ANNEX 1: Partly Dissenting Opinion of Judge Luz del Carmen Ibáñez Carranza

PARTLY DISSENTING OPINION OF JUDGE LUZ DEL CARMEN IBÁÑEZ CARRANZA

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PROLEGOMENA

i. It is with the greatest respect for my colleagues and under the mandate of my conscience that I issue this partly dissenting opinion to express my disagreement with the Majority's ruling on one discrete but significant aspect of the appeal lodged by Mr Ongwen against the Sentencing Decision. At the outset, I must highlight that the Judges have reached a consensus and rejected the 90 grounds of appeal raised in the conviction appeal, and, consequently, confirmed the Conviction Decision. The Appeals Chamber has also unanimously rejected ten out of the 11 grounds of appeal raised in the sentencing appeal. We have also agreed on three of the four sub-grounds raised under ground of appeal 12. However, for reasons that will be explained in detail, I am unable to agree with my colleagues on the issue of double-counting of the factor of the multiplicity of victims in the Trial Chamber's assessment of gravity and as an aggravating circumstance. While the issue may be discrete, it raises a serious problem of reasoning by the Trial Chamber amounting to an error of law, which materially affected almost one third of the individual sentences imposed on Mr Ongwen. In my view, this issue cannot be overlooked, because it adversely affects the fairness of the sentencing proceedings, causing serious prejudice to the convicted person.

ii. In this regard, I would also like to emphasise the need to ensure fairness and be particularly cautious when determining the appropriate sentence. This need is heightened in this case, given the peculiar personal circumstances of Mr Ongwen's condition as a former child soldier and thus his condition as a victim-perpetrator. It is significant that the Court is called upon for the first time to address the unique issue of victim-perpetrator and its relevance to the determination of sentence. It must be pointed out that, in the circumstances of this case, the status of victim-perpetrator is not a consideration relevant to the determination of an accused person's guilt or innocence pursuant to article 74 of the Statute. Rather, these matters inform the appropriate sentence to be imposed in case of a conviction under article 76 of the Statute. At this stage, the appropriate sentence is not only informed by the circumstances of the crimes of which the person was convicted and his or her degree of blameworthiness, but also, and importantly, by his or her personal circumstances. In particular, in this case, it is of crucial importance to consider the impact that Mr Ongwen's abduction, conscription,

violent indoctrination, being forced to carry out and participate in criminal acts when he was still a defenceless child of about nine years of age, and his upbringing in the coercive environment of the LRA had on his personality, the development of his brain and moral values, and future opportunities. A determination of the appropriate sentence requires thus both a holistic and intersectional analysis that takes into consideration both the blameworthiness of the convicted person and his or her individual circumstances. Mr Ongwen's condition as a victim did not cease when he turned 18 years old.

iii. For the reasons fully developed in this opinion, as a result of the error of double-counting that materially affected almost one third of the individual sentences imposed and thus the joint sentence, the matter should be remanded to the Trial Chamber for it to determine a new sentence. 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 of the traumatic experiences incurred, as described above.

iv. Given the specific nature of the serious crimes under the jurisdiction of the Court, which entail grave violations of international human rights, and the contexts of violence in which generally these crimes take place, as well as considering the essential values enshrined in the Statute, namely the peace, security and well-being of the world, I also consider it necessary and relevant to discern the object and purposes of sentencing within the specific legal framework that governs proceedings before this Court. In the context of international criminal law and international criminal justice, I firmly believe that sentencing serves various purposes, including in particular retribution and prevention in all its variants. In relation to prevention, all its aspects ought to be considered, and because of the nature and the context of the crimes, in particular the positive aspect of general prevention is of relevance. Indeed, according to the jurisprudence of the Court and that of other international tribunals, and as illustrated in the recent developments before the Assembly of States Parties, positive general prevention includes contributions to the promotion of restorative justice and reconciliation as a way to advance the enforcement of the rule of law and therefore sustainable peace.

v. The above aspects must be considered to achieve the imposition of a sentence that is fair for the victims, the convicted person and the affected communities. Additionally, such a sentence ought to be perceived as fair by the international community as a whole. This is also the case when determining the sentence of Mr Ongwen, particularly, considering the context of violence and the circumstances in which the crimes occurred, as described in the Conviction Decision.

vi. Importantly, I also would like to emphasise that nothing in this opinion should be interpreted as negating the great suffering of the victims of the very serious crimes of which Mr Ongwen has been convicted, in particular that suffered by the victims of sexual and gender based crimes and the victimised children. This has been duly and unanimously acknowledged in the Conviction Decision and in the Sentencing Decision as confirmed by the Appeals Chamber in today's judgments. In no way should this opinion be interpreted as an insinuation that Mr Ongwen should not be punished. I firmly believe that he indeed should. Only through the imposition of an adequate, proportionate and fair sentence will justice for both the victims and the convicted person be achieved.

I. KEY FINDINGS

1. Certainty and clarity are at the core of the judicial work. All judicial decisions must reflect the reasoning of the Judges in a clear and unambiguous manner. This is an indispensable requirement of fairness and one that becomes even more fundamental at the sentencing stage when the Judges are to decide on the imposition of a proportionate and fair penalty.

2. In cases where a given factor may be relevant to both the gravity assessment and as an aggravating circumstance, a trial chamber must be careful and the sentencing decision must unambiguously state in its reasoning whether weight is given to this factor as part of the gravity assessment or as an aggravating circumstance. If this requirement is not observed, the legal error of double-counting affects the fairness of the sentencing proceedings.

3. The condition of victim-perpetrator is unique, particularly in the case of persons that were victimised in their early childhood. Children that have been conscripted and

used in hostilities are forced to experience highly traumatic events that often include physical and psychological harm. In general, this harm leaves scars for the rest of their lives and has long-lasting effects on their personality, the development of their brain and moral values, and future opportunities. These circumstances ought to be considered as relevant and unique personal circumstances at the sentencing stage.

4. In the specific context of international criminal law and international criminal justice, sentencing serves various purposes, including in particular retribution and prevention in all its variants. In relation to prevention, all its aspects ought to be considered. In this regard, because of the nature and the context of the crimes the positive aspects of general prevention are of relevance. This includes, according to the jurisprudence of the Court and that of 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 advance the enforcement of the rule of law and therefore sustainable peace.

II. INTRODUCTION

5. As set out in the Prolegomena, Judge Ibáñez Carranza agrees with her colleagues on all of the conclusions reached in the Conviction Appeal Judgment, as well as with almost all of the conclusions reached in the determination of the appeal lodged against the Sentencing Decision. This dissent only concerns the determination by the majority of the Appeals Chamber of one aspect of ground of appeal 12, namely the alleged double-counting of the factor of the multiplicity of victims. According to the Defence, the Trial Chamber erred by counting the number of victims both in its assessment of gravity and as an aggravating circumstance in relation to 22 counts.[1] Despite acknowledging that in relation to 20 counts, "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

[1] Appeal Brief, paras 245-250.

its analysis", the majority of the Appeals Chamber "finds that it did not rely upon this factor twice".[2]

6. As it will be fully elaborated on in this opinion, it is the firm view of Judge Ibáñez Carranza that: the Trial Chamber erred by double-counting the factor of the multiplicity of victims in relation to 20 of the 61 crimes for which Mr Ongwen was convicted; this legal error materially affected the individual sentences, led the Trial Chamber to exercise its discretion based on an erroneous interpretation of the law and, thus, resulted in a disproportionate joint sentence; and the appropriate relief would be to reverse the joint sentence and remand the matter to the Trial Chamber for it to determine a new sentence. When re-examining the matter and ultimately determining the joint sentence, the Trial Chamber would need to reassess the relevant factors, including Mr Ongwen's individual circumstances, in particular, his abduction as a child and his upbringing in the LRA and the impact that this had on his personality, the development of his brain and moral values, and future opportunities. The Trial Chamber should also bear in mind the object and purposes of sentencing, including prevention in its positive aspect as fully explained below.

