
[459] Sentencing Decision, para. 94. *See also* para. 100.
[460] Sentencing Decision, para. 54.
[461] Sentencing Decision, para. 100.
[462] Sentencing Decision, para. 100.
[463] Sentencing Decision, para. 94. *See also* para. 100.

236. The Appeals Chamber recalls that in its appeal against the Conviction Decision the Defence already challenged aspects of these findings of the Trial Chamber and the Appeals Chamber rejected the Defence's arguments. In particular, the Appeals Chamber found that "the Trial Chamber's reliance on P-0445's evidence, which also considered the relevance of Mr Ongwen's abduction for her assessment, was not incompatible with its conclusion that Mr Ongwen did not suffer from a mental disease or defect at the relevant time".[464]

237. The Appeals Chamber also rejected the Defence's argument, based on P-0445's evidence, that the Trial Chamber ignored the fact that Mr Ongwen "lacked control" over the environment of the LRA and could not escape its "negative influences".[465] The Appeals Chamber noted that "while P-0445's holistic assessment of the evidence concerning Mr Ongwen's childhood development included the impact of his abduction and his lack of control, as an adolescent, over the adverse environment within the LRA, she, nevertheless, acknowledged that these factors did not absolve Mr Ongwen of criminal responsibility, as an adult, for the crimes charged".[466] While acknowledging that P-0445's "characterisation of these factors as 'important mitigating factors' may be viewed as significant for the purposes of sentencing", the Appeals Chamber noted P-0445's conclusion that "there is no evidence from [the psychiatric reports of the Defence experts and Professor de Jong] that [Mr Ongwen's mental] illnesses are directly linked to the crimes he allegedly committed".[467]

238. Furthermore, the Appeals Chamber rejected the Defence's argument that the Trial Chamber disregarded P-0445's conclusion that Mr Ongwen's psychosocial development was "arrested at the time of abduction".[468] It found that, in light of P-0445's assessment, "Mr Ongwen's psychosocial development at the time of his abduction had no bearing on his criminal responsibility for the crimes he was found to have committed as an adult".[469]

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[464] Conviction Appeal Judgment, para. 1371.
[465] Conviction Appeal Judgment, para. 1375.
[466] Conviction Appeal Judgment, para. 1377.
[467] Conviction Appeal Judgment, para. 1377, *referring to* P-0445's Report, UGA-OTP-0280-0732, at 0756.
[468] Conviction Appeal Judgment, para. 1378.
[469] Conviction Appeal Judgment, para. 1383.

239. Finally, the Appeals Chamber rejected the Defence's argument that it was incorrect for the Trial Chamber to conclude that Mr Ongwen, "who lived within this context of mass trauma as an abductee of the LRA, was not affected by, or was immune from, this mass trauma".[470] In that regard, the Appeals Chamber noted the Trial Chamber's reliance on the evidence of P-0447 that "trauma is of [a] subjective nature and that it need not necessarily lead to a trauma-related mental disorder".[471] It also noted that the evidence showed that Mr Ongwen's exposure to mass trauma did not necessarily result in him developing post-traumatic stress disorder or any other mental disorder that the Defence experts had diagnosed.[472] The Appeals Chamber concluded that it was reasonable for the Trial Chamber not to rely on Professor Musisi's evidence for its assessment under article 31(1)(a) of the Statute.[473]

240. The Appeals Chamber is mindful that these conclusions made in the Conviction Appeal Judgment concern findings which the Trial Chamber made in the Conviction Decision. However, as discussed above, the Trial Chamber reassessed these findings in the Sentencing Decision under the "balance of probabilities" standard. The Appeals Chamber's conclusions with regard to those findings are thus relevant to the present appeal.

241. In the present appeal, the Defence refers to the above findings of expert witnesses concerning Mr Ongwen's traumatic experiences and their possible impact on his mental health to argue that the Trial Chamber ought to have reassessed them under the "balance of probabilities" standard.[474] However, as shown above, the Trial Chamber duly considered these findings and reassessed them under the "balance of probabilities" standard and in light of the threshold of "substantially diminished mental capacity" under rule 145(2)(a)(i) of the Rules. The Trial Chamber relied on the ultimate conclusions of the experts that, despite the possible trauma-related disorder, Mr Ongwen's level of functioning was not severely impaired. The Appeals Chamber has already rejected Mr Ongwen's challenges to these findings made in his appeal

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[470] Conviction Appeal Judgment, para. 1301.
[471] Conviction Appeal Judgment, para. 1303, *referring to* Conviction Decision, para. 2489; P-0447's Report, UGA-OTP-0280-0674, at 0678-0679.
[472] Conviction Appeal Judgment, para. 1301.
[473] Conviction Appeal Judgment, para. 1306.
[474] Appeal Brief, paras 156, 161.

against the Conviction Decision. As indicated above, its conclusions in the Conviction Appeal Judgment are also relevant to the present appeal.

242. As noted above, the threshold for mitigating circumstances under rule 145(2)(a)(i) of the Rules is lower than that for grounds for excluding criminal responsibility under article 31(1)(a) of the Statute. It is therefore possible that some findings of the experts, upon which the Trial Chamber relied to reject the arguments regarding the exclusion of criminal responsibility, may still meet the threshold for the mitigating circumstance of substantially diminished mental capacity. Indeed, the Appeals Chamber acknowledged that P-0445's above-mentioned reference to "'important mitigating factors' may be viewed as significant for the purposes of sentencing".[475] However, as discussed earlier, despite their recognition of the traumatic nature of Mr Ongwen's childhood experience and its possible impact on his mental health, the experts' clear conclusion was that Mr Ongwen "would seem to have matured developmentally against all odds"[476] and that it was "highly unlikely that [Mr Ongwen's] level of functioning was severely impaired".[477] As discussed above, the Trial Chamber reassessed these findings under the "balance of probabilities" standard and in light of the threshold of "substantially diminished mental capacity".

243. The Appeals Chamber considers that these unambiguous findings of the experts do not support the proposition that Mr Ongwen suffered from a substantially diminished mental capacity. They thus do not demonstrate that "circumstances falling short of constituting" a ground for exclusion of criminal responsibility were established pursuant to rule 145(2)(a)(i) of the Rules. Rather, these findings demonstrate that the state of Mr Ongwen's mental health was far from constituting "substantially diminished mental capacity". It was therefore not unreasonable for the Trial Chamber to conclude, under the "balance of probabilities" standard, that "the results of the detailed evidentiary analysis of the possibility of mental disease or defect in [Mr] Ongwen are also incompatible with any consideration of substantially diminished mental capacity".[478]

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[475] Conviction Appeal Judgment, para. 1377.
[476] Conviction Decision, para. 2480, *referring to* P-0445's Report, UGA-OTP-0280-0732, at 0753.
[477] Conviction Decision, para. 2491, *referring to* P-0447's First Report, UGA-OTP-0280-0674, at 0698.
[478] Sentencing Decision, para. 94. *See also* para. 100.

244. The Defence also argues that by relying on its conclusions from the Conviction Decision, the Trial Chamber applied the "beyond reasonable doubt" standard instead of the "balance of probabilities" standard.[479] However, the evidentiary basis for the Trial Chamber's conclusions was unambiguous. It clearly showed that Mr Ongwen did not suffer from a substantially diminished mental capacity. Accordingly, the Defence fails to show that the Trial Chamber applied the incorrect standard.

245. For the foregoing reasons, the Appeals Chamber rejects these arguments raised under ground of appeal 7.

#### (b) Alleged failure to reassess the evidence of the Defence expert witnesses and Professor de Jong

246. The Defence argues that the Trial Chamber failed to reassess, under the "balance of probabilities" standard, the findings of the Defence expert witnesses, namely Dr Dickens Akena (hereinafter: "D-0041") and Professor Emilio Ovuga (hereinafter: "D-0042"), as well as Professor de Jong.[480] It also raises the issue of "the [Trial] Chamber's unequivocal rejection of the Defence Experts, total acceptance of Prosecution Expert evidence, and related errors".[481]

247. The Appeals Chamber notes at the outset that the latter argument is based on submissions incorporated by reference to the Defence's appeal against the Conviction Decision.[482] The Appeals Chamber recalls that it is impermissible to incorporate by reference arguments that are not set out in the appeal brief.[483]

248. In the Sentencing Decision, the Trial Chamber decided, for reasons explained in the Conviction Decision, not to rely on the expert evidence of D-0041 and D-0042.[484] Those reasons were that the Defence experts had: (i) lost their objectivity by blurring the roles of treating physicians and forensic experts;[485] (ii) "failed to apply scientifically

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[479] Appeal Brief, paras 152-155.
[480] Appeal Brief, paras 162-165; T-266, p. 20, lines 24-25.
[481] Appeal Brief, para. 168. *See also* para. 170; T-266, p. 20, lines 19-20.
[482] Appeal Brief, para. 168 (the Defence submits that it "extensively covered this in the *Defence Appeal Brief Against the Convictions in the Judgment of 4 February 2021*, which discusses the Chamber's unequivocal rejection of the Defence Experts, total acceptance of Prosecution Expert evidence, and related errors" (footnote omitted)).
[483] Conviction Appeal Judgment, para. 92.
[484] Sentencing Decision, para. 95, *referring to* Conviction Decision, section IV.D.1.iv.
[485] Conviction Decision, paras 2528-2531.

validated methods and tools for use as a basis for a forensic report";[486] (iii) expressed inconsistent or contradictory opinions;[487] (iv) "failed to take into account other sources of information about [Mr] Ongwen which were readily available to them";[488] (v) failed to address "malingering as a possible explanation for the presence of symptoms of mental disorders";[489] and (vi) provided very general analyses and findings, without identifying their relevance to the charged period nor the specific factual context in which Mr Ongwen acted.[490]

249. In the Sentencing Decision, the Trial Chamber indicated that it also did not rely on D-0042's subsequent report prepared for the purposes of sentencing, as it was "built on the premise of the conclusions in previous reports prepared by [D-0042] and [D-0041]" and affected by "the same methodological concerns".[491]

250. Regarding Professor de Jong's findings, the Trial Chamber recalled its assessment, made in the Conviction Decision, that "Professor De Jong's report was prepared for a different purpose, having as its object of examination [Mr] Ongwen's mental health at the time of the examination during the trial, and not at the time of his conduct relevant under the charges".[492] The Trial Chamber therefore decided not to rely on that report "directly for its conclusions with respect to the issue at hand".[493]

251. The Appeals Chamber notes that the Defence raised similar, but far more detailed arguments, in its appeal against the Conviction Decision and that the Appeals Chamber rejected them.[494] The Appeals Chamber concluded that the "Trial Chamber did not err in finding that it could not rely on the Defence Experts' evidence, given the concerns it had over the methodology employed by these experts".[495] The Appeals Chamber also

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[486] Conviction Decision, paras 2532-2535.
[487] Conviction Decision, paras 2536-2544.
[488] Conviction Decision, paras 2545-2557.
[489] Conviction Decision, paras 2558-2568.
[490] Conviction Decision, paras 2569-2573.
[491] Sentencing Decision, para. 95.
[492] Sentencing Decision, para. 97, *referring to* Conviction Decision, paras 2576-2579.
[493] Sentencing Decision, para. 97.
[494] Conviction Appeal Judgment, section VI.F.1(b) (Grounds of appeal 27, 29, 31-32, and 37-41: Alleged errors in the Trial Chamber's assessment of the Defence Experts' evidence).
[495] Conviction Appeal Judgment, para. 1277.

considered similar arguments regarding the report of Professor de Jong.[496] The Appeals Chamber found that the Defence showed no error in the Trial Chamber's "decision not to rely on Professor de Jong's report for its conclusions under article 31(1)(a) of the Statute".[497]

252. Finally, the Appeals Chamber already examined the Defence's argument that the Conviction Decision "simply chooses the Prosecution expert evidence over the Defence expert evidence".[498] The Appeals Chamber rejected that argument and found that "there is no indication that the Trial Chamber analysed the evidence of the experts selectively or to the exclusion of other relevant evidence on the record".[499]

253. In the present appeal, the Defence does not explain, nor is it readily apparent, why the Trial Chamber's findings on the reliability of the Defence experts' evidence and the report of Professor de Jong had to be reassessed in the sentencing proceedings. It is also unclear why, as argued by the Defence, the application of the "balance of probabilities" standard would have led the Trial Chamber to make different findings. The Defence's arguments amount to a mere disagreement with the Trial Chamber's findings without identifying an error. The Appeals Chamber therefore rejects the present arguments of the Defence.

254. In light of the foregoing considerations, the Appeals Chamber rejects these arguments raised under ground of appeal 7.