7. This opinion shall begin with the challenge brought by the Defence and the issues arising therefrom. It will then set out the relevant parts of the Sentencing Decision. Next, the partly dissenting opinion shall summarise the relevant findings reached by the majority of the Appeals Chamber. This opinion shall then turn to the analysis, which will be structured as follows: (i) the reasons supporting the finding of an error by the Trial Chamber in double-counting the factor of the multiplicity of victims in its assessment of gravity and as an aggravating circumstance; (ii) the reasons supporting the finding of the material impact of the error on each of the 20 individual sentences concerned and, ultimately, on the joint sentence imposed by the Trial Chamber; (iii) the reasons supporting the decision to reverse the joint sentence and remand the matter to the Trial Chamber for it to determine a new sentence; and (iv) other relevant considerations when determining the new sentence. Lastly, the concluding section will contain a recapitulation of the points made in the present opinion and the proposed outcome.

[2] Majority Judgment, para. 348.

III. THE DEFENCE'S CHALLENGE AND ISSUES ARISING

8. Under ground of appeal 12, the Defence submits, *inter alia*, that "[t]he Chamber erred in factoring the high number of victims both as a factor of gravity and as an aggravating factor".[3] In its view, "[t]his impermissible double-counting for the crimes of murder, attempted murder, torture and enslavement, resulted in a manifestly unreasonable increase of the sentence for Counts 2-3, 4-5, 8, 12-13, 14-15, 16-17, 20, 25-26, 27-28, 29-30, 33, 38-39, 40-41 and 46".[4]

9. The Defence requests the Appeals Chamber to "quash the individual sentences imposed after an erroneous double-counting, and either impose reduced individual sentences, or remand the matter to Trial Chamber IX".[5]

10. In light of the challenge brought by the Defence, the following issues arise and need to be considered in the present opinion:

a. Whether the Trial Chamber erred by double-counting the factor of the multiplicity of victims in its assessment of gravity and as an aggravating circumstance in relation to 22 counts?;

b. If the Trial Chamber erred, whether the error had a material impact on the affected individual sentences imposed, and on the joint sentence of 25 years of imprisonment ultimately imposed by the Trial Chamber?;

c. If the Trial Chamber committed a material error, what is the appropriate relief?;

d. In case of reversal and remand to the Trial Chamber, what other relevant considerations should the Trial Chamber take into account when determining a new sentence?

11. In the following sections, this opinion will analyse and provide answers to each of these questions.

[3] Appeal Brief, p. 82.
[4] Appeal Brief, para. 245.
[5] Appeal Brief, para. 261.

IV. RELEVANT PARTS OF THE SENTENCING DECISION

12. In the Sentencing Decision, in the section on "Applicable law", the Trial Chamber referred to the prohibition of double-counting factors in gravity and as aggravating factors and the Appeals Chamber's previous jurisprudence on the matter as follows:

> The Chamber is attentive to the considerations expressed by the Appeals Chamber to the effect 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. This is the case, for example, as concerns the interplay between the "gravity of the crime" under Article 78(1) of the Statute, the "extent of the damage caused", the "degree of participation of the convicted person" under Rule 145(1)(c) of the Rules and the aggravating circumstances listed in Rule 145(2)(b) of the Rules. Indeed, as explained by the Appeals Chamber, "certain facts may reasonably be considered under more than one of the categories", and "[w]hat is of importance, therefore, is not so much in which category a given factor is placed, but that the Trial Chamber identifies all relevant factors and attaches reasonable weight to them in its determination of the sentence, carefully avoiding that the same factor is relied upon more than once".[6]

13. The Trial Chamber further explained that "[f]or the determination of each individual sentence to be imposed", it would "identify all facts […] it deems to be relevant to its assessment of the factors referred to in the applicable provisions and their balancing".[7] Importantly, it stated that "[i]rrespective 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 Dominic Ongwen was convicted".[8]

14. Subsequently, in its consideration of the factors deemed relevant to the determination of the individual sentences of 22 counts, the Trial Chamber referred to the number of victims. The counts in relation to which the Defence alleges double-counting of the factor of the high number of victims are: the crime against humanity of murder and the war crime of murder committed during the attack on Pajule IDP camp (counts 2-3);[9] the crime against humanity of murder and the war crime of murder

[6] Sentencing Decision, para. 55, *referring to* *Bemba et al*. Sentencing Appeal Judgment, para. 4.
[7] Sentencing Decision, para. 56.
[8] Sentencing Decision, para. 56.
[9] Sentencing Decision, paras 153-154: "153. Turning to the crime against humanity of murder (Count 2) and the war crime of murder (Count 3), the Chamber observes at the outset that the value protected by the incrimination is human life, which is a strong factor of gravity. In this regard, the Chamber agrees that '[m]urder is inherently one of the most serious crimes'. 154. Also in the concrete circumstances of

committed during the attack on Odek IDP camp (counts 12-13);[10] the crime against humanity of attempted murder and the war crime of attempted murder committed during the attack on Odek IDP camp (counts 14-15);[11] the crime against humanity of murder and the war crime of murder committed during the attack on Lukodi IDP camp (counts 25-26);[12] the crime against humanity of attempted murder and the war crime of attempted murder committed during the attack on Lukodi IDP camp (counts and 27-28);[13] the crime against humanity of murder and the war crime of murder committed

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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 Dominic 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 Dominic Ongwen was aware of this. On the same basis, the Chamber also considers that Dominic Ongwen knew that in the ordinary course of the events there would be multiple victims" (footnotes omitted).

[10] Sentencing Decision, paras 187-188: "187. Turning to the crime against humanity of murder (Count 12) and the war crime of murder (Count 13), the Chamber reiterates that the value protected by the incrimination is human life, and that murder is inherently one of the most serious crimes. 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 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 Dominic Ongwen ordered the attackers to target everyone, including civilians, such widespread extent of killings as part of the attack was intended by Dominic Ongwen" (footnotes omitted).

[11] Sentencing Decision, paras 192-193: "192. 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 Dominic Ongwen's) control. 193. 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 Dominic Ongwen intended for there to be multiple killings" (footnote omitted).

[12] Sentencing Decision, paras 225-226: "225. Turning to the crime against humanity of murder (Count 25) and the war crime of murder (Count 26), the Chamber reiterates that the value protected by the incrimination is human life, and that murder is inherently one of the most serious crimes. 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 Dominic Ongwen's order to attack Lukodi IDP camp and everyone present in that location, including civilians, it was also intended by him" (footnotes omitted).

[13] Sentencing Decision, para. 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 Dominic Ongwen's)

during the attack on Abok IDP camp (counts 38-39);[14] the crime against humanity of attempted murder and the war crime of attempted murder committed during the attack on Abok IDP camp (counts 40-41);[15] the crime against humanity of torture and the war crime of torture committed during the attack on Pajule IDP camp (counts 4-5);[16] the crime against humanity of torture and the war crime of torture committed during the attack on Odek IDP camp (counts 16-17);[17] the crime against humanity of enslavement

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 Dominic Ongwen" (footnote omitted).

[14] Sentencing Decision, paras 261-262: "261. Turning to the crime against humanity of murder (Count 38) and the war crime of murder (Count 39), the Chamber reiterates that the value protected by the incrimination is human life, and that murder is inherently one of the most serious crimes. 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 Dominic Ongwen" (footnotes omitted).

[15] Sentencing Decision, para. 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 Dominic 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 Dominic Ongwen" (footnote omitted).

[16] Sentencing Decision, paras 157-159: "157. Turning to the crimes of torture – of which in the context of the attack on Pajule IDP camp Dominic Ongwen was convicted under Count 4 (torture as a crime against humanity) and Count 5 (torture as a war crime) – the Chamber first observes that torture is a particularly heinous act, violating the right not to be subjected to torture recognised in customary and conventional international law and as a norm of *ius cogens*. Torture represents an assault on the personal human dignity, security and mental well-being of the victims. As such, the gravity of the crime of torture is in the abstract very high. The Chamber notes that the crime against humanity of torture and the war crime of torture each have a specific legal element not contained in the other, but is of the view that it cannot be said in the abstract that the presence of this legal element, or more precisely of the facts typically underlying it, means that the crime against humanity of torture is in the abstract graver than the war crime of torture, or *vice versa*. 158. 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 Dominic Ongwen was convicted under Counts 4 and 5. In 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. 159. 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 Dominic Ongwen knew that there would be multiple victims" (footnotes omitted).

[17] 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

committed during the attack on Pajule IDP camp (count 8);[18] the crime against humanity of enslavement committed during the attack on Odek IDP camp (count 20);[19] the crime against humanity of enslavement committed during the attack on Lukodi IDP

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 Dominic Ongwen ordered the attackers to target everyone, including civilians, the Chamber also considers that Dominic Ongwen intended for there to be multiple victims of torture" (footnotes omitted).

[18] Sentencing Decision, paras 162-164: "162. Under Count 8, Dominic Ongwen was convicted of the crime against humanity of enslavement. This incrimination protects the individual's personal liberty, making the crime of enslavement in abstracto a crime of considerable gravity. 163. In the concrete circumstances, the Chamber considers the gravity of the crime of enslavement in the context of the attack on Pajule IDP camp to be high. As found by the Chamber, hundreds of civilians from the Pajule IDP camp were abducted and enslaved. They were forced to carry looted items, including heavy loads, for long distances while retreating from the camp. For example, P-0006, whose story is discussed in more detail in the Trial Judgment, testified that seven armed LRA fighters entered her house and abducted her, making her carry items out of the house. She explained how she was beaten, as were other abductees, and that she was made to carry 'extremely heavy' items, and that she also saw other abductees struggling to carry the load. She testified that despite the fact that the LRA rebels were beating abductees to make them walk faster, the abductees could only walk slowly because of the heavy items they were carrying. Other very detailed individual accounts are referred to in the Trial Judgment, demonstrating the nature and extent of the conduct of the LRA attackers with respect to the persons they abducted during the attack on Pajule IDP camp, and the nature and extent of the harm suffered by the victims. 164. 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 Dominic Ongwen himself. The high number of victims – which was therefore specifically intended by Dominic Ongwen – must thus be qualified as an aggravating circumstance of multiplicity of victims under Rule 145(2)(b)(iv) of the Rules" (footnotes omitted).

[19] Sentencing Decision, paras 197-199: "197. With respect to the crime against humanity of enslavement (Count 20), the Chamber refers to its considerations above as to the gravity of this crime in abstracto. 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 Dominic Ongwen's household. P-0252 testified about being abducted during the attack on Odek IDP camp and about his subsequent experience in the LRA before his return from captivity sometime in June 2004. 198. As noted in the Trial Judgment, P-0252 testified that older women and very young children were sent home, but some girls, approximately 14 years old and upwards, were kept. P-0252 further testified that children from 10-14 years were taken to the bush and recruited as fighters in the LRA. 199. 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, Dominic Ongwen intended it." (footnotes omitted).

camp (count 33);[20] and the crime against humanity of enslavement committed during the attack on Abok IDP camp (count 46).[21]

V. RELEVANT PARTS OF THE MAJORITY OPINION

15. After recalling the relevant findings of the Trial Chamber in relation to the 22 counts allegedly affected by the error of double-counting, the majority of the Appeals Chamber notes that in relation to 20 of these instances, "[t]he 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".[22] It is only in relation to counts 16 and 17 (the crime against humanity of torture and the war crime of torture committed during the attack on Odek IDP camp), that the majority of the Appeals Chamber concludes that "the Trial Chamber appears to have referred to the number of victims only in relation to the aggravating circumstance of multiplicity of victims".[23]

16. Despite its acknowledgment that in the vast majority of instances (20 counts), "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" and that "the Trial Chamber may

[20] Sentencing Decision, paras 235-236: "235. With respect to the crime against humanity of enslavement (Count 33), the Chamber refers to its considerations above as to the gravity of this crime in abstracto. 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. 236. 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 Dominic Ongwen" (footnotes omitted).
[21] Sentencing Decision, paras 270-271: "270. With respect to the crime against humanity of enslavement (Count 46), the Chamber refers to its considerations above as to the gravity of this crime in abstracto. 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. 271. 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 Dominic Ongwen." (footnotes omitted).
[22] Majority Judgment, para. 346.
[23] Majority Judgment, para. 347.

not have been sufficiently careful in its discussion of this factor", the majority of the Appeals Chamber finds that "it did not rely upon [it] twice".[24]

17. In order to reach the above conclusion and referring to its previous jurisprudence in the *Ntaganda* Case,[25] the majority of the Appeals Chamber, finds that

> 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, as 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 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.[26]

18. The majority of the Appeals Chamber also reaches this conclusion on the basis that in the section setting out the applicable law, the Trial Chamber indicated that it would "not consider the same factor more than once for the purpose of the determination of the appropriate sentence for each crime".[27] The majority of the Appeals Chamber therefore finds that

> By referring to the factor of multiplicity of victims under more than one category, the Trial Chamber appears to have merely identified the 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.[28]

19. The dissenting judge respectfully disagrees with the Majority's finding that the Trial Chamber's reasoning was merely ambiguous, feature that in any event, and for the reasons set out below, is incompatible with the requirement of fairness and certainty in a judicial decision. As will be explained below, Judge Ibáñez Carranza considers

[24] Majority Judgment, para. 348.
[25] Majority Judgment, para. 349, *referring to* *Ntaganda* Sentencing Appeal Judgment, para. 124.
[26] Majority Judgment, para. 350.
[27] Majority Judgment, para. 351, *referring to* Sentencing Decision, paras 55, 135.
[28] Majority Judgment, para. 352 (footnote omitted).

that, on the contrary, the Trial Chamber's reasoning clearly shows that the Trial Chamber took into account the multiplicity of victims twice and therefore erred.