### (c) Alleged error in reliance on the evidence of lay persons

255. The Defence argues that the Trial Chamber erroneously relied on the testimony of lay persons, without properly considering the cultural aspects of their observations, and that some persons may interpret certain behaviours as "spirit possession".[500]

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[496] Conviction Appeal Judgment, section VI.F.1(c) (Grounds of appeal 19 and 42: Alleged error in the Trial Chamber's failure to rely on Professor de Jong's report for its conclusions under article 31(1)(a) of the Statute).
[497] Conviction Appeal Judgment, para. 1288.
[498] Conviction Appeal Judgment, para. 1120.
[499] Conviction Appeal Judgment, para. 1123.
[500] Appeal Brief, para. 169; T-267, p. 30, line 22 to p. 31, line 2.

256. In the Sentencing Decision, the Trial Chamber noted, based on its findings in the Conviction Decision, that

> nothing in the testimonies of P-0099, P-0101, P-0214, P-0226, P-0227, P-0235 or P-0236 indicates that these women, who were […] held as so-called "wives" or otherwise captive in [Mr] Ongwen's immediate proximity at various times over the course of around 20 years, observed behaviour on the part of [Mr] Ongwen suggestive of a mental disease or defect.[501]

257. In the Conviction Decision, the Trial Chamber also found that

> [c]ontrary to what is implied by the Defence, the Chamber is not looking in this evidence [from the trial] for diagnoses of mental disease or defect. It is clear that, save for the experts within the scope of their expertise, the witnesses in the case are not qualified to make such diagnoses. Rather, the exercise consists of assessing whether any descriptions in particular of the conduct of [Mr] Ongwen correspond to symptoms of mental disorders. Further, as correctly pointed out by the Prosecution, the possibility that witnesses may regard symptoms of mental disorders as spirit possession is immaterial, insofar as they would still describe certain symptoms, irrespective of the cause attributed to them.[502]

258. The Appeals Chamber observes that it has already examined similar arguments raised in the Defence's appeal against the Conviction Decision. In particular, the Appeals Chamber considered the argument that the Trial Chamber failed to consider the cultural aspects of lay persons' observations, who could perceive Mr Ongwen's behaviour as spirit possession.[503] It also examined the Defence's argument that the "Trial Chamber failed to recognise that certain symptoms of mental disease or defect may be expressed in culturally sensitive ways".[504] The Appeals Chamber rejected these arguments and found that the Defence showed "no error in the Trial Chamber's conclusion that lay persons who interacted with Mr Ongwen would have noted symptoms of mental disorders".[505] The Appeals Chamber also found that the Trial Chamber did not err by "disregarding some cultural issues when assessing Mr Ongwen's mental health" and in "treating certain incidents as trivial".[506]

259. The Appeals Chamber notes that the above-mentioned conclusions in the Conviction Appeal Judgment concern the Trial Chamber's findings on issues such as

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[501] Sentencing Decision, para. 93, *referring to* Conviction Decision, para. 2519.
[502] Conviction Decision, para. 2501 (footnotes omitted).
[503] Conviction Appeal Judgment, para. 1244.
[504] Conviction Appeal Judgment, para. 1339.
[505] Conviction Appeal Judgment, para. 1247.
[506] Conviction Appeal Judgment, para. 1340.

cultural sensitivity and a lay person's ability to note symptoms of mental disorders. Given the nature of these issues, the Appeals Chamber considers that its conclusions in the Conviction Appeal Judgment apply to the present appeal, despite the application of the different threshold and the different standard of proof in the sentencing proceedings. It therefore rejects the present sub-ground of ground of appeal 7.

#### (d) Alleged failure to consider the adjustment of the trial schedule

260. The Defence argues that the Trial Chamber failed to assess the fact that it took measures to adjust the trial schedule as a factor showing that Mr Ongwen suffered from a substantially diminished mental capacity.[507]

261. The Trial Chamber addressed the Defence's argument regarding the adjustment of the trial schedule and noted that it had not, even in the context of decisions on trial management, "[found] or otherwise express[ed] the view that [Mr] Ongwen suffered from 'significantly diminished capacity'".[508]

262. The Appeals Chamber notes that the Defence's argument is unsubstantiated. Indeed, the Defence does not point to any decision or order of the Trial Chamber allegedly recognising that Mr Ongwen suffered from a substantially diminished mental capacity at the relevant time. Nor does the Defence show any error in the Trial Chamber's statement that it never expressed such a view. Accordingly, the Appeals Chamber dismisses this sub-ground of ground of appeal 7.

#### (e) Alleged error in declining to consider Mr Ongwen's current mental health as a mitigating factor

263. The Defence challenges the Trial Chamber's rejection of Mr Ongwen's current mental state as a personal circumstance or a mitigating factor.[509] The Defence argues that the Trial Chamber failed to articulate the standard of "exceptional circumstances" and to "cite primary law" that clarifies that standard, or, alternatively, it "should have

[507] Appeal Brief, paras 155, 166.
[508] Sentencing Decision, para. 98.
[509] Appeal Brief, paras 171-187.

provided a reasoned statement explaining its conclusion that the Appellant's health conditions are not exceptional".[510]

264. The Appeals Chamber finds no merit in the Defence's arguments. The Trial Chamber considered the Defence's submissions on Mr Ongwen's current mental health and concluded that it could not be taken into account as a mitigating circumstance.[511] Moreover, contrary to the Defence's assertion, the Trial Chamber clearly set out the standard of "exceptional cases" for accepting poor health as a mitigating factor. It referred to the jurisprudence of the ICTY and the standard which it articulated is consistent with that jurisprudence.

265. Indeed, in the judgments cited by the Trial Chamber, the ICTY Appeals Chamber held that poor health is a mitigating factor only in "exceptional or rare cases".[512] Furthermore, the Trial Chamber explained the standard it adopted, by clarifying that "[o]nly 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".[513] The Trial Chamber also held that "the management of the convicted person's health is primarily a matter for the enforcement of the imposed sentence, rather than a factor bearing upon the determination of its length".[514] Thus, the Defence does not demonstrate that this standard lacks clarity. Nor does it cite to any "primary law", which provides more detail to this standard and which, in its view, the Trial Chamber should have quoted.

266. Finally, the Defence does not demonstrate that the Trial Chamber failed to provide a reasoned statement in this respect. To the contrary, the Trial Chamber clearly articulated the standard and held that "none of the information available to the Chamber as to [Mr] Ongwen's mental health at various times during his detention at the seat of

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[510] Appeal Brief, paras 172-174.
[511] Sentencing Decision, paras 101-105.
[512] *Šainović et al.* Appeal Judgment, para. 1827; *Galić* Appeal Judgment, para. 436; *Blaškić* Appeal Judgment, para. 696. *See also Prlić et al.* Appeal Judgment, para. 3315; *Babić* Appeal Judgment on Sentence, para. 43.
[513] Sentencing Decision, para. 103.
[514] Sentencing Decision, para. 103. *See also Prlić et al.* Appeal Judgment, para. 3315.

the Court, or even the Defence submissions, point to anything exceptional".[515] The Appeals Chamber therefore rejects these arguments.

267. Further, the Defence submits that the Trial Chamber failed to consider Mr Ongwen's purported mental disabilities as a personal circumstance or as a mitigating factor, despite those disabilities being recorded in: (i) the Defence's requests for medical examinations of Mr Ongwen; (ii) Professor de Jong's report; (iii) the Defence experts' reports; (iv) the information from the Registry; and (v) the information on Mr Ongwen's suicide attempts.[516]

268. The Appeals Chamber notes that the Defence does not clearly identify the alleged error. It only argues that the Trial Chamber ought to have considered Mr Ongwen's alleged mental disabilities, "because [they] were recorded in the trial record many times".[517] The Defence does not expressly argue, nor is it readily apparent from the quoted sources recording Mr Ongwen's condition, that those alleged disabilities constitute an "exceptional case" within the meaning adopted by the Trial Chamber.

269. To the extent that the Defence can be understood to argue that the Trial Chamber erred by disregarding those sources allegedly recording Mr Ongwen's mental disabilities, the Appeals Chamber finds no merit in this argument. It is clear from the Sentencing Decision that the Trial Chamber considered documents in which Mr Ongwen's current condition is established. The Trial Chamber noted that the Defence's argument on Mr Ongwen's current mental health "is based on essentially the same evidence" as the submissions concerning the alleged substantially diminished mental capacity.[518]

270. The Trial Chamber specifically referred to the sources which the Defence lists in its appeal brief. It referred to "the Defence submissions" and "the information available to the Chamber as to [Mr] Ongwen's mental health at various times during his detention at the seat of the Court".[519] It also referred to "essentially the same evidence" as that

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[515] Sentencing Decision, para. 103.
[516] Appeal Brief, paras 177-187. *See also* T-266, p. 7, lines 7-10.
[517] Appeal Brief, para. 177.
[518] Sentencing Decision, para. 101.
[519] Sentencing Decision, para. 103.

upon which the Defence relied to argue that Mr Ongwen suffered from a substantially diminished mental capacity.[520] This appears to be a reference to the reports of Defence experts and the report of Professor de Jong. As discussed earlier in this judgment, the Trial Chamber decided not to rely on these sources.[521] It follows that the Trial Chamber clearly had regard to all of these sources when it concluded that "none of the information available to [it] […] point to anything exceptional".[522]

271. The Appeals Chamber therefore rejects this sub-ground of ground of appeal 7.

#### (f) Alleged erroneous use of Mr Ongwen's unsworn statement to negate mitigating circumstances

272. The Defence argues that the Trial Chamber erred by using Mr Ongwen's unsworn statement, which he made in court, against him.[523]

273. In the Sentencing Decision, in addition to its conclusion that "none of the information available to [it] […] point[ed] to anything exceptional",[524] the Trial Chamber referred to its own impressions of Mr Ongwen's personal statement in court to conclude that his current mental health could not be taken into account as a mitigating circumstance.[525] The Trial Chamber also referred to Mr Ongwen's personal statement to conclude that, given the absence of any expressed remorse, this did not warrant the application of the mitigating circumstance under rule 145(2)(a)(ii) of the Rules.[526]

274. The Appeals Chamber notes that the Defence misrepresents the Sentencing Decision. First, contrary to the Defence's assertion, the Trial Chamber did not use Mr Ongwen's unsworn statement "to increase the sentence from 20 years to 25 years of imprisonment".[527] The Trial Chamber only referred to his personal statement to determine that the relevant mitigating circumstances did not apply. Second, the Defence incorrectly submits that the Trial Chamber relied on that statement "to negate the mitigating factor and personal circumstance of substantially diminished mental

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[520] Sentencing Decision, para. 101.
[521] Sentencing Decision, para. 95.
[522] Sentencing Decision, para. 103.
[523] Appeal Brief, paras 205-214.
[524] Sentencing Decision, para. 103.
[525] Sentencing Decision, paras 104-105.
[526] Sentencing Decision, paras 42, 394.
[527] Appeal Brief, paras 205, 213.

capacity".[528] As summarised above, the Trial Chamber referred to that statement in the context of the current state of Mr Ongwen's mental health and the absence of any expressed remorse.

275. The Defence further submits that the Trial Chamber erroneously "used a discrete moment in time […] to determine the overall mental state" of Mr Ongwen, whereas he "has moments of extreme clarity, but he also has moments of extreme problems".[529] The Appeals Chamber notes that the Trial Chamber primarily relied on other information available to it, which, in its finding, did not "point to anything exceptional" with respect to Mr Ongwen's mental health.[530] It is therefore not the case that the assessment of his mental health was based entirely on that "discrete moment in time". Rather, the Trial Chamber's impression of that particular statement given by Mr Ongwen in court only reaffirmed the conclusion that, based on the available information, the mitigating circumstances of poor health did not apply.

276. Furthermore, the Trial Chamber's enquiry was limited to examining whether the current mental health of Mr Ongwen was one amounting to an "exceptional case".[531] The Defence does not explain how the alleged variability of Mr Ongwen's condition would have affected the Trial Chamber's conclusion that his overall mental health did not amount to an "exceptional case" such as to warrant the mitigation of his sentence. This argument is therefore rejected.

277. The Defence further asserts that the Trial Chamber failed to use the "balance of probabilities" standard to assess Mr Ongwen's mental state.[532] The Defence refers in this respect to its submissions made under ground of appeal 7 and to excerpts from its Sentencing Brief, which it annexed to the Appeal Brief.[533] To the extent that these submissions repeat those made under ground of appeal 7, the Appeals Chamber refers to its relevant findings above. As far as the Defence seeks to incorporate its submissions made in the Defence Sentencing Brief, the Appeals Chamber recalls that it is not

[528] Appeal Brief, paras 205, 214.
[529] Appeal Brief, paras 206, 208. *See also* para. 207.
[530] Sentencing Decision, para. 103.
[531] Sentencing Decision, para. 103.
[532] Appeal Brief, para. 209.
[533] Annex A to the Appeal Brief, paras 85-101.

permissible to incorporate by reference in the appeal brief, submissions made in other filings.[534] Furthermore, contrary to the Defence's contention,[535] regulation 36(2)(b) of the Regulations clearly stipulates that "[a]n appendix shall not contain submissions".[536] This is so irrespective of whether the main filing uses the entire page limit or not. The Appeals Chamber will therefore not consider these submissions.