VI. STANDARD OF REVIEW

20. The dissenting judge notes that, as explained below, an allegation of double-counting, if established, amounts to a legal error. In this regard, Judge Ibáñez Carranza recalls the standard of review for these kind of errors as set out in the Majority Judgment:

> 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.[29]

21. As to the material effect in case 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. 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.[30]

22. The above standard of review will guide the below analysis in this opinion.

VII. ERROR OF DOUBLE-COUNTING

23. This section will set out the reasons supporting Judge Ibáñez Carranza's conclusion that the Trial Chamber erred by double-counting the multiplicity of victims in relation to the 20 counts. To that end, the opinion will address: (i) relevant legal considerations, in particular, those concerning the prohibition against double-counting and the requirement of a reasoned decision; and (ii) the application of the law to the facts by reference to the specific circumstances in this case.

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[29] Majority Judgment, para. 33, *referring to* *Lubanga* Appeal Judgment, para. 18; *Bemba et al.* Sentencing Appeal Judgment, para. 22; *Ntaganda* Sentencing Appeal Judgment, para. 25.
[30] Majority Judgment, para. 36, *referring to* *Lubanga* Sentencing Appeal Judgment, para. 45; *Bemba et al.* Sentencing Appeal Judgment, para. 25; *Ntaganda* Sentencing Appeal Judgment, para. 32.

A. Relevant legal considerations

24. In order to discern whether the Trial Chamber erred by double-counting the factor of multiplicity of victims in its assessment of gravity and as an aggravating factor in relation to the 22 counts allegedly affected by the error, it is necessary to discuss the relevant legal considerations regarding the prohibition against double-counting and the requirement of a reasoned decision. These are addressed below.

1. The prohibition against double-counting

25. In order to determine whether the Trial Chamber erred by double-counting, it is necessary to first briefly set out a correct understanding of the prohibition against double-counting. Although the prohibition against double-counting is not specifically provided in the Statute, it has been adopted in the jurisprudence of the Court, and that of other national and international courts as a guiding principle in sentencing proceedings to ensure fairness. In this regard, the *rationale* behind the principle is to prevent a convicted person from being punished twice in relation to the same factor.

26. The ICTY Appeals Chamber has noted that "[w]here established, such double-counting amounts to a legal error since '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*'".[31] In a different case, it "confirmed that 'factors which a Trial Chamber takes into account as aspects of the gravity of the crime cannot additionally be taken into account as separate aggravating circumstances, and *vice versa*'".[32]

27. Before the SCSL, it has also been emphasised that if a trial chamber "contravened" "the Rule against 'Double Counting' […] [it] could […] prejudice, or violate the rights of the Accused".[33] Indeed, as correctly stated by Ambos, the prohibition against double-counting "flows from the basic rationale of achieving a just and adequate punishment".[34]

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[31] *D. Milošević* Appeal Judgment, para. 306.
[32] *Deronjić* Sentencing Appeal Judgment, para. 107.
[33] *Sesay et al.* Sentencing Decision, Separate concurring opinion and partially dissenting opinion of Hon Justice Benjamin Mutanga Itoe, para. 6.
[34] K. Ambos, *Treatise on International Criminal Law*, Volume II: The Crimes and Sentencing, (OUP, 2014), p. 266.

28. It is recalled that the Appeals Chamber has addressed the prohibition of double-counting factors in gravity and as aggravating factors in previous judgments, notably in the *Bemba et al*. Sentencing Appeal Judgment and in its recent *Ntaganda* Sentencing Appeal Judgment. It is noted that in the Sentencing Decision, the Trial Chamber referred to the prohibition of double-counting, explicitly recalling the Appeals Chamber's jurisprudence.

29. In the *Bemba et al*. Sentencing Appeal Judgment, the Appeals Chamber held as follows:

> The Appeals Chamber is of the view that the "gravity of the crime" mentioned in article 78 (1) of the Statute, the "extent of the damage caused", the "degree of participation of the convicted person" mentioned in rule 145 (1) (c) of the Rules and the aggravating circumstances listed in rule 145 (2) (b) of the Rules are not neatly distinguishable and mutually exclusive categories. Rather, certain facts may reasonably be considered under more than one of the categories. What is of importance, therefore, is not so much in which category a given factor is placed, but that the Trial Chamber identifies all relevant factors and attaches reasonable weight to them in its determination of the sentence, carefully avoiding that the same factor is relied upon more than once.[35]

30. Similarly, in the *Ntaganda* Sentencing Appeal Judgment, the Appeals Chamber stated as follows:

> 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*".[36]

31. Specifically referring to its previous jurisprudence in the *Bemba et al*. Case, the Appeals Chamber further held:

> 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

[35] *Bemba et al*. Sentencing Appeal Judgment, paras 4, 112 (footnote omitted), *referring to* Lubanga Sentencing Appeal Judgment, paras 61-65, discussing potential alternative interpretations of the interplay between the factors in article 78(1) of the Statute and those in rule 145(1)(c) of the Rules and concluding, at para. 66, that "the issue is whether the Trial Chamber considered all the relevant factors and made no error in the weighing and balancing exercise of these factors in arriving at the sentence".
[36] *Ntaganda* Sentencing Appeal Judgment, para. 123 (footnote omitted), *referring to D. Milošević* Appeal Judgment, para. 306, *referring to M. Nikolić* Sentencing Appeal Judgment, para. 58; *Deronjić* Sentencing Appeal Judgment, para. 106.

> 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.[37]

32. From the above, it is clear that while a trial chamber can identify factors relevant to both the gravity of a particular crime and any aggravating circumstance, it must be "careful" not to rely on the same factor more than once. It follows that, in cases where a given factor may be relevant to both the gravity assessment and as an aggravating circumstance, a trial chamber should be careful. In this regard, the sentencing decision must clearly state in its reasoning whether weight is given to this factor as part of the gravity assessment or as an aggravating circumstance. If this is not unambiguous, the trial chamber has not been "careful" and the only reasonable conclusion is that a trial chamber has given weight to the same factor twice in contravention of the prohibition against double-counting.

33. In cases where the prohibition against double-counting is contravened, a trial chamber commits an error of law and therefore, as explained above, the standard of review for such errors requires the Appeals Chamber "not [to] 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".[38]

2. Requirement of a reasoned decision

34. As acknowledged by the majority of the Appeals Chamber, the wording used by the Trial Chamber when considering the multiplicity of victims in relation to the 20 counts in question was "rather ambiguous and did not contribute to the clarity of its analysis".[39] In the view of Judge Ibáñez Carranza, this raises an issue of sufficiency of reasoning in this part of the Sentencing Decision. It is therefore appropriate to recall the applicable law with respect to the requirement of a reasoned decision.

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[37] *Ntaganda* Sentencing Appeal Judgment, para. 124 (footnote omitted), *referring to* *Bemba et al.* Sentencing Appeal Judgment, para. 112.
[38] *Ntaganda* Sentencing Appeal Judgment, para. 25.
[39] Majority Judgment, para. 348.

35. Articles 64(2) and 67(1) of the Rome Statute require the Court to conduct a fair trial. Moreover, article 21(3) of the Statute stipulates that the legal texts of the Court must be interpreted and applied in accordance with internationally recognised human rights. In this regard, the following provisions from International Human Rights Law are of relevance: article 14(1) providing that "[i]n the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing";[40] article 14(3) of the International Covenant on Civil and Political Rights stating that "[i]n the determination of any criminal charge against him, everyone shall be entitled to […] minimum guarantees, in full equality";[41] article 6 of the European Convention on Human Rights;[42] article 8(1) of the American Convention on Human Rights;[43] and article 7 of the African Charter on Human and Peoples' Rights.[44]

36. It is recalled that the right to a fair trial refers to the observation of the due process of law which consists of a series of judicial guarantees (substantive and procedural) to which any person subject to judicial proceedings is entitled, in particular in criminal proceedings.[45] One of these judicial guarantees is the right to a reasoned decision. Indeed, the requirement of a reasoned decision as an element of the principle of a fair trial is part and parcel of international human rights law.[46]

37. As fully explained below, the reasoning in any judicial decision must be logical, consistent and unambiguous. Such reasoning is one that is structurally consistent, and from which only one conclusion can be drawn[47] – in other words, this is the requirement of certainty, with which any judicial decision must comply.

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[40] Article 14(1) of the *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations Treaty Series vol. 999.
[41] Article 14(3) of the *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations Treaty Series vol. 999.
[42] Article 6 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950.
[43] Article 8(1) of the *American Convention on Human Rights*, 22 November 1969.
[44] Article 7 of the *African Charter on Human and Peoples' Rights*, 27 June 1981.
[45] *Ongwen* OA4 Judgment, para. 134.
[46] *See in this regard e.g.* T. Giorgi, *The Right to a Reasoned Judgment*, Constitutional Law Review, (2016), pp. 16-27; M. Dymitruk, *The Right to a Fair Trial in Automated Civil Proceedings*, Masaryk University Journal of Law and Technology (2019), pp. 38- 41. *See also* the relevant international human rights jurisprudence cited below.
[47] *See* in this regard F. Mixan Mass, *Debate Penal Revista no. 9* (1977), Peru, pp. 193-203.

38. The requirement of a reasoned decision is also expressly provided for in article 74(5) of the Statute, which stipulates that "[t]he decision […] shall contain a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions". While this requirement is set out in relation to decisions on guilt or innocence, it undoubtedly applies to decisions on sentencing. Indeed, a reasoned statement means that the *rationale* of the decision must be clearly explained. The obligation to provide a reasoned opinion is of crucial importance for various reasons.

39. The Appeals Chamber in its current composition had the opportunity to consider the requirement of a reasoned decision in the *Said* Case. It stated that "[a] reasoned decision is paramount to the exercise of the right to a fair trial".[48] The Appeals Chamber further emphasised "the importance of reasoning in allowing the accused person to usefully exercise available rights of appeal", requiring "that courts 'indicate with sufficient clarity the grounds on which they based their decision'".[49] It found that "[a] Chamber's provision of reasons in decisions also 'enables the Appeals Chamber to clearly understand the factual and legal basis upon which the decision was taken and thereby properly exercise its appellate functions'".[50]

40. As to the extent of the reasoning, the Appeals Chamber has consistently held, including in the *Said* Case,[51] that

> The extent of the reasoning will depend on the circumstances of the case, but it is essential that it indicates with sufficient clarity the basis of the decision. Such reasoning will not necessarily require reciting each and every factor that was before the Pre-Trial Chamber to be individually set out, but it must identify which facts it found to be relevant in coming to its conclusion.[52]

41. Given that the requirement of a reasoned decision is a crucial element of fairness, it is also important to recall some relevant human rights jurisprudence on the matter. In this regard, the ECtHR has stressed in numerous cases that "courts must indicate with sufficient clarity the grounds on which they based their decision. It is this, *inter alia*, which makes it possible for the accused to exercise usefully the rights of appeal

[48] *Said* OA Judgment, para 41.
[49] *Said* OA Judgment, para. 42.
[50] *Said* OA Judgment, para. 43.
[51] *Said* OA Judgment, para. 45.
[52] *Lubanga* OA5 Judgment, para. 20.

available to him".[53] It is thus, not only an established case-law principle but also a reflection of the proper administration of justice, that judgments of courts and tribunals should adequately state the reasons on which they are based.[54]

42. In similar terms, the IACtHR has indicated that all decisions that "could affect human rights must be duly justified, because, if not, they would be arbitrary decisions".[55] It indicated in this regard that "[t]he grounds are the exteriorization of the reasoned justification that allows a conclusion to be reached".[56] The IACtHR has also recalled that "[t]he duty to state grounds is a guarantee linked to the proper administration of justice, protecting the right of citizens to be tried for the reasons provided by Law, and giving credibility to the legal decisions adopted in the framework of a democratic society".[57]

43. Although entered in the context of a reasoned decision pursuant to article 74(2) of the Statute, Judge Ibáñez Carranza considers that her previous conclusions in the *Gbagbo and Blé Goudé* Case on the matter are equally applicable to any judicial decision. In her dissenting opinion, Judge Ibáñez Carranza explained that "the decision-making process includes two sides of the same coin that judges must conduct concomitantly".[58] It was clarified in that opinion that "[o]ne side is the internal process where the trial judges assess all the evidence, both separately and holistically considered, along with the entire proceedings", indicating that "[t]his is the internal side where judges engage in a deliberative and dynamic process, through which it is possible to make findings and conclusions from the evidence".[59] As observed in that opinion, "[t]he other side is the act of putting such findings and conclusions into writing", explaining in this regard that "writing the final judgment is the external side of the decision-making process".[60] Judge Ibáñez Carranza stated in that opinion and re-states

[53] *Hadjianastassiou v. Greece* Judgment, para. 33.
[54] *See e.g. Garcia Ruiz v. Spain* Judgment, para. 26: "The Court reiterates that, according to its established case-law reflecting a principle linked to the proper administration of justice, judgments of courts and tribunals should adequately state the reasons on which they are based".
[55] *Álvarez and Íñiguez v. Ecuador* Judgment, para. 107.
[56] *Álvarez and Íñiguez v. Ecuador* Judgment, para. 107.
[57] *Aptiz Barbera et al. v. Venezuela* Judgment, para. 77.
[58] *Gbagbo and Blé Goudé* Dissenting Opinion, para. 207.
[59] *Gbagbo and Blé Goudé* Dissenting Opinion, para. 207.
[60] *Gbagbo and Blé Goudé* Dissenting Opinion, para. 207.

now in this case that "[b]oth sides run concurrently. Only through this twofold process is it possible to obtain a reliable decision for all parties and participants".[61]

44. Indeed, the findings and conclusions that are put in writing must invariably reflect the internal process that precedes this second step. This is the only possible way to ensure consistency: what is put in writing must mirror the internal process undergone by the Judges in their decision-making process. While at times the law and/or the facts may be ambiguous, the reasoning, findings and conclusions in a judicial decision ought to be clear, consistent and unambiguous.

45. It follows that the requirement of a reasoned decision constitutes an indispensable element of the appellate process. Indeed, the Appeals Chamber's review is corrective and it can only carry out its functions if it is in the position to understand and review the Trial Chamber's reasoning and findings. More fundamentally, the obligation to provide a reasoned opinion is a crucial element of the fair trial process and thus of the guarantees inherent in the due process of law, insofar as only a clear reasoned opinion enables an accused person to understand the basis of a judicial determination and to exercise his or her right to appeal. Therefore, logical, consistent and unambiguous reasoning is at the heart of any judicial decision and a fundamental aspect of the right to a fair trial.