278. Finally, the Defence submits that the Trial Chamber used the content of Mr Ongwen's personal statement in its determination of his sentence and that it thus violated his right to remain silent.[537] The Appeals Chamber notes that the Defence does not explain how the Trial Chamber's reference to Mr Ongwen's personal statement violated his right under article 67(1)(g) of the Statute "[n]ot to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence". Mr Ongwen was neither compelled to testify nor compelled to confess his guilt.

279. If the Defence is to be understood to argue that the Trial Chamber drew adverse inferences from Mr Ongwen's personal statement, the Appeals Chamber notes that a trial chamber has a broad discretion in "determining what constitutes a mitigating factor, and the weight, if any, to attribute to it".[538] In this respect, the discretion of a trial chamber when determining the sentence, and especially when examining evidence on the person's character, is not constrained by the same rules as when determining the person's guilt or innocence.[539] Rather, in these circumstances, a trial chamber, in its discretion, may rely on any factor provided that such factors do not infringe on the convicted person's rights. For instance, a trial chamber may not rely on a person's "failure to give oral testimony as an aggravating factor in determining his [or her] sentence", as this would run counter to the "prohibition against consideration of silence in the determination of guilt or innocence".[540] However, a trial chamber may, for instance, rely on a person's "conduct during trial proceedings, ascertained primarily

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[534] *See* paragraph 247 above.
[535] Appeal Brief, fn. 355.
[536] *See also* *Kenya* Decision on Request for Disqualification, para. 5.
[537] Appeal Brief, paras 175, 205, 210-213.
[538] *Ntaganda* Sentencing Appeal Judgment, para. 174, *referring to* *Bemba et al.* Sentencing Appeal Judgment, para. 188; *Lubanga* Sentencing Appeal Judgment, para. 111.
[539] *Delalić et al.* Appeal Judgment, paras 787-788.
[540] *See* *Delalić et al.* Appeal Judgment, para. 783 (emphasis in original omitted). *See also* para. 785.

through the Trial Judges' perception" of the person.[541] The Appeals Chamber is of the view that the Trial Chamber's reliance on its impressions of Mr Ongwen's personal statement does not fall into the former category of impermissible factors. Rather, it is a case of permissible reliance on the trial judges' perception of Mr Ongwen's conduct.

280. Furthermore, the Trial Chamber was careful to rely on its impressions of Mr Ongwen's personal statement only to confirm its findings: (i) that the potential mitigating circumstance under rule 145(2)(a)(ii) of the Rules was not established, as Mr Ongwen had not expressed remorse;[542] and (ii) that his current mental health could not be taken into account as a mitigating circumstance.[543] When referring to Mr Ongwen's submissions during the sentencing hearing to note the absence of "any expression of empathy for the numerous victims of his crimes" and his "constant focus on himself", the Trial Chamber made it clear that this was "not an aggravating factor in and of itself or an element otherwise impinging as such on the length of the prison sentence".[544] The Trial Chamber's reliance on Mr Ongwen's personal statement thus only served the purpose of finding the absence of two mitigating circumstances – a finding already supported by other evidence or information. The Trial Chamber made it clear that that statement was not used to establish an aggravating factor or that it otherwise affected the length of Mr Ongwen's sentence.

281. The Appeals Chamber therefore rejects Mr Ongwen's arguments.

#### (g) Conclusion

282. Having rejected or dismissed all the arguments of the Defence, the Appeals Chamber rejects grounds of appeal 7 and 10.

## H. Ground of appeal 8: Alleged errors by disregarding evidence on duress as a mitigating circumstance

283. Under this ground of appeal, the Defence submits that the Trial Chamber erred in law and in fact by disregarding evidence in its assessment of whether the circumstances

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[541] *Delalić et al.* Appeal Judgment, para. 788.
[542] Sentencing Decision, para. 42.
[543] Sentencing Decision, paras 104-105.
[544] Sentencing Decision, para. 394.

of the present case met the threshold of duress as a circumstance falling short of constituting a ground for excluding criminal responsibility.[545]

*1. Summary of the submissions*

284. The Defence submits that the evidence adduced during trial showed that "the LRA rank structure can only be understood in the context of the spiritualism within which it operated" and owing to the spiritual actions by Joseph Kony.[546] The Defence contends that the Trial Chamber erred by disregarding the evidence from D-0133, D-0114 and D-0060, as well as "a plethora of [other] evidence", on how spiritualism "played a pivotal role on the actions of [Mr Ongwen]".[547] The Defence argues that the Trial Chamber's failure "to take duress into account resulted in a disproportionate sentence".[548]

285. The Prosecutor requests the dismissal *in limine* of a number of arguments made by the Defence in other filings that are sought to be included and substantive arguments contained in an annex to its appeal brief.[549] The Prosecutor further argues that the Defence inappropriately challenges findings made in the Conviction Decision in the present appeal and that, to this extent, its arguments should also be dismissed *in limine*.[550] Moreover, he contends that the ground of appeal should be "summarily dismissed" since the Defence merely repeats the arguments made before the Trial Chamber without showing an error in the Trial Chamber's determination of the same.[551] The Prosecutor avers that, should the Appeals Chamber not dismiss the Defence's arguments *in limine*, the Trial Chamber "reasonably assessed the evidence of D-0060, D-0114 and D-0133".[552] The Prosecutor submits that in the absence of any factual basis establishing duress it was reasonable for the Trial Chamber to conclude that the mitigating circumstance of duress under rule 145(2)(a)(i) of the Rules was not applicable.[553]

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[545] Appeal Brief, p. 66, paras 193-204.
[546] Appeal Brief, paras 193-195, 204.
[547] Appeal Brief, paras 197-203; T-266, p. 23, lines 7-25.
[548] Appeal Brief, para. 204.
[549] Prosecutor's Response, paras 171, 174, 176, 183.
[550] Prosecutor's Response, paras 175, 183.
[551] Prosecutor's Response, para. 177.
[552] Prosecutor's Response, paras 178-182.
[553] Prosecutor's Response, para. 191.

286. Victims Group 1 submit that ground of appeal 8 "is an attempt to re-litigate" the Trial Chamber's findings made in the Conviction Decision and is framed as a mere disagreement, rather than an error of law, procedure or fact.[554] Victims Group 2 argue that a factual finding of duress is necessary in order for duress to constitute a mitigating circumstance.[555] Victims Group 2 submit that the Trial Chamber found that there was a "total absence of duress whatsoever".[556] Accordingly, Victims Group 2 submit that because guilt or innocence is a question to be determined prior to sentencing, the Defence cannot challenge the validity of the conviction via the sentencing submissions.[557]

*2. Relevant parts of the Conviction and Sentencing Decisions*

287. In the Conviction Decision, the Trial Chamber found that "there is no basis in the evidence to hold that [Mr] Ongwen was subjected to a threat of imminent death or imminent or continuing serious bodily harm to himself or another person at the time of his conduct underlying the charged crimes".[558] It further found that "[i]n fact [Mr Ongwen] frequently acted independently and even contested orders received from Joseph Kony".[559] The Trial Chamber concluded that "[d]uress as a ground excluding criminal responsibility under Article 31(1)(d) of the Statute is therefore not applicable".[560]

288. In the Sentencing Decision, the Trial Chamber addressed the Defence's argument that duress, "while not amounting to a complete defence under Article 31(1)(d)", should be considered as a mitigating circumstance.[561] The Trial Chamber noted that "in all cases, a 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".[562] The Trial Chamber referred to its findings in the Conviction Decision[563] to conclude, "on the

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[554] Victims Group 1's Observations, paras 71-75. *See also* T-266, p. 42, line 3 to p. 43, line 3.
[555] Victims Group 2's Observations, para. 77.
[556] Victims Group 2's Observations, para. 78.
[557] Victims Group 2's Observations, para. 78.
[558] Conviction Decision, para. 2668.
[559] Conviction Decision, para. 2668.
[560] Conviction Decision, para. 2670.
[561] Sentencing Decision, paras 106-116.
[562] Sentencing Decision, para. 109.
[563] Sentencing Decision, paras 110, 112.

same basis", that "duress is not applicable in the present case as a mitigating circumstance pursuant to Rule 145(2)(a)(i) of the Rules".[564]

289. The Trial Chamber examined three documents submitted by the Defence for the purpose of sentencing, to conclude that a report from D-0060 "[did] not contain any critical assessment of the statements received in particular from [Mr] Ongwen, which appear to have been taken at face value", and was therefore "not suitable for use as evidence in these proceedings".[565] With respect to a document prepared by D-0114, the Trial Chamber noted that it "relate[d] directly to issues that were resolved in the [Conviction Decision] based on reliable evidence" and that the value of the paper was "diminished by virtue of the author declaring a motivation to achieve […] a more lenient sentence for [Mr] Ongwen".[566] The Trial Chamber also found a report by D-0133 not to be suitable as evidence in view of "the stated basis for the report".[567]

*3. Determination by the Appeals Chamber*

290. The Appeals Chamber notes at the outset that the Defence incorporates by reference its arguments made in another filing[568] and arguments included in an annex to its Appeal Brief.[569] As discussed earlier in this judgment,[570] this is not permissible and the Appeals Chamber will not consider these arguments.

291. Rule 145(2)(a)(i) of the Rules provides that in its determination of the sentence pursuant to article 78(1) of the Statute, "the Court shall take into account, as appropriate: […] [m]itigating circumstances such as: […] the circumstances falling short of constituting grounds for exclusion of criminal responsibility, such as substantially diminished mental capacity or duress". Although the Defence frames this ground of appeal as one raising legal and factual errors, the Defence does not take issue with the Trial Chamber's legal interpretation of this provision.[571] Therefore, the below

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[564] Sentencing Decision, para. 111.
[565] Sentencing Decision, para. 114.
[566] Sentencing Decision, para. 115.
[567] Sentencing Decision, para. 116.
[568] Appeal Brief, para. 192.
[569] Appeal Brief, para. 202.
[570] *See* paragraph 247 above.
[571] Sentencing Decision, paras 108-109 ("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) of the Rules. In the view of the Chamber, this mitigating circumstance can be found in cases of duress not meeting the thresholds of necessity or

determination by the Appeals Chamber is limited to the alleged factual errors raised in the Appeal Brief.

292. The Defence's main argument under this ground of appeal is that the Trial Chamber erred by disregarding evidence which, in the Defence's view, demonstrated that Mr Ongwen was in a state of duress within the meaning of rule 145(2)(a)(i) of the Rules.[572] It refers in particular to a report prepared by D-0133,[573] a "paper" by D-0114,[574] a report by D-0060[575] and "a plethora of evidence on record".[576] However, other than summarising aspects of the reports or simply referring to several transcripts in a footnote, the Defence does not explain how this evidence would have led the Trial Chamber to conclude that the mitigating circumstance of duress had been established.

293. In any event, the Appeals Chamber recalls that in the Conviction Decision, the Trial Chamber undertook a detailed assessment of all relevant facts and evidence to determine the potential applicability of duress as a ground excluding the criminal responsibility of Mr Ongwen[577] and referred to this analysis in the Sentencing Decision.[578] The Trial Chamber recalled that "[b]ased on a thorough analysis of evidence, duress was excluded in the present case as the conduct constituting the crimes [Mr] Ongwen was convicted of was not caused by a threat of death or serious bodily harm to [Mr] Ongwen or another person".[579] On the same basis, it determined that "duress is not applicable in the present case as a mitigating circumstance pursuant to Rule 145(2)(a)(i) of the Rules".[580]

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reasonableness of the action taken by the perpetrator to avoid the threat, or where the specific mental element is not met. Needless to say, the application of this mitigating circumstance is not automatic in cases of duress not meeting all of the criteria of Article 31(1)(d) of the Statute, but must be assessed on the facts of each case. Importantly, in all cases, a 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").

[572] Appeal Brief, paras 197-199, 201, 204.
[573] Appeal Brief, paras 195-197.
[574] Appeal Brief, paras 198-199.
[575] Appeal Brief, paras 200-201.
[576] Appeal Brief, para. 203.
[577] Conviction Decision, section IV.D.2.
[578] Sentencing Decision, para. 110, fn. 200.
[579] Sentencing Decision, para. 111.
[580] Sentencing Decision, para. 111.

294. In its Conviction Appeal Judgment, the Appeals Chamber has already considered in depth and rejected the Defence's arguments relating to Mr Ongwen's status in the LRA hierarchy and the applicability of the LRA disciplinary regime to him,[581] as well as purported errors regarding threats from Joseph Kony and his killing of senior commanders,[582] and alleged errors in relation to Joseph Kony's purported spiritual powers.[583] The Appeals Chamber notes in this regard that, in arguing that relevant evidence was ignored or disregarded, the Defence appears to raise identical issues in its sentencing appeal brief.

295. Specifically in relation to the evidence of D-0133, D-0114 and D-0060,[584] the Appeals Chamber notes that it has already considered similar arguments with respect to D-0060, raised in the Defence's appeal against the Conviction Decision. In that decision, the Trial Chamber noted that D-0060 "did not question the statements made to him about the spiritual influence on LRA fighters and did not consider it to be his role to make a judgment about the truthfulness or falsity of the statements".[585] The Trial Chamber identified similar shortcomings in the report prepared by D-0060 for the purposes of sentencing. It found that "the report does not contain any critical assessment of the statements received in particular from [Mr] Ongwen, which appear to have been taken at face value".[586]

296. In the Conviction Appeal Judgment, the Appeals Chamber rejected the Defence's argument that, in the Conviction Decision, the Trial Chamber failed to properly assess, *inter alia*, the evidence of D-0060.[587] The Appeals Chamber noted that the Trial Chamber explained why it found D-0060's evidence to be of "limited value".[588] In the Sentencing Decision, the Trial Chamber also explained the reasons upon which it decided not to rely on the report prepared by D-0060 for the purposes of the sentencing proceeding. The Appeals Chamber notes that, other than asserting that "the statements

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[581] Conviction Appeal Judgment, paras 1445-1456.
[582] Conviction Appeal Judgment, paras 1482-1490.
[583] Conviction Appeal Judgment, paras 1545-1562.
[584] Appeal Brief, paras 195-201.
[585] Conviction Decision, para. 597.
[586] Sentencing Decision, para. 114.
[587] Conviction Appeal Judgment, para. 1550.
[588] Conviction Appeal Judgment, para. 1553.

from [Mr Ongwen] were properly and critically assessed by [D-0060]",[589] the Defence does not explain how the Trial Chamber erred by not relying on D-0060's report.

297. Regarding D-0133, the Trial Chamber took note of his report[590] and found it not to be "suitable for use as evidence in the case in relation to the issue at hand".[591] The Trial Chamber referred in this context to the stated basis for the report:

> that the report is based on "insights acquired from years of interaction with abducted children", that it "garners insight from the eight years of service on the CRC committee, numerous public discourses and interactions with State Parties, other members of the Committee and the various stakeholders", that it is "also based on [D-0133's] own experience and recollection of what happened to [him] and other abductees", and that it also makes reference to "relevant reports, publications and legal texts".[592]

298. The Defence does not allege any error in this finding of the Trial Chamber regarding the reliability of the report of D-0133. Rather, it merely argues that the Trial Chamber erred in disregarding it.[593] In addition, the content of D-0133's report quoted in the Appeal Brief concerns matters that were already discussed in the Conviction Decision and confirmed in the Conviction Appeal Judgment. Arguments of the Defence that were similar to the present ones have thus already been considered and rejected. As the Defence does not raise anything new, the Appeals Chamber dismisses the Defence's arguments regarding D-0133 as unsubstantiated.

299. With respect to D-0114, the Trial Chamber decided not to rely on his paper,[594] as (i) it "relates directly to issues that were resolved in the [Conviction Decision] based on reliable evidence" and (ii) its value was "diminished by virtue of the author declaring a motivation to achieve a specific result – a more lenient sentence for [Mr] Ongwen".[595] The Defence does not identify any specific error in relation to the Trial Chamber's rejection of D-0114's paper. It merely reiterates that the paper was "informed by his own personal and professional experience".[596] Furthermore, the Defence does not engage with the Trial Chamber's remark that D-0114's paper covered issues already

[589] Appeal Brief, para. 201.
[590] UGA-D26-0015-1889.
[591] Sentencing Decision, para. 116.
[592] Sentencing Decision, para. 116, fn. 214.
[593] Appeal Brief, para. 197.
[594] UGA-D26-0015-1907.
[595] Sentencing Decision, para. 115.
[596] Appeal Brief, para. 199.

resolved in the Conviction Decision, nor does it point to any content of the report that would relate to any other relevant issues. Accordingly, the Defence's argument regarding D-0114's paper is dismissed as unsubstantiated.

#### *4. Conclusion*

300. Having rejected or dismissed all arguments of the Defence under ground of appeal 8, the Appeals Chamber rejects this ground of appeal.

## I. Ground of appeal 11: Alleged error in the Trial Chamber's reliance on "aggravating circumstances" when determining the joint sentence

301. Under this ground of appeal, the Defence submits that the Trial Chamber impermissibly relied on the "accumulation of aggravating factors" when calculating a joint sentence pursuant to article 78(3) of the Statute and abused its discretion in imposing a joint sentence that was "arbitrary and without justifiable legal and evidentiary basis".[597] It requests that the Appeals Chamber reverse the "five-year additional sentence in the Joint Sentence and order the sentence against the Appellant to be no more than 20 years, which is the highest single sentence".[598]

#### *1. Summary of the submissions*

302. The Defence submits that, when imposing the joint sentence of 25 years of imprisonment, the Trial Chamber "disregarded overlapping factors, partially overlapping factors, general factors and circumstances which were double-counted" or considered as aggravating factors.[599] In its view, the Trial Chamber failed to "provide a reasoned statement" on the criteria relied upon to impose the joint sentence[600] and also failed to "balance relevant factors, individual circumstances and mitigating factors".[601] According to the Defence, when imposing the joint sentence, the Trial Chamber "abused its discretion" by relying on the same factors relevant to the determination of the individual sentences.[602] In addition, the Defence complains that

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[597] Appeal Brief, para. 222. *See also* paras 227-233.
[598] Appeal Brief, para. 235.
[599] Appeal Brief, para. 218 (footnote omitted). *See also* para. 221; T-266, p. 17, lines 8-19, p. 17, line 22 to p. 18, line 1.
[600] Appeal Brief, para. 219. *See also* paras 224, 229.
[601] Appeal Brief, para. 220. *See also* para. 233.
[602] Appeal Brief, para. 223. *See also* paras 222, 229-233.

the Trial Chamber "failed to exclude impermissible aggravating factors, such as modes of liability and acts and conduct not committed or attributable to the Appellant".[603]

303. The Prosecutor submits that the Defence's arguments "are premised on a mischaracterisation of the Chamber's reasoning" as well as its "misunderstanding of the factors relevant to determining a joint sentence".[604] He contends that the Trial Chamber "did not 'accumulate' all aggravating factors" underlying the individual sentences, but, rather, it "appropriately considered the distinct conduct underlying the crimes" when arriving at the joint sentence.[605] In his view, the joint sentence imposed "was proportionate to the gravity of the crimes" and reflects the culpability of Mr Ongwen for the crimes for which he was convicted.[606] Finally, the Prosecutor submits that even assuming that the Trial Chamber "erroneously double-counted the same underlying factors or aggravating circumstances" when determining the joint sentence, this would not have "impacted on the overall final sentence".[607]

304. Victims Group 1 contend that the Defence's submissions are "based on a spurious interpretation" of the Sentencing Decision.[608] They argue that the Defence merely speculates as to the Trial Chamber's exercise of discretion and that its submissions on the alleged lack of reasoning are "without basis".[609] Victims Group 1 further submit that the Defence fails to identify "any concrete example" as to how the Trial Chamber allegedly double-counted, failed to identify new aggravating factors, or failed to balance all relevant factors.[610]

305. Victims Group 2 submit that the Defence "misrepresents the process reflected in the Sentencing Decision".[611] They contend that the Defence's allegation that the Trial Chamber "'double-counted' overlapping factors underlying conducts of the Appellant is baseless".[612] Victims Group 2 aver that the Trial Chamber's consideration

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[603] Appeal Brief, para. 225. *See also* para. 226.
[604] Prosecutor's Response, para. 215. *See also* paras 226-228.
[605] Prosecutor's Response, para. 215. *See also* paras 217-225.
[606] Prosecutor's Response, para. 215. *See also* paras 229-232.
[607] Prosecutor's Response, para. 236. *See also* para. 235.
[608] Victims Group 1's Observations, para. 90.
[609] Victims Group 1's Observations, paras 91-92.
[610] Victims Group 1's Observations, para. 93.
[611] Victims Group 2's Observations, para. 90.
[612] Victims Group 2's Observations, para. 92 (emphasis in original omitted).

of "the totality of the aggravating and mitigating circumstances and the personal circumstances" of Mr Ongwen is obviously "intrinsic in the process for determination of the joint sentence".[613] They submit that "[i]n concrete terms", the Trial Chamber's weighing of all relevant factors "actually worked in [Mr Ongwen's] favour".[614]

*2. Relevant parts of the Sentencing Decision*

306. After having determined the individual sentence for each crime for which Mr Ongwen had been convicted, the Trial Chamber proceeded to determine the joint sentence, recalling that pursuant to article 78(3) of the Statute, the duration of the sentence could not be less than 20 years of imprisonment (corresponding to the highest individual sentence pronounced), "but 'shall not exceed 30 years imprisonment or a sentence of life imprisonment in conformity with article 77, paragraph 1 (b)'".[615]

307. Having regard to "the large amount of distinct criminal conducts underlying the different crimes", the Trial Chamber determined that "a joint sentence corresponding to the highest individual sentence pronounced, as proposed by the Prosecution, is manifestly incapable of reflecting [Mr] Ongwen's total culpability for all the numerous crimes that he committed".[616] It also decided not to impose life imprisonment given the individual circumstances of Mr Ongwen, which included the circumstances of his childhood and his abduction and integration into the LRA at 9 years of age.[617] Having excluded the possibility of imposing the minimum joint sentence (corresponding to the highest individual sentence of 20 years) and the maximum (life imprisonment), the majority of the Trial Chamber decided to sentence Mr Ongwen to a total period of imprisonment of 25 years as a joint sentence for the 62 counts of crimes.[618]

*3. Determination by the Appeals Chamber*

308. For the reasons that follow, the Appeals Chamber finds no merit in the arguments raised by the Defence under the eleventh ground of appeal.

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[613] Victims Group 2's Observations, para. 93 (emphasis in original omitted).
[614] Victims Group 2's Observations, para. 94 (emphasis in original omitted). *See also* paras 95-96.
[615] Sentencing Decision, para. 374.
[616] Sentencing Decision, para. 382 (footnote omitted).
[617] Sentencing Decision, paras 386-388.
[618] Sentencing Decision, paras 382, 392-396. Judge Pangalangan dissented, as he was of the view that a higher joint sentence of 30 years of imprisonment was warranted. *See* Partly Dissenting Opinion of Judge Pangalangan, paras 13, 17.

309. Contrary to the Defence's suggestion,[619] the Trial Chamber articulated in a clear manner the relevant considerations that informed its exercise of discretion when imposing the joint sentence of 25 years of imprisonment. In particular, in order to reach its determination that a joint sentence of 25 years of imprisonment was "proportionate to the crimes [Mr] Ongwen committed, congruous to his specific individual circumstances arising from his abduction as a child, and suitably conforming to the fundamental purposes of retribution and deterrence underlying sentencing in the system of the Court",[620] the Trial Chamber considered the following relevant factors: (i) the fact that in relation to a number of crimes, "the same conduct and consequence are characterised as more than one crime";[621] (ii) the existence of "a number of instances of (partial) overlap in the underlying conduct between different crimes";[622] (iii) the fact that "a large number of other crimes […] which are each largely designed to safeguard wholly distinct protected interests, cannot be said to be in any relation of […] – even partial – overlap in terms of relevant conduct";[623] (iv) the gravity of the crimes "especially when considered jointly";[624] (v) the degree of Mr Ongwen's participation in the commission of crimes;[625] and (vi) the "peculiar personal background" of Mr Ongwen, including the circumstances of his childhood.[626] From the above, it is clear that, contrary to the Defence suggestion,[627] the Trial Chamber did "balance relevant factors, individual circumstances and mitigating factors" when determining the joint sentence.

310. Regarding the Defence's argument that the Trial Chamber failed to "identify new aggravating factors" and/or "failed to provide a reasoned statement about any new alleged aggravating factors",[628] the Appeals Chamber notes that the Defence does not clearly set out any alleged error. It fails to explain what it means by "new" factors and what the legal basis is for the alleged duty of the Trial Chamber to identify such factors.

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[619] Appeal Brief, paras 220, 224, 229, 233-235.
[620] Sentencing Decision, para. 396.
[621] Sentencing Decision, para. 376.
[622] Sentencing Decision, para. 377. *See also* para. 378.
[623] Sentencing Decision, para. 380. *See also* para. 381.
[624] Sentencing Decision, para. 384.
[625] Sentencing Decision, para. 385.
[626] Sentencing Decision, para. 388. *See also* paras 389-390.
[627] Appeal Brief, para. 220. *See also* paras 225, 229, 232; T-266, p. 17, lines 20-22.
[628] Appeal Brief, para. 219. *See also* paras 232-233.

As a result, the Defence's arguments amount to a mere disagreement with the Trial Chamber's exercise of discretion.