46. Certainty and clarity are at the core of judicial decision-making. All judicial decisions must reflect the reasoning of the Judges in a clear and unambiguous manner. This is an indispensable requirement of fairness and one that becomes even more fundamental at the sentencing stage when the Judges are to decide on the imposition of a proportionate penalty which generally involves imprisonment, that is the restriction of the right to liberty of the convicted person.

47. Specifically, in the context of the prohibition of double-counting, the requirement of a logical, consistent and unambiguous reasoned decision is particularly relevant given that the Trial Chamber is required to not to rely on the same factor twice. This means that, in cases where a factor is identified as relevant for both the gravity

[61] *Gbagbo and Blé Goudé* Dissenting Opinion, para. 207.

assessment and as a possible aggravating factor, it should be clear from the reasoning of the Trial Chamber, that the factor has been relied upon only once.

B. Whether the Trial Chamber erred

48. In the case at hand, a careful reading of the relevant parts of the Sentencing Decision objectively shows that in relation to the 20 counts in question,[62] the Trial Chamber referred to the high number of victims twice in its assessment. The exception seems to be the case of counts 16 and 17 (the crime against humanity of torture and the war crime of torture committed during the attack on Odek IDP camp), where it is clear that the Trial Chamber did not refer to the multiplicity of victims in its assessment of gravity and only considered it in its determination of the existence of the aggravating circumstance of multiplicity of victims pursuant to rule 145(2)(b)(iv) of the Rules.[63] This exception indicates that the Trial Chamber was capable of being careful not to rely on the same factor twice in its assessment and that therefore, its two references to the same factor in relation to the remaining 20 counts cannot be a mere oversight.

49. A plain reading of the relevant parts of the Sentencing Decision reveals that, in relation to 20 counts, at no point of its analysis, the Trial Chamber specified that it attached weight to the factor of multiplicity of victims only once, either as part of its gravity assessment or as an aggravating circumstance. On the contrary, in its analysis the Trial Chamber seems to have referred to the multiplicity as informing both, thus logically implying that weight was attached twice to the factor. This is indeed illustrated in each of the 20 instances, as summarised below.

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[62] The crime against humanity of murder and the war crime of murder committed during the attack on Pajule IDP camp (counts 2-3); the crime against humanity of murder and the war crime of murder committed during the attack on Odek IDP camp (counts 12-13); the crime against humanity of attempted murder and the war crime of attempted murder committed during the attack on Odek IDP camp (counts 14-15); the crime against humanity of murder and the war crime of murder committed during the attack on Lukodi IDP camp (counts 25-26); the crime against humanity of attempted murder and the war crime of attempted murder committed during the attack on Lukodi IDP camp (counts and 27-28); the crime against humanity of murder and the war crime of murder committed during the attack on Abok IDP camp (counts 38-39); the crime against humanity of attempted murder and the war crime of attempted murder committed during the attack on Abok IDP camp (counts 40-41); the crime against humanity of torture and the war crime of torture committed during the attack on Pajule IDP camp (counts 4-5); the crime against humanity of enslavement committed during the attack on Pajule IDP camp (count 8); the crime against humanity of enslavement committed during the attack on Odek IDP camp (count 20); the crime against humanity of enslavement committed during the attack on Lukodi IDP camp (count 33); and the crime against humanity of enslavement committed during the attack on Abok IDP camp (count 46).
[63] Sentencing Decision, para. 195.

50. Specifically, in relation to the crime against humanity of murder (Count 2) and the war crime of murder (Count 3), the Trial Chamber first referred to the gravity of the crimes *in abstracto* and when referring to the gravity *in concreto* it stated that "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".[64] This assertion is immediately followed by the Trial Chamber's reference to "the extent of victimisation" and the modalities of commission of the crimes and concludes in the same paragraph affirming that "[t]he aggravating circumstance of multiplicity of victims under Rule 145(2)(b)(iv) of the Rules is therefore established".[65]

51. Similar wording is used, and reasoning is provided, for the crime against humanity of murder (Count 38) and the war crime of murder (Count 39);[66] the crime against humanity of torture (Count 4) and torture as a war crime (Count 5);[67] the crime against humanity of enslavement (count 8);[68] and the crime against humanity of enslavement (Count 20).[69]

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[64] Sentencing Decision, paras 153-154.
[65] Sentencing Decision, para. 154.
[66] Sentencing Decision, para. 262: "In the concrete circumstances of the case, the Chamber considers the crimes of murder under Counts 38 and 39 to be of very high gravity. Indeed, the Chamber found that the LRA attackers killed at least 28 civilian residents 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" (footnotes omitted).
[67] 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 Dominic Ongwen was convicted under Counts 4 and 5. In 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. […] 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" (footnotes omitted).
[68] 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. […] 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 Dominic Ongwen himself. The high number of victims – which was therefore specifically intended by Dominic Ongwen – must thus be qualified as an aggravating circumstance of multiplicity of victims under Rule 145(2)(b)(iv) of the Rules" (footnotes omitted)."
[69] 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. […] 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" (footnotes omitted).

52. Even if one were to assume that it is not sufficiently clear that the Trial Chamber attached weight to the factor of multiplicity of victims as part of its gravity assessment and as an aggravating circumstance, this lack of clarity cannot prejudice Mr Ongwen's rights. On the contrary, as explained above, the due process of law guarantee of a logical, consistent and unambiguous reasoned decision becomes particularly relevant given that the Trial Chamber is required to be careful not to rely on the same factor twice. This means that, in cases such as the present, where a factor is identified as relevant for both the gravity assessment and as a possible aggravating factor, it must be clear from the reasoning of the Trial Chamber that the factor has been relied upon only once. If this is not clear, it must be assumed that the prohibition against double-counting has been infringed.

53. More striking is the case of the crime against humanity of murder (Count 12) and the war crime of murder (Count 13), where, in considering the gravity of the crimes *in concreto*, the Trial Chamber found it to be "very high", noting that "[t]his is so *in particular because of the number of victims*".[70] In the same paragraph and after noting the modalities of commission, the Trial Chamber found that "[t]he aggravating circumstance of multiplicity of victims under Rule 145(2)(b)(iv) of the Rules is therefore established".[71] In this case, the Trial Chamber's error is blatant given the use of connectors. Indeed, in its analysis, it resorted to the use of the connector "in particular because of" to justify its finding that the gravity of the crimes is "very high" while in the same paragraph it determined that the aggravating circumstance is "therefore established".[72]

54. The Trial Chamber's assessment of the crime against humanity of murder (Count 25) and the war crime of murder (Count 26) is similarly unambiguous in illustrating that the Trial Chamber double-counted the factor of multiplicity of victims. The Trial Chamber considered, "[i]n the concrete circumstances of the case, […] the gravity of the crimes of murder under Counts 25 and 26 to be very high", noting that "[t]he high number of victims, at least 48, *justifies this conclusion*".[73] In the same paragraph, the Trial Chamber concluded that "[t]he aggravating circumstance of

[70] Sentencing Decision, para. 188 (emphasis added).
[71] Sentencing Decision, para. 188.
[72] Sentencing Decision, para. 188.
[73] Sentencing Decision, para. 226 (emphasis added).

multiplicity of victims under Rule 145(2)(b)(iv) of the Rules is therefore established".[74] As with the previous example, in this case the wording employed by the Trial Chamber, namely the connectors used, makes it crystal clear that it attached weight twice to the factor of multiplicity of victims.