311. Furthermore, the Defence incorrectly submits that the Trial Chamber "established and relied on criteria of a 'very large extent of cumulative victimisation' and 'the extent of accumulation of the individual sentences'".[629] A plain reading of the section of the Sentencing Decision containing the determination of the joint sentence[630] reveals that the Trial Chamber weighed several relevant considerations but did not impose any criteria in the terms suggested by the Defence. The Appeals Chamber notes that the Trial Chamber referred to the "extent of accumulation of the individual sentences" in the following terms, when setting out its understanding of article 78(3) of the Statute:

> All relevant circumstances and factors related to the gravity of the specific crimes as well as the personal circumstances of [Mr] 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 [Mr] Ongwen's "total culpability".[631]

312. As clearly transpires from the discussion which follows this passage in the Sentencing Decision, by "the extent of accumulation" the Trial Chamber meant the "extent [to which] the criminal conduct underlying each of the crimes – and corresponding blameworthiness […] overlap […], or must be (separately) reflected in the joint sentence".[632] As indicated above, the Trial Chamber also took into account the gravity of the crimes "especially when considered jointly".[633] There is thus nothing to suggest that "the extent of accumulation of the individual sentences" was a separate criterion imposed outside of the statutory scheme.

313. Regarding the second of the so-called "criteria" challenged by the Defence under the present ground of appeal, the Trial Chamber noted the "very large extent of cumulative victimisation", when considering the gravity of the crimes for which

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[629] Appeal Brief, para. 219 (emphasis in original omitted). *See also* paras 222-223, 229-230, 233; T-266, p. 17, lines 4-7, p. 18 lines 2-8.
[630] Sentencing Decision, paras 374-397.
[631] Sentencing Decision, para. 375 (footnote omitted).
[632] Sentencing Decision, para. 375.
[633] Sentencing Decision, para. 384.

Mr Ongwen was convicted: "[c]onsidering – jointly – the long list of extremely serious crimes, and referring to the analysis above on the relevant considerations with respect to each of these crimes, the Chamber recalls the very large extent of cumulative victimisation of the crimes committed by [Mr] Ongwen".[634] It is clear that the Trial Chamber did not establish an additional criterion of the extent of cumulative victimisation, but merely recalled its relevant considerations with respect to each of the crimes. The Appeals Chamber finds that the Defence's submissions on this issue are misleading and do not identify any error in the way the Trial Chamber considered the matter.

314. In relation to the Defence's argument that the Trial Chamber "overlooked" its own decision to consider double-counting, in particular overlapping factors and circumstances,[635] the Appeals Chamber notes that the Trial Chamber clearly considered these elements. Indeed, the Trial Chamber acknowledged that the criminal conduct underlying many of the crimes overlapped or that such crimes were in concurrence,[636] including "the analogous war crimes and crimes against humanity, which are distinguished only by different contextual elements".[637]

315. It also took into account the partial overlap in the underlying conduct between different crimes committed in the context of the attacks on the four IDP camps, noting in this regard that instances of factual overlap "result in corresponding (partial) overlap in the related factors informing the gravity of the individual crimes concerned and their specific aggravating circumstances".[638] Similarly, it considered the partial overlap in Mr Ongwen's conduct "with respect to the sexual and gender-based crimes directly committed by [Mr] Ongwen against four of his so-called 'wives'".[639]

316. The Trial Chamber indicated that it was "well aware of these instances of concurrence or partial overlap in the factual basis of certain crimes […] as well as of the need to take this into due account to prevent that [Mr Ongwen] be punished beyond

[634] Sentencing Decision, para. 384.
[635] Appeal Brief, para. 221. *See also* paras 223, 229, 232, 234-235.
[636] Sentencing Decision, paras 375-379.
[637] Sentencing Decision, para. 376.
[638] Sentencing Decision, para. 377.
[639] Sentencing Decision, para. 378.

his actual culpability".[640] However, it noted that this did not "have a significant bearing in the determination of the joint sentence […], given the strikingly large number of distinct convictions, holding [an] entirely different factual basis" in this case.[641] In relation to the latter, the Trial Chamber explained that these crimes "are each largely designed to safeguard wholly distinct protected interests".[642] It held as follows:

> 381. In other words, [Mr] Ongwen was convicted for a large number of crimes which he committed by way of a number of distinguishable criminal conducts (including several for which the highest individual sentence of 20 years of imprisonment is pronounced), each carrying its own distinct blameworthiness not otherwise absorbed within any other crime and corresponding individual sentence(s).
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> 382. Thus, and 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 circumstances of this case, any such issue to weigh noticeably in the present determination.[643]

317. It is thus clear that, contrary to the Defence's submissions,[644] the Trial Chamber duly considered the fact that the factual basis of some crimes of which Mr Ongwen was convicted overlapped completely or partially, but, in light of other relevant considerations, determined that this would not "weigh noticeably" in its determination.[645]

318. The Defence further submits that the Trial Chamber "failed to exclude impermissible aggravating factors", referring in particular to "modes of liability and acts and conducts not committed or attributable to the Appellant".[646] The Appeals Chamber notes that the paragraphs of the Sentencing Decision referred to by the Defence are not contained in the section dealing with the determination of the joint sentence, which the present ground of appeal challenges, but in the sections setting out

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[640] Sentencing Decision, para. 379.
[641] Sentencing Decision, para. 379.
[642] Sentencing Decision, para. 380.
[643] Sentencing Decision, paras 381-382 (footnote omitted).
[644] Appeal Brief, para. 221. *See also* para. 223.
[645] Sentencing Decision, para. 382. *See also* paragraph 139 above.
[646] Appeal Brief, para. 225. *See also* para. 226.

the Trial Chamber's determination of an individual sentence for each crime and the assessment of the relevant factors and circumstances related to individual crimes.[647]

319. Regardless of the foregoing, the Appeals Chamber recalls "the well-established prohibition on 'double-counting' of factors relevant to the determination of a sentence".[648] It also recalls that what is decisive is that the legal elements of the offence are not considered as aggravating factors.[649] However, the prohibition does not extend to factors that do not constitute legal elements of the crimes or modes of liability but rather serve to prove them.[650] The Trial Chamber was aware of these principles.[651]

320. The Defence alleges that the Trial Chamber failed to exclude impermissible aggravating factors in this case, and submits that although Mr Ongwen was not convicted under article 25(3)(b) of the Statute (ordering), the Trial Chamber relied in the Sentencing Decision on "its findings that the Appellant ordered crimes to be committed".[652] The Appeals Chamber, however, notes that it is precisely because Mr Ongwen was convicted for having committed the crimes under article 25(3)(a) of the Statute and not for ordering the commission of crimes (article 25(3)(b) of the Statute) that it was not *per se* impermissible for the Trial Chamber to consider as an aggravating factor the fact that Mr Ongwen himself ordered the commission of a number of crimes. However, had Mr Ongwen been convicted for ordering the crimes under article 25(3)(b) of the Statute, the fact that he ordered some of the crimes could

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[647] Appeal Brief, para. 226, fn. 399, *referring to* Sentencing Decision, paras 86 (appearing in the section "[Mr] Ongwen's abduction as a child"), 167, 171 (both appearing in the section "Factors and circumstances specifically related to individual crimes – Crimes committed in the context of the attack on Pajule IDP camp"), 188, 195 (both appearing in the section "Factors and circumstances specifically related to individual crimes – Crimes committed in the context of the attack on Odek IDP camp"), 253 (appearing in the section "Factors and circumstances specifically related to individual crimes – Crimes committed in the context of the attack on Abok IDP camp"), 296 (appearing in the section "Factors and circumstances specifically related to individual crimes – Sexual and gender-based crimes directly perpetrated by [Mr] Ongwen"), 372 (appearing in the section "Factors and circumstances specifically related to individual crimes – Crime of conscription of children under the age of 15 and their use to participate actively in hostilities").
[648] *Ntaganda* Sentencing Appeal Judgment, para. 123.
[649] *Bemba et al*. Sentencing Appeal Judgment, para. 129.
[650] *Bemba et al*. Sentencing Appeal Judgment, para. 128.
[651] Sentencing Decision, para. 53: "This limitation [the prohibition of considering as an aggravating circumstance a legal element of the crime or of the mode of liability], however, applies only to such legal elements – or the material factual findings underpinning them – 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".
[652] Appeal Brief, para. 226.

not have been considered as an aggravating factor, as this would indeed amount to double-counting an element of the mode of liability. However, in this case the factual findings concerning the ordering of crimes by Mr Ongwen were not legal elements, but rather findings that serve to establish the legal elements of the crimes for which Mr Ongwen was convicted as a direct and indirect perpetrator pursuant to article 25(3)(a) of the Statute.

321. The Defence also alleges a violation of Mr Ongwen's right to a fair trial in relation to the Trial Chamber's reliance on crimes ordered by him as aggravating factors for individual sentences.[653] The Appeals Chamber recalls in this respect that "considerations of procedural fairness and the rights of the defence require that the convicted person be sufficiently put on notice of the facts that are taken into account to aggravate the sentence".[654] As previously held by the Appeals Chamber,

> If a trial chamber relies upon facts in aggravation that were established in its decision on conviction under article 74 of the Statute, there is, barring exceptional circumstances, also no further notice required to the convicted person as these facts clearly form part of the context of the conviction. The convicted person must, therefore, expect that they may be taken into account by the trial chamber in sentencing.[655]

322. In this case, as acknowledged by the Defence,[656] the findings concerning the ordering of crimes by Mr Ongwen were established in the Conviction Decision and therefore there was "no further notice required".[657] Thus, the Appeals Chamber finds no merit in the Defence's argument that the Trial Chamber's reliance on these factual findings in aggravation "violated the Appellant's right to a fair trial and is tantamount to an abuse of discretion".[658]

323. Finally, the Appeals Chamber finds no merit in the Defence's submission that "the aggravating factors which the Chamber identified and relied on for aggravating circumstances in individual sentences were determined as aggravating factors in the Trial Judgement".[659] The Defence does not provide any reference to instances of any

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[653] Appeal Brief, para. 226.
[654] *Bemba et al*. Sentencing Appeal Judgment, para. 116.
[655] *Bemba et al*. Sentencing Appeal Judgment, para. 116.
[656] Appeal Brief, para. 226, fn. 400.
[657] *Bemba et al*. Sentencing Appeal Judgment, para. 116.
[658] Appeal Brief, para. 226.
[659] Appeal Brief, para. 231.

such reliance in the Sentencing Decision. Furthermore, it is unclear what these "aggravating factors in the Trial Judgement" are. It is also noted that the numerous references provided at footnote 406 of the Appeal Brief are almost identical to the references given in support of the Defence's argument that the Trial Chamber improperly relied on the factual findings concerning Mr Ongwen's issuance of orders to commit crimes,[660] which the Appeals Chamber has rejected above.[661] In any event, as stated above, the Appeals Chamber identifies no error in the Trial Chamber's reliance in the Sentencing Decision on findings made in the Conviction Decision insofar as the prohibition against double-counting is respected and to the extent that Mr Ongwen was on notice of the facts considered in aggravation.

#### *4. Conclusion*

324. Having rejected the totality of the arguments advanced by the Defence, the Appeals Chamber rejects ground of appeal 11.

## J. Ground of appeal 12: Alleged error in the Trial Chamber's reliance on "actions and/or mental states" necessary to establish guilt as aggravating circumstances

325. Under this ground of appeal, the Defence submits that the Trial Chamber erred by violating "[t]he prohibition against counting the same factor twice in sentencing".[662] It requests that the Appeals Chamber "quash the individual sentences imposed" and "either impose reduced individual sentences, or remand the matter to Trial Chamber IX".[663]

#### *1. Summary of the submissions*

326. The Defence submits that "[t]he prohibition against counting the same factor twice in sentencing is well established", in the sense that factors informing the gravity of the crime cannot additionally be taken into account as aggravating circumstances.[664] In particular, it argues that the Trial Chamber double-counted discriminatory intention,

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[660] *See* Appeal Brief, para. 226, fn. 400.
[661] *See* paragraph 320 above.
[662] Appeal Brief, para. 236. *See also* paras 237-238.
[663] Appeal Brief, para. 261.
[664] Appeal Brief, para. 236. *See also* para. 237.

the multiplicity of victims, the vulnerability of children conscripted by the LRA and elements essential to the mode of liability.[665]

327. The Prosecutor submits that the Defence "misunderstands" the Trial Chamber's reasoning, takes its findings "out of context", raises arguments that "are legally and factually incorrect" and fails to demonstrate how the alleged errors materially affected the Sentencing Decision.[666]

328. Victims Group 1 contend that the Defence's submissions conflate the Trial Chamber's overall considerations, as the Trial Chamber only factored once the discriminatory intent of Mr Ongwen and the multiplicity of the victims as aggravating circumstances.[667] They further submit that the Defence fails to demonstrate how the Trial Chamber's clear distinction between the particularly young victims and "the overall vulnerability of children" could amount to double-counting.[668] Finally, Victims Group 1 contend that the Defence's argument that the Trial Chamber erroneously considered the role of Mr Ongwen and the nature of the common plan both in its assessment of gravity and as an aggravating factor "does not arise from the Sentencing Decision".[669]

329. Victims Group 2 submit that the Trial 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".[670] Regarding the Trial Chamber's consideration of the high number of victims, Victims Group 2 submit that the Trial Chamber consistently applied "the rule against double-counting, which concerns itself only with the legal elements of the crimes".[671] They argue 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".[672] Finally, in relation to the purported double-

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[665] Appeal Brief, para. 238. *See also* paras 239-260.
[666] Prosecutor's Response, paras 237-238. *See also* paras 239-261.
[667] Victims Group 1's Observations, paras 97, 99.
[668] Victims Group 1's Observations, paras 103-104.
[669] Victims Group 1's Observations, paras 105-106.
[670] Victims Group 2's Observations, para. 102. *See also* paras 98-101.
[671] Victims Group 2's Observations, para. 108.
[672] Victims Group 2's Observations, para. 111.

counting of the common plan in relation to the crime of enslavement, Victims Group 2 contend that there is no indication of double-counting.[673]

*2. Relevant parts of the Sentencing Decision*

330. In the Sentencing Decision, when setting out the applicable law, the Trial Chamber recalled that "certain factors referred to in different provisions as being relevant to the determination of the sentence are not neatly distinguishable from each other and are not mutually exclusive categories".[674] Recalling the relevant jurisprudence of the Appeals Chamber on the impermissibility of double-counting,[675] the Trial Chamber explained that:

> For the determination of each individual sentence to be imposed on [Mr] Ongwen the Chamber will therefore identify all facts which – also in light of the submissions advanced by the participants in these proceedings – it deems to be relevant to its assessment of the factors referred to in the applicable provisions and their balancing. Irrespective of the individual category under which any such fact/factor is placed, the Chamber will not consider the same factor more than once for the purpose of the determination of the appropriate sentence for each crime of which [Mr] Ongwen was convicted.[676]

331. Other relevant parts of the Sentencing Decision concerning specific crimes are set out in the "Determination by the Appeals Chamber" below.