55. Similarly, in relation to the crime against humanity of enslavement (Count 33), the Trial Chamber considered the gravity of the crime in the concrete circumstances "to be high […] because LRA fighters abducted at least 29 civilians, men, women and children, to carry looted goods from the camp".[75] After referring to the modalities of the crimes, in the following paragraph the Trial Chamber found "[o]n the basis of the facts as found […] the presence of the aggravating circumstance of multiplicity of victims under Rule 145(2)(b)(iv) of the Rules".[76] Identical wording is used, and reasoning is provided, for the crime against humanity of enslavement (Count 46).[77]

56. With respect to all of the counts concerning the crime against humanity of attempted murder (Count 14, 27, 40) and the war crime of attempted murder (Count 15, 28, 41), the Trial Chamber found "the gravity of the crimes in the concrete circumstances to be high", noting in this regard the number of civilians "that the LRA fighters attempted to kill" and "who eventually did not lose their life for reasons entirely outside the LRA fighters' (or Dominic Ongwen's) control".[78] In all of these cases, the Trial Chamber immediately found, without any further reasoning, that "the aggravating circumstance of the multiplicity of victims under Rule 145(2)(b)(iv) of the Rules is present".[79]

[74] Sentencing Decision, para. 226.
[75] Sentencing Decision, para. 235.
[76] Sentencing Decision, para. 236.
[77] 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. […] 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 Dominic Ongwen" (emphasis added, footnotes omitted).
[78] Sentencing Decision, paras 192, 230, 266.
[79] Sentencing Decision, paras 193, 230, 266.

57. It is clear that this way of proceeding resulted in a determination that is insufficiently reasoned and that, ultimately, amounts to a contravention of the prohibition against double-counting.

58. As to the level of reasoning, the Trial Chamber failed to "indicate with sufficient clarity the grounds on which [it] based [its] decision",[80] and there is "no exteriorization of the reasoned justification".[81] In these circumstances, the determination of the Trial Chamber on the weight attached to the multiplicity of victims is not self-explanatory.

59. Furthermore, on this specific point, the Sentencing Decision is not internally consistent. While the Trial Chamber quoted the jurisprudence on the prohibition of double counting, it did so only in the section setting out the applicable law.[82] Notably, in the absence of any indication that the Trial Chamber in fact applied that jurisprudence in its analysis relevant to each of the 20 counts concerned, it would be unreasonable to assume that it did so.

60. The above leads Judge Ibáñez Carranza to conclude that the Trial Chamber erred by double-counting the number of victims, once for gravity and once as aggravating circumstance. Indeed, as it is clear from the wording in the Sentencing Decision, the Trial Chamber referred twice to the same factor. In the absence of any further explanation, the logical and objective conclusion can only be that it relied twice on it.

61. As correctly noted in the Appeals Chamber's jurisprudence, "certain facts may reasonably be considered under more than one of the categories".[83] This means that there may be factors that could be relevant to the gravity of the crime and may, at the same time, be capable of constituting an aggravating circumstance. In the view of the dissenting judge, the number of victims could indeed be one such factor. As stated by the Appeals Chamber, regardless of the category under which the factor is considered, what is of crucial importance in order not to infringe the prohibition against double-counting is to be "careful not to rely on the same factor more than once".[84]

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[80] *See e.g.* *Said* OA Judgment, para. 42.
[81] *Álvarez and Íñiguez v. Ecuador* Judgment, para. 107.
[82] Sentencing Decision, paras 55-56.
[83] *Bemba et al.* Sentencing Appeal Judgment, paras 4, 112.
[84] *Ntaganda* Sentencing Appeal Judgment, para. 124 (footnote omitted), *referring to* *Bemba et al.* Sentencing Appeal Judgment, para. 112.

62. The majority of the Appeals Chamber has accepted that "the Trial Chamber may not have been sufficiently careful in its discussion of this factor".[85] This lack of care on the part of the Trial Chamber shows that it acted in contravention of the prohibition against double-counting. Indeed, in cases such as the present, where the number of victims may have been relevant both to the gravity assessment and as an aggravating circumstance, the Sentencing Decision should have clearly stated in its reasoning whether weight was given to this factor as part of the gravity assessment or as an aggravating circumstance. Since this was not done, the Trial Chamber has not been "careful" and the only reasonable conclusion is that, in relation to the 20 counts in question, the Trial Chamber has given weight to the number of victims twice in contravention of the prohibition of double-counting, thus affecting fairness.

63. In light of the above considerations, Judge Ibáñez Carranza cannot turn a blind eye and condone a legal error of this magnitude which in essence amounts to a violation of the procedural guarantees that constitute the due process of law and are part and parcel of a fair trial. Indeed, the error incurred by the Trial Chamber affected the fairness of the sentencing proceedings and led the Trial Chamber to misdirect itself in its exercise of discretion when determining the appropriate individual sentences and, ultimately the joint sentence of 25 years of imprisonment. Failure to correct the error and the consequent erroneous exercise of discretion would affect the fair adjudication of the case.

VIII. MATERIAL IMPACT OF THE ERROR

64. Having determined the existence of an error of double-counting in relation to 20 of the 61 crimes, pursuant to article 83(2) of the Statute, this opinion will now address the question of whether the error had a material impact on the individual sentences imposed and, ultimately, on the joint sentence of 25 years of imprisonment imposed on Mr Ongwen.

65. As explained above, in the context of sentencing, the Appeals Chamber has held that:

> 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

[85] Majority Judgment, para. 348.

> 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.[86]

66. Therefore, in order to determine whether the error of double-counting materially affected the Sentencing Decision, it is necessary to determine what other factors were considered by the Trial Chamber in the imposition of the 20 individual sentences for the 20 counts affected by the error. More broadly, it is also necessary to assess the impact that the error had on the joint sentence imposed, namely, whether the error led to the imposition of a disproportionate sentence.

67. Turning to the circumstances of the present case, the individual sentences imposed on Mr Ongwen for the crimes affected range between 14 and 20 years of imprisonment. While it is correct that the individual sentences in question were informed by a variety of factors, both in aggravation and in mitigation,[87] the dissenting judge considers that had the Trial Chamber not erred by counting the factor of high number of victims twice in aggravation, each of the 20 individual sentences would have been lower. For the reasons explained above, the legal error of double-counting affected the fairness of the sentencing proceedings

68. Furthermore, the error of double-counting affected 20 out of the 61 individual sentences. This number is almost one third, a very significant portion of the total number of individual sentences. Thus, considering the high number of individual sentences affected, the only logical conclusion is that the joint sentence was materially affected. Indeed, the imposition of 20 lower individual sentences would have likely resulted in a joint sentence lower than 25 years of imprisonment.

69. In the view of the dissenting judge, it is clear that the legal error of double-counting resulted in an incorrect exercise of discretion on the part of the Trial Chamber, both when imposing the 20 individual sentences in question as well as in relation to the ultimate joint sentence of 25 years of imprisonment. In accordance with the standard of review as set out above, this warrants the Appeals Chamber's intervention.