*3. Determination by the Appeals Chamber*

332. The Appeals Chamber has previously addressed the prohibition of double-counting factors in gravity and as aggravating factors, notably in its sentencing appeal judgments rendered in the *Bemba et al*. Case and in the *Ntaganda* Case. As noted above, in the Sentencing Decision, the Trial Chamber referred to the prohibition of double-counting, explicitly recalling the Appeals Chamber's jurisprudence.

333. Specifically, the Appeals Chamber stated that:

> 123. The Appeals Chamber notes the well-established 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*". […]

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[673] Victims Group 2's Observations, para. 118. *See also* paras 115-117.
[674] Sentencing Decision, para. 55, *referring to* *Bemba et al*. Sentencing Appeal Judgment, para. 4.
[675] Sentencing Decision, para. 55, *referring to* *Bemba et al*. Sentencing Appeal Judgment, para. 4.
[676] Sentencing Decision, para. 56.

> 124. 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.[677]

334. For the reasons that follow, the Appeals Chamber finds no merit in any of the four sets of arguments raised by the Defence under the twelfth ground of appeal in relation to the alleged double-counting of factors: (i) discriminatory intent as a factor of the gravity of the crime and as an aggravating factor;[678] (ii) the high number of victims as a factor of gravity and as an aggravating factor;[679] (iii) the "defencelessness of children recruited into the LRA as an aggravating factor";[680] and (iv) essential elements of the modes of liability as aggravating factors.[681]

335. The Appeals Chamber will address each of these arguments in turn.

#### (a) Alleged error in double-counting discriminatory intent

336. The Defence's first argument is that the Trial Chamber took into account the discriminatory intent both in its assessment of the gravity of the crimes committed in the context of the attacks on the four IDP camps and as an aggravating factor.[682] Article 78(1) of the Statute requires the Court to "take into account such factors as the gravity of the crime". Rule 145(2)(b)(v) of the Rules provides in relevant part that "the Court shall take into account, as appropriate […] [a]s aggravating circumstances: […] [c]ommission of the crime for any motive involving discrimination on any of the grounds referred to in article 21, paragraph 3".

337. In the Sentencing Decision, the Trial Chamber determined the appropriate sentence to be imposed for the crimes committed in the context of the attacks on the

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[677] *Ntaganda* Sentencing Appeal Judgment, paras 123-124 (footnotes omitted), *referring to* *D. Milošević* Appeal Judgment, para. 306; *M. Nikolić* Sentencing Appeal Judgment, para. 58; *Deronjić* Sentencing Appeal Judgment, para. 106; *Bemba et al.* Sentencing Appeal Judgment, para. 112.
[678] Appeal Brief, paras 239-244.
[679] Appeal Brief, paras 245-250.
[680] Appeal Brief, paras 251-256.
[681] Appeal Brief, paras 257-260.
[682] Appeal Brief, para. 239. *See also* paras 241-242.

four IDP camps by first setting out "certain relevant circumstances" applicable to all crimes committed in the context of each attack, and then carrying out an assessment for each crime committed in the context of each attack.[683]

338. In the first part of its analysis, the Trial Chamber noted that a "feature common to the crimes" committed in the context of each of the four attacks on IDP camps was that "they were all committed for motives involving discrimination – within the meaning of Rule 145(2)(b)(v) of the Rules".[684] It held that this aspect "inform[ed] the Chamber's consideration of the gravity of the crimes".[685] Then, in its assessment of "the specific considerations and conclusions concerning each of the individual crimes" committed in the context of each of the attacks on the four IDP camps,[686] the Trial Chamber considered "all relevant factors, concerning both the gravity of the crime and the individual circumstances of [Mr] Ongwen, […] as well as the presence of the aggravating circumstances of commission of the crime for a motive involving discrimination".[687]

339. The Trial Chamber referred to the fact that the crimes had been committed for motives involving discrimination as an aspect that informed its consideration of the *gravity* of the crimes.[688] While this may have been misleading, its reference to rule 145(2)(b)(v) of the Rules[689] makes it clear that this factor was in fact considered as an aggravating factor, and not as part of the Trial Chamber's assessment of the gravity of the crimes.

340. This is also illustrated by the fact that in assessing the specific considerations concerning each individual crime, in those instances where it identified this factor as an aggravating circumstance only, the Trial Chamber referred back to its finding, contained in the section setting out common features to all crimes, that "they were all

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[683] Sentencing Decision, paras 139, 147 (attack on Pajule IDP camp), 179, 184 (attack on Odek IDP camp), 217, 222 (attack on Lukodi IDP camp), 252, 257 (attack on Abok IDP camp).
[684] Sentencing Decision, paras 145, 182, 220, 255.
[685] Sentencing Decision, paras 145, 182, 220, 255.
[686] Sentencing Decision, paras 147, 184, 222, 257.
[687] Sentencing Decision, paras 152, 156, 161, 168, 173 (attack on Pajule IDP camp), 186, 191, 194, 196, 200, 205, 211 (attack on Odek IDP camp), 224, 229, 232, 234, 237, 241, 246 (attack on Lukodi IDP camp), 260, 265, 267, 269, 272, 276, 279 (attack on Abok IDP camp).
[688] Sentencing Decision, paras 145, 182, 220, 255.
[689] Sentencing Decision, paras 145, 182, 220, 255.

committed for motives involving discrimination".[690] It is thus clear that despite the somewhat misleading wording, the Trial Chamber did not consider the same factor twice. Rather, the fact that the crimes were committed for motives involving discrimination was only considered as an aggravating circumstance. The Defence's argument is accordingly rejected.

341. The Defence also challenges the Trial Chamber's finding that the "discriminatory dimension" underlying the crimes of persecution constituted an aggravating circumstance in regard to other crimes.[691] The Appeals Chamber notes that the Trial Chamber expressly acknowledged the overlap "in the underlying conduct between different crimes":

> the crimes of persecution committed in the course of each of the four attacks (Counts 10, 23, 36 and 49, respectively) were committed through acts constituting also other crimes committed in the same context, qualified by the element of discrimination on political grounds. In turn, such "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.[692]

342. The Trial Chamber clearly indicated that it was "well aware of these instances of concurrence or partial overlap in the factual basis of certain crimes" and stated that such overlap had no significant bearing in the determination of the joint sentence.[693] Importantly, the Trial Chamber acknowledged that the "discriminatory dimension" underlying the crimes of persecution constitutes an aggravating circumstance with respect to "the *other* crimes" committed in the course of each of the four attacks,[694] and not in regard to the same crime of persecution. As correctly noted by Victims Group 2,[695] there is thus no suggestion that the motives involving discrimination were taken into account twice in the assessment of factors relevant to an individual sentence with respect to any of the crimes concerned.

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[690] Sentencing Decision, paras 152, 156, 161, 168, 173, 186, 191, 194, 196, 200, 205, 211, 224, 229, 232, 234, 237, 241, 246, 260, 265, 267, 269, 272, 276, 279, fns 276, 283, 294, 319, 328, 347, 365, 369, 374, 384, 394, 400, 417, 430, 435, 445, 452, 461, 470, 488, 497, 501, 506, 514, 522, 528.
[691] Appeal Brief, para. 240.
[692] Sentencing Decision, para. 377 (emphasis added, footnotes omitted).
[693] Sentencing Decision, paras 379, 382.
[694] Sentencing Decision, para. 377 (emphasis added).
[695] *See* Victims Group 2's Observations, para. 98.

343. In relation to the Defence's submission that the Trial Chamber impermissibly double-counted discriminatory intent by finding in the Conviction Decision that such intent was "an essential element of the respective common plans" for the attacks on the Pajule and Odek IDP camps,[696] the Appeals Chamber recalls that in the Conviction Decision, the Trial Chamber found that "the attack on Pajule took place pursuant to an agreement involving [Mr] Ongwen, Vincent Otti, Raska Lukwiya, Okot Odhiambo and other LRA commanders" which consisted of "attack[ing] both the UPDF at the barracks as well as civilian areas of the camp, [looting] radio equipment, food and other items, and to abduct civilians".[697] Similar reasoning was provided when identifying the common plan to attack Odek IDP camp.[698] The existence of the common plans was established beyond reasonable doubt on the basis of a holistic assessment of a number of factors, such as the fact that the LRA, including Mr Ongwen, perceived the civilians living in Northern Uganda to be the enemy.[699]

344. In light of the above, it is apparent that although in its assessment of whether the above-described common plans existed, the Trial Chamber considered the fact that "the LRA, including [Mr**]** Ongwen, perceived as associated with the Government of Uganda, and thus as the enemy, the civilians living in Northern Uganda, in particular those who lived in government-established IDP camps in Northern Uganda",[700] the discriminatory intent was not "an essential element of the respective common plans" as suggested by the Defence.[701] Further, it is recalled that discriminatory intent is not a legal element of indirect co-perpetration as a mode of liability, and in this case discriminatory intent was considered to establish the existence of one legal element, namely the existence of a common plan to attack Pajule and Odek IDP camps. Indeed, the prohibition against double-counting does not extend to factors or elements

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[696] Appeal Brief, paras 243-244.
[697] Conviction Decision, para. 2853.
[698] Conviction Decision, para. 2912 ("the Chamber finds that the attack on Odek IDP camp took place pursuant to an agreement involving [Mr] Ongwen, Joseph Kony and other Sinia brigade leaders. It is noted that this agreement was not concluded in a specific direct communication between [Mr] Ongwen, Joseph Kony and others, but the sequence of events, in particular Joseph Kony's order, followed by [Mr] Ongwen's planning and instructions prior to the attack, and his reporting of the results of the attack after it occurred, demonstrate clearly that such meeting of the minds existed in substance. The Chamber also finds, on the basis of the above, that the agreement was to attack everyone at Odek IDP camp, including civilians, to loot and to abduct civilians").
[699] Conviction Decision, paras 2851-2854, 2910-2912.
[700] Conviction Decision, paras 2852, 2910.
[701] Appeal Brief, paras 243-244.

considered to prove the existence of the relevant legal elements of the crimes or modes of liability.[702] In these circumstances, the Appeals Chamber finds no merit in the Defence's argument that discriminatory intent was double-counted.

**(b) Alleged error in double-counting the number of victims**

345. The Defence's second argument is that the Trial Chamber erred in double-counting the number of victims in its assessment of gravity and as an aggravating circumstance.[703] In its view, "[t]he 'high number of victims' and the 'multiplicity of victims' are essentially the same consideration".[704] It challenges in particular the double-counting in relation to the crimes of murder and attempted murder (counts 2-3, 12-13, 14-15, 25-26, 27-28, 38-39 and 40-41),[705] torture (counts 4-5 and 16-17)[706] and enslavement (counts 8, 20, 33 and 46).[707] Rule 145(2)(b)(iv) of the Rules provides in relevant part that "the Court shall take into account, as appropriate […] [a]s aggravating circumstances: […] Commission of the crime […] where there were multiple victims".

346. The Trial Chamber appears to have referred to the number of victims in its assessment of the gravity of the crimes concerned and in its determination that the aggravating circumstance of multiplicity of victims was established in relation to: the crime against humanity of murder and the war crime of murder committed during the attack on Pajule IDP camp (counts 2-3);[708] the crimes against humanity of murder and attempted murder and the war crime of murder and attempted murder committed during the attack on Odek IDP camp (counts 12-13 and 14-15);[709] the crimes against humanity

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[702] *Bemba et al*. Sentencing Appeal Judgment, para. 128.
[703] Appeal Brief, paras 245-250.
[704] Appeal Brief, para. 245.
[705] Appeal Brief, paras 246-247.
[706] Appeal Brief, para. 248.
[707] Appeal Brief, para. 249.
[708] Sentencing Decision, para. 154 ("Also in the concrete circumstances of the case, the Chamber considers the gravity of the crimes of murder under Counts 2 and 3 to be very high. As concerns the extent of victimisation, the Chamber found that in the course of the attack on Pajule IDP camp, LRA fighters killed at least four civilians, most of whom were abductees killed because they tried to escape or refused to carry looted goods. The aggravating circumstance of multiplicity of victims under Rule 145(2)(b)(iv) of the Rules is therefore established. The Chamber previously found that the agreement involving [Mr] Ongwen and other LRA commanders aimed at engaging in conduct during the attack on Pajule IDP camp which, in the ordinary course of events, would result in murder, and that [Mr] Ongwen was aware of this. On the same basis, the Chamber also considers that [Mr] Ongwen knew that in the ordinary course of the events there would be multiple victims") (footnotes omitted).
[709] Sentencing Decision, paras 188 ("In the concrete circumstances of the case, the Chamber considers the gravity of the crimes of murder Count 12 and 13 to be very high. This is so in particular because of the number of victims: the Chamber found that at least 52 civilians died as a result of the injuries

of murder and attempted murder and the war crime of murder and attempted murder committed during the attack on Lukodi IDP camp (counts 25-26 and 27-28);[710] the crimes against humanity of murder and attempted murder and the war crime of murder and attempted murder committed during the attack on Abok IDP camp (counts 38-39 and 40-41);[711] the crime against humanity of torture and the war crime of torture committed during the attack on Pajule IDP camp (counts 4-5);[712] the crime against

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sustained in the camp or in the course of the retreat. The bodies of the dead were scattered everywhere across the camp. The Chamber found that under orders to shoot civilians in the chest and head to ensure that they died, LRA fighters fired their weapons at civilians during the attack. The aggravating circumstance of multiplicity of victims under Rule 145(2)(b)(iv) of the Rules is therefore established, also considering that, in light of the Chamber's findings as to the mental elements, and in particular in light of the fact that [Mr] Ongwen ordered the attackers to target everyone, including civilians, such widespread extent of killings as part of the attack was intended by [Mr] Ongwen") (footnotes omitted), 192-193 ("As concerns the crime against humanity of attempted murder (Count 14) and the war crime of attempted murder (Count 15), the Chamber's analysis is guided by similar considerations as that under murder. The Chamber deems the gravity of the crimes in the concrete circumstances to be high, noting that the LRA fighters attempted to kill at least ten civilians, who eventually did not lose their life for reasons entirely outside the LRA fighters' (or [Mr] Ongwen's) control. Also, the aggravating circumstance of the multiplicity of victims under Rule 145(2)(b)(iv) of the Rules is present. As explained above, the Chamber considers that [Mr] Ongwen intended for there to be multiple killing") (footnotes omitted).

[710] Sentencing Decision, paras 226 ("In the concrete circumstances of the case, the Chamber considers the gravity of the crimes of murder under Counts 25 and 26 to be very high. The high number of victims, at least 48, justifies this conclusion, as does the fact that men, women and children were among the victims. The aggravating circumstance of multiplicity of victims under Rule 145(2)(b)(iv) of the Rules is therefore established, also considering that in light of [Mr] Ongwen's order to attack Lukodi IDP camp and everyone present in that location, including civilians, it was also intended by him") (footnotes omitted), 230 ("As concerns the crime against humanity of attempted murder (Count 27) and the war crime of attempted murder (Count 28), the Chamber's analysis is guided by similar considerations as that under murder. The Chamber deems the gravity of the crimes in the concrete circumstances to be high, noting that the LRA fighters attempted to kill at least 11 civilians, who eventually did not lose their life for reasons entirely outside the LRA fighters' (or [Mr] Ongwen's) control. Also, the aggravating circumstance of multiplicity of victims under Rule 145(2)(b)(iv) of the Rules is established, also considering that, as discussed just above in respect of the crime of murder, this was intended by [Mr] Ongwen") (footnote omitted).

[711] Sentencing Decision, paras 262 ("In the concrete circumstances of the case, the Chamber considers the crimes of murder under Counts 38 and 39 to be of very high gravity. Indeed, the Chamber found that the LRA attackers killed at least 28 civilian residents of Abok IDP camp, and that they killed civilians by shooting, burning and/or beating them. The aggravating circumstance of multiplicity of victims under Rule 145(2)(b)(iv) of the Rules is therefore established, also considering that in light of the Chamber's findings as to the mental elements it was also objectively foreseeable by [Mr] Ongwen") (footnotes omitted), 266 ("As concerns the crime against humanity of attempted murder (Count 40) and the war crime of attempted murder (Count 41), the Chamber's analysis is guided by similar considerations as that under murder. The Chamber deems the gravity of the crimes in the concrete circumstances to be high, noting that the LRA fighters attempted to kill at least four civilians, who eventually did not lose their life for reasons entirely outside the LRA fighters' (or [Mr] Ongwen's) control. In addition, the aggravating circumstance of multiplicity of victims under Rule 145(2)(b)(iv) of the Rules is established, also considering that in light of the Chamber's findings as to the mental elements it was also objectively foreseeable to [Mr] Ongwen") (footnotes omitted).

[712] Sentencing Decision, paras 158-159 ("Also in the concrete circumstances of the case, the Chamber considers the gravity of the crimes of torture under Counts 4 and 5 to be high. The Chamber recalls the large number of victims of the crimes of which [Mr] Ongwen was convicted under Counts 4 and 5. In

humanity of enslavement committed during the attack on Pajule IDP camp (count 8);[713] the crime against humanity of enslavement committed during the attack on Odek IDP camp (count 20);[714] the crime against humanity of enslavement committed during the attack on Lukodi IDP camp (count 33);[715] and the crime against humanity of enslavement committed during the attack on Abok IDP camp (count 46).[716]

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particular, the Chamber found that in the course of the attack on Pajule IDP camp hundreds of civilians – who were abducted by the LRA – were forced to carry injured LRA fighters and looted items from the camp, including heavy loads, for long distances. They were under armed guard to prevent their escape and were under constant threat of beatings or death, some were tied to each other, and many of the abductees were forced to walk barefoot or not fully clothed through the bush for a long distance. The Chamber also found that LRA fighters beat abductees to make them walk faster. The high number of victims must be qualified as an aggravating circumstance of multiplicity of victims under Rule 145(2)(b)(iv) of the Rules, also considering that, by the same token as above, the Chamber considers that [Mr] Ongwen knew that there would be multiple victims") (footnotes omitted).

[713] Sentencing Decision, paras 163-164 ("In the concrete circumstances, the Chamber considers the gravity of the crime of enslavement in the context of the attack on Pajule IDP camp to be high. As found by the Chamber, hundreds of civilians from the Pajule IDP camp were abducted and enslaved. They were forced to carry looted items, including heavy loads, for long distances while retreating from the camp. […] The large amount of victims of this crime is particularly striking. The Chamber recalls in this regard that the abduction of civilians was in fact one of the main purposes of the attack on Pajule IDP camp as designed by a number of LRA commanders, including [Mr] Ongwen himself. The high number of victims – which was therefore specifically intended by [Mr] Ongwen – must thus be qualified as an aggravating circumstance of multiplicity of victims under Rule 145(2)(b)(iv) of the Rules") (footnotes omitted).

[714] Sentencing Decision, paras 197, 199 ("In the concrete circumstances, the Chamber considers the gravity of the crime to be high. The Chamber found that the LRA attackers abducted at least 40 civilian residents from the camp, including men, women and children. Abductees, including children as young as 11 or 12 years old, were forced to carry looted items away from the camp. Apart from the abductees killed during the retreat, some abductees were released after a few days in the bush, others were integrated into the LRA, including into [Mr] Ongwen's household. […] On the basis of the facts as found, the Chamber finds the presence of the aggravating circumstance of multiplicity of victims under Rule 145(2)(b)(iv) of the Rules, also considering that given his order issued to the attackers in advance, [Mr] Ongwen intended it") (footnotes omitted).

[715] Sentencing Decision, paras 235-236 ("In the concrete circumstances, the Chamber considers the gravity of the crime to be high. This is because LRA fighters abducted at least 29 civilians, men, women and children, to carry looted goods from the camp. Some of the abductees were tied together. The abductees were under armed guard to prevent their escape and were under constant threat of beatings or death. On the basis of the facts as found, the Chamber finds the presence of the aggravating circumstance of multiplicity of victims under Rule 145(2)(b)(iv) of the Rules, and in light of the order he gave in advance of the attack, the Chamber also considers that it was intended by [Mr] Ongwen") (footnotes omitted).

[716] Sentencing Decision, paras 270-271 ("In the concrete circumstances, the Chamber considers the gravity of the crime to be high. This is because in the course of the attack, the LRA fighters deprived many civilians of their liberty by abducting them and forcing them to carry looted goods, as well as an injured fighter, for long distances. Some of the abductees were tied to each other. The abductees were under armed guard to prevent their escape and were under constant threat of beatings or death. Some abductees were killed in captivity, at times for failing to keep up with their captors, others eventually escaped and returned home, some remained with the LRA. On the basis of the facts as found, the Chamber finds the presence of the aggravating circumstance of multiplicity of victims under Rule 145(2)(b)(iv) of the Rules, and, in light of the Chamber's findings as to the mental elements, it must be held that it was also intended by [Mr] Ongwen") (footnotes omitted).

347. Of the crimes listed by the Defence under this sub-ground of appeal, the only crimes with respect to which the Trial Chamber proceeded differently were the crime against humanity of torture and the war crime of torture committed during the attack on Odek IDP camp (counts 16-17). Here, the Trial Chamber appears to have referred to the number of victims only in relation to the aggravating circumstance of multiplicity of victims.[717]

348. The Appeals Chamber concurs with the Prosecutor[718] that the Trial Chamber's reference to the number of victims both in the context of discussing the gravity of the crimes and to establish the aggravating circumstance of multiplicity of victims pursuant to rule 145(2)(b)(iv) of the Rules was rather ambiguous and did not contribute to the clarity of its analysis. In this regard, although the Trial Chamber may not have been sufficiently careful in its discussion of this factor, the Appeals Chamber, by majority, Judge Ibáñez Carranza partially dissenting, finds that it did not rely upon this factor twice.

349. The Appeals Chamber recalls that in its determination of the appropriate individual sentence for a crime,

> a trial chamber *identifies* all the relevant factors associated with the gravity of the particular crime, […] 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.[719]

350. It is therefore not, in and of itself, erroneous for a trial chamber to identify a factor as relevant both to the assessment of gravity and to the aggravating circumstance of multiplicity of victims, so long as that chamber attaches the appropriate weight to that factor only in relation to one of these two parameters. In the case at hand, the Trial

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[717] Sentencing Decision, para. 195 ("Turning to torture as a crime against humanity (Count 16) and torture as a war crime (Count 17), the Chamber reiterates that torture is a particularly heinous act generally of very high gravity. The Chamber considers the gravity of these crimes in the specific circumstances to be high. In this regard, the Chamber notes the findings in the Trial Judgment to the effect that civilians who had been abducted suffered instances of grave physical abuse at the hands of the LRA fighters, such as beatings with sticks and guns. Based on the findings in the Trial Judgment, the aggravating circumstance of multiplicity of victims under Rule 145(2)(b)(iv) of the Rules is present, and in light of the fact that [Mr] Ongwen ordered the attackers to target everyone, including civilians, the Chamber also considers that [Mr] Ongwen intended for there to be multiple victims of torture") (footnotes omitted).
[718] Prosecutor's Response, para. 245.
[719] *Ntaganda* Sentencing Appeal Judgment, para. 124 (emphasis added). *See also* *Bemba et al.* Sentencing Appeal Judgment, para. 112.

Chamber appears to have identified the number of victims as a factor relevant both to gravity and the aggravating circumstance of multiplicity of victims. However, the Trial Chamber only attached weight to this factor in relation to the aggravating circumstance of multiplicity of victims.

351. This is demonstrated by the Trial Chamber's correct statement of the principle according to which one factor can be relied upon only once.[720] The Trial Chamber also acknowledged that some of these factors "are not neatly distinguishable from each other and are not mutually exclusive categories".[721] The Trial Chamber also correctly identified "the interplay between the 'gravity of the crime' […] and the aggravating circumstances" as an example of factors that are not neatly distinguishable.[722] The Trial Chamber then set out its approach as follows:

> For the determination of each individual sentence to be imposed on [Mr] Ongwen the Chamber will therefore *identify* all facts which – also in light of the submissions advanced by the participants in these proceedings – it deems to be relevant to its assessment of the factors referred to in the applicable provisions and their balancing. Irrespective of the individual category under which any such fact/factor is placed, the Chamber will not *consider* the same factor more than once for the purpose of the determination of the appropriate sentence for each crime.[723]

352. By referring to the factor of multiplicity of victims under more than one category, the Trial Chamber appears to have merely identified that factor as being relevant. The "appropriate weight" is then correctly attached to that factor under only one category. Given the express reference to rule 145(2)(b)(iv) of the Rules in each of the paragraphs of the Sentencing Decision cited above, the Appeals Chamber, by majority, Judge Ibáñez Carranza partly dissenting, understands that the Trial Chamber only attached the appropriate weight to the multiplicity of victims as an aggravating circumstance. This finding is further supported by the concluding paragraphs regarding each crime in which the Trial Chamber specifically refers to the gravity assessment and to the multiplicity of victims only as an aggravating circumstance.[724]

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[720] Sentencing Decision, paras 55, 135.
[721] Sentencing Decision, para. 55.
[722] Sentencing Decision, para. 55.
[723] Sentencing Decision, para. 56 (emphasis added).
[724] Sentencing Decision, paras 156, 161, 168, 191, 196, 200, 229, 237, 265, 272.

353. Accordingly, the Appeals Chamber, by majority, Judge Ibáñez Carranza partly dissenting, rejects the Defence's arguments.

354. For the reasons that are fully set out in her partly dissenting opinion,[725] Judge Ibáñez Carranza is of the view that the Trial Chamber's reference to the number of victims, both in the context of discussing the gravity of the crimes and to establish the aggravating circumstance of multiplicity of victims pursuant to rule 145(2)(b)(iv) of the Rules, without specifying under which category it attached weight, demonstrates that the Trial Chamber took this factor into account twice. This is not permissible. Indeed, Judge Ibáñez Carranza considers that the Trial Chamber erred by double-counting the number of victims insofar as this factor informed the gravity assessment of 20 specific crimes (the crimes of murder and attempted murder (counts 2-3, 12-13, 14-15, 25-26, 27-28, 38-39, and 40-41), torture (counts 4-5) and enslavement (counts 8, 20, 33 and 46)) and was at the same time the basis to establish the aggravating factor of multiplicity of victims under rule 145(2)(b)(iv) of the Rules in relation to the same specific crimes. In her view, this issue cannot be overlooked, because it adversely affects the fairness of the sentencing proceedings, causing prejudice to the convicted person.

355. Judge Ibáñez Carranza would find that this error materially affected 20 out of the 61 individual sentences imposed and thus the joint sentence of 25 years' imprisonment. This error thus affected the fairness of the sentencing proceedings. As to the appropriate relief, Judge Ibáñez Carranza would reverse the joint sentence of 25 years of imprisonment and remand the matter to the Trial Chamber for it to determine a new sentence. According to her, in its new determination, the Trial Chamber should also consider the weight that ought to be afforded in mitigation to Mr Ongwen's personal circumstances, in particular the impact that the traumatic experiences which he underwent, had on his personality, brain formation, future opportunities and the development of his moral values.

356. In her partly dissenting opinion, Judge Ibáñez Carranza also considers it necessary and relevant to discern the object and purposes of sentencing within the specific legal framework that governs proceedings before this Court. In her view, sentencing serves various purposes, including in particular retribution and prevention

[725] Annex 1: Partly Dissenting Opinion of Judge Luz del Carmen Ibáñez Carranza.

in all its variants (special and general). In relation to general prevention, all its aspects ought to be considered, in particular the positive aspect of general prevention is of relevance and includes, according to the jurisprudence of this and other international tribunals, and as illustrated in the recent developments before the Assembly of States Parties, contributions to the promotion of restorative justice and reconciliation as a way to promote the restoration of the rule of law and therefore sustainable peace. The views of Judge Ibáñez Carranza are further developed in her partly dissenting opinion appended to this judgment.[726]

#### (c) Alleged error in double-counting the defencelessness of children recruited into the LRA

357. The Defence's third argument is that the Trial Chamber erroneously double-counted the defencelessness of children recruited into the LRA as both a factor relevant to its assessment of gravity and as an aggravating circumstance pursuant to rule 145(2)(b)(iii) of the Rules.[727] In its view, since "the vulnerability of the victims is inherently part of the gravity of the crime [of conscription of children under the age of 15 and their use to participate in hostilities]", it should not have been considered as an aggravating factor as well.[728] Rule 145(2)(b)(iii) of the Rules provides in relevant part that "the Court shall take into account, as appropriate: […] [a]s aggravating circumstances: […] Commission of the crime where the victim is particularly defenceless".

358. In the relevant part of the Sentencing Decision, the Trial Chamber held as follows:

> 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 [Mr] Ongwen and his co-perpetrators. In this regard, P-0015 testified that children as young as eight years old were abducted from Pajule during the attack on 10 October 2003.

[726] Annex 1: Partly Dissenting Opinion of Judge Luz del Carmen Ibáñez Carranza.
[727] Appeal Brief, paras 251-256.
[728] Appeal Brief, para. 251.

> P-0275 was nine years old when he was abducted during the attack on Odek IDP camp on 29 April 2004. P-0372 testified that children as young as eight to 10 years old were trained with a gun in [Mr] Ongwen's group. The Chamber, also noting its findings on the mental elements in relation to the crime, considers that [Mr] Ongwen was aware that particularly young children under 10 years old were abducted and integrated into Sinia.[729]

359. The Appeals Chamber once again recalls that the prohibition against double-counting does not extend to factors that do not constitute the legal elements of the crimes for which the person was convicted, or the relevant mode of liability, but rather serve to prove them.[730] It agrees in this regard with Trial Chamber VI insofar as it held in the *Ntaganda* Case 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 these crimes.[731]

360. The Appeals Chamber also agrees that when the victims are of very young age, this may be a factor that could be considered either as part of the gravity assessment or as an aggravating factor[732] (but not towards both) when determining the appropriate sentence for the crimes of conscription of children under the age of 15 years and their use in hostilities.

361. In the case at hand, it is clear from the Trial Chamber's reasoning that the very young age of some of the victims was considered as an aggravating factor under rule 145(2)(b)(iii) of the Rules in the sense that the crimes were committed against "*particularly* defenceless" victims.[733] Indeed, after recognising that "by definition", the crimes of conscription and use of children under the age of 15 in hostilities are committed against vulnerable victims (children), the Trial Chamber found that some of them may be even more vulnerable "due to their particularly young age".[734] It was on this basis that the Trial Chamber considered that the aggravating circumstance of the

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[729] Sentencing Decision, para. 369 (footnotes omitted).
[730] *See* paragraph 344 above.
[731] *Ntaganda* Sentencing Decision, para. 195.
[732] *Ntaganda* Sentencing Decision, para. 195.
[733] Emphasis added.
[734] Sentencing Decision, para. 369.

commission of a crime against particularly defenceless victims was established, in relation to those particularly young victims.[735]

362. The Appeals Chamber finds no error in the Trial Chamber's above approach and determination.

363. In relation to the Defence's argument that the Trial Chamber "gave no explanation as to why the age of 10 was chosen as the border between vulnerable and 'particularly vulnerable'",[736] the Appeals Chamber agrees that some further explanation may have been desirable setting out the basis for the distinction adopted by the Trial Chamber. This notwithstanding, the Appeals Chamber notes that the Trial Chamber gave examples of children abducted at a very young age and that all of them were under the age of 10.[737] It thus appears that the Trial Chamber based its finding on the specific cases, which persuaded it that those victims were particularly defenceless. The Appeals Chamber notes in this regard that while the UN Children's Rights Convention defines a child as an individual aged 0–18 years, in time, the UN has come to formally define adolescence as the period between 10 and 19 years of age.[738] Furthermore, the expert report of Professor Michael Wessells (PCV-0002), submitted pursuant to rule 68(3) of the Rules[739] and cited by Victims Group 2, provides that:

> Children who either grow up inside the LRA or 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. […] 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.[740]

364. This report lends further support to the Trial Chamber's finding that in the present case children under the age of 10 years were particularly defenceless. The Appeals

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[735] Sentencing Decision, para. 369.
[736] Appeal Brief, para. 254.
[737] Sentencing Decision, para. 369.
[738] *See e.g.* WHO Global Strategy for Women', Children' and Adolescents' Health, pp. 4-5.
[739] Conviction Decision, para. 601.
[740] UGA-PCV-0002-0076, at 0091-0093.

Chamber therefore finds that, contrary to the Defence's contention,[741] the Trial Chamber did not introduce an arbitrary threshold of age.

365. Accordingly, the Defence's arguments are rejected.

### (d) Alleged error in double-counting the essential elements of the mode of liability as aggravating factors and/or in the gravity assessment

366. Under its fourth argument, the Defence submits that the Trial Chamber erroneously considered Mr Ongwen's role and the "nature of the common purpose" when assessing the gravity and aggravating factors regarding the crime against humanity of enslavement committed in the course of the attack on Pajule IDP camp.[742] It submits that by doing so, the Trial Chamber "double-counted essential elements of the mode of liability as aggravating factors".[743]

367. The Defence refers in particular to paragraph 167 of the Sentencing Decision, which reads as follows:

> 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 [Mr] 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, [Mr] Ongwen personally ordered a subordinate to abduct civilians, and that this order was executed. [Mr] 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 [Mr] Ongwen's group.[744]

368. At the outset, the Appeals Chamber notes that the Defence does not refer to any finding of the Trial Chamber to the effect that Mr Ongwen's role in relation to the commission of the crime of enslavement during the attack on Pajule IDP camp and the fact that one of the main purposes of the attack was the enslavement of civilians were taken into account as aggravating circumstances.

369. Regarding the question of whether these considerations were properly weighed in the assessment of gravity, the Appeals Chamber finds that the Defence's submissions

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[741] Appeal Brief, para. 253.
[742] Appeal Brief, paras 257-260.
[743] Appeal Brief, para. 257.
[744] Sentencing Decision, para. 167 (footnotes omitted).

are premised on an incorrect understanding of the scope of the prohibition against double-counting. As recalled above and in the determination of ground of appeal 11, the prohibition against double-counting applies to the legal elements of the crimes of which the person was convicted or the relevant mode of liability, but does not extend to those factors that are not the legal elements but only serve to prove them.[745]

370. In this respect, the Appeals Chamber agrees with the Prosecutor[746] that, while it is correct that the enslavement of civilians was a feature of the common plan agreed upon by Mr Ongwen and the co-perpetrators to attack Pajule IDP camp,[747] it is clear that this factor does not amount to a legal element of Mr Ongwen's individual criminal responsibility under article 25(3)(a) of the Statute of indirect co-perpetration. Rather, this serves to prove the existence of a common plan to attack Pajule IDP camp.

371. The same holds true for Mr Ongwen's role and degree of involvement in the commission of the crime of enslavement during the attack on Pajule IDP camp. While the fact that Mr Ongwen ordered the commission of the crime and led a group of abductees was considered in the determination of his control over the crimes committed in the context of the attack,[748] neither of these amount to legal elements of the mode of liability of indirect co-perpetration but rather serve to prove one of them, namely control over the crime. The Defence's argument is accordingly rejected.

#### (e) Conclusion

372. Having rejected the totality of the arguments raised by the Defence, the Appeals Chamber, by majority, Judge Ibáñez Carranza partly dissenting, rejects the twelfth ground of appeal.

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[745] *See* paragraph 319 above.
[746] Prosecutor's Response, para. 256.
[747] Conviction Decision, paras 2851-2854.
[748] Conviction Decision, paras 2862, 2864.

## VI. APPROPRIATE RELIEF

373. The Appeals Chamber has unanimously rejected 10 of the 11 grounds of appeal. It confirms these aspects of the Sentencing Decision. Regarding ground of appeal 12, the Appeals Chamber rejects it by majority, Judge Ibáñez Carranza partly dissenting in respect to the allegation of double-counting the factor of multiplicity of victims. While the Majority confirms the Sentencing Decision in this respect, Judge Ibáñez Carranza would reverse the joint sentence of 25 years of imprisonment and remand the matter to the Trial Chamber for it to determine a new sentence.

374. The Appeals Chamber thus confirms, by majority, the joint sentence of 25 years' imprisonment imposed on Mr Ongwen.

Judge Ibáñez Carranza appends her partly dissenting opinion.

Done in both English and French, the English version being authoritative.

**Judge Luz del Carmen Ibáñez Carranza**
**Presiding**

**Judge Piotr Hofmański** | **Judge Solomy Balungi Bossa**

**Judge Reine Alapini-Gansou** | **Judge Gocha Lordkipanidze**

Dated this 15th day of December 2022
At The Hague, The Netherlands