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[86] *Ntaganda* Sentencing Appeal Judgment, para. 32, *referring to* *Lubanga* Sentencing Appeal Judgment, para. 45.
[87] Sentencing Decision, paras 158, 161, 168, 191, 194, 200, 229, 232, 237, 265, 267, 272.

70. In addition, the dissenting judge deems it important to recall that when determining each of the 20 individual sentences affected, the Trial Chamber gave weight to Mr Ongwen's individual circumstances as a mitigating factor, notably, Mr Ongwen's abduction as a child.[88] In relation to these circumstances, the Trial Chamber referred back to the section of the Sentencing Decision where it elaborated on these circumstances and the weight they had when considering the appropriate sentence to be imposed. For reasons further developed below in the section addressing the appropriate relief, this factor carries significant weight in mitigation. For present purposes, it suffices to recall that this was "[a] significant consideration" that applied "for the determination of the individual sentences for all crimes of which Dominic Ongwen has been convicted".[89]

71. In light of the above, the dissenting judge considers that the legal error of double-counting had a material impact on the 20 individual sentences concerned, affecting the fairness of the sentencing proceedings and, ultimately, leading to an incorrect exercise of discretion by the Trial Chamber as a consequence of which the Trial Chamber imposed a disproportionate joint sentence of 25 years of imprisonment.

IX. APPROPRIATE RELIEF

72. Article 83(2)(a) and (b) of the Statute stipulates that, in an appeal against a sentence, if the Appeals Chamber finds factual, legal or procedural errors materially affecting the sentence, or unfairness affecting its reliability, it may reverse or amend the sentence or order a new trial before a different trial chamber. Furthermore, pursuant to article 83(3) of the Statute, "[i]f in an appeal against sentence, the Appeals Chamber finds that the sentence is disproportionate to the crime, it may vary the sentence in accordance with Part 7".

73. The dissenting judge has determined that the error of double-counting had a material impact on the individual sentences imposed in relation to the 20 counts in question and, therefore, on the joint sentence of 25 years of imprisonment. Thus, it is necessary to reverse the joint sentence imposed on Mr Ongwen and determine a new sentence, taking into account the above considerations. The following question is thus,

[88] Sentencing Decision, paras 158, 161, 168, 191, 194, 200, 229, 232, 237, 265, 267, 272.
[89] Sentencing Decision, para. 65.

whether the new sentence should be imposed by the Trial Chamber or by the Appeals Chamber itself.

74. In the *Bemba et al.* Sentencing Appeal Judgment, the Appeals Chamber has previously determined that "the power to remand follows from its power to reverse the sentence in case it has found errors materially affecting the sentence because, if the sentence is vacated, a new sentence has to be determined".[90] For the reasons that follow, the dissenting judge considers that, although she has no doubt that the joint sentence should be appropriately reduced due to the error identified in this opinion, in the particular circumstances of this case, remanding the matter to the Trial Chamber for it to determine a new sentence, and in particular the extent of the reduction of the joint sentence, is the most appropriate remedy.

75. Although it is correct that remanding the issue to the Trial Chamber would involve some delays in the proceedings, in light of the factors identified by the Trial Chamber and the specific circumstances of this case as explained below, the dissenting judge is of the view that remanding the matter remains the most appropriate outcome.

76. First, Judge Ibáñez Carranza notes that remanding the matter rather than amending the sentence would eventually enable the parties to exercise their right to appeal the Trial Chamber's fresh determination of the matter.

77. Second, the dissenting judge recalls that in the determination of a sentence, "[a] Trial Chamber enjoys broad discretion" and the fact that the "weight given to an individual factor and the balancing of all relevant factors in arriving at the sentence is at the core of a Trial Chamber's exercise of discretion".[91] Given the high degree of discretion afforded to trial chambers, it is difficult for the dissenting judge to speculate as to the weight that the Trial Chamber afforded to the factor of high number of victims in relation to the 20 counts when it double-counted it.

78. Third, the task of potentially amending the Sentencing Decision by imposing a new joint sentence becomes even more difficult if one considers that although the

[90] *Bemba et al.* Sentencing Appeal Judgment, para. 362.
[91] *Lubanga* Sentencing Appeal Judgment, paras 1, 40, 43.

material error of double-counting affected 20 individual sentences, there are 41 other individual sentences that remain unaffected.

79. It is important in this regard to recall that Mr Ongwen has been convicted and sentenced for very serious crimes such as killings, torture, enslavement, conscription and use of children below the age of 15 years, forced marriage as an other inhumane act, forced pregnancy, several of these against women and children.[92] Judge Ibáñez Carranza also considers it important to recall that Mr Ongwen "played a key role" in the commission of the crimes, including for instance his involvement in sexual and gender-based crimes and the abduction and integration of children under the age of 15 which was "striking", the fact that in his role of commander, he exercised an essential role in sustaining the methodical abduction and abuse of women and girls and his degree of participation in the attacks on the four IDP camps.[93]

80. The above considerations, coupled with Mr Ongwen's individual circumstances in mitigation, which as explained below were indeed taken into account by the Trial Chamber, make it very difficult for the dissenting judge to speculate as to the extent of the impact that the material error identified would have had on the individual sentences concerned and on the joint sentence ultimately imposed. This is particularly so because of the high degree discretion afforded to trial chambers in the determination of an appropriate sentence, as explained above.

81. The dissenting judge recalls that in order to impose new individual sentences for the crimes affected by the error and, ultimately, a new joint sentence, the Trial Chamber would need to "take into account such factors as the gravity of the crime and the individual circumstances of the convicted person" (article 78(1) of the Statute); "the extent of the damage caused, in particular the harm caused to the victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime; the degree of participation of the convicted person; the degree of intent; the circumstances of manner, time and location; and the age, education, social and

[92] Sentencing Decision, para. 384. *See also* Conviction Appeal Judgment, Introduction.
[93] Sentencing Decision, para. 385. *See also* Conviction Appeal Judgment, Introduction and Alleged errors concerning Mr Ongwen's individual criminal responsibility as indirect perpetrator and as indirect co-perpetrator.

economic condition of the convicted person" (rule 145(1)(c) of the Rules); and mitigating and aggravating circumstances (rule 145(2) of the Rules).

82. As correctly found in the *Lubanga* Sentencing Appeal Judgment:

> Once all of the relevant factors have been identified and taken into account, rule 145 (1) (b) of the Rules of Procedure and Evidence requires that a Trial Chamber "[b]alance all the relevant factors" and pronounce a sentence. Article 78 (3) provides that, if the person is convicted of more than one crime, the Trial Chamber "shall pronounce a sentence for each crime", as well as "a joint sentence specifying the total period of imprisonment", which cannot be less than the highest individual sentence. Additionally, rule 145 (1) (a) of the Rules of Procedure and Evidence contains the overarching requirement that "the totality of any sentence […] must reflect the culpability of the convicted person".[94]

83. The Trial Chamber's determination of new individual sentences and, ultimately, a new joint sentence ought to be informed by all of the relevant circumstances identified in the Sentencing Decision.[95] Importantly, in relation to the high number of victims, the Trial Chamber must ensure to accord weight to this factor only once. It should also clearly state if weight is attached to this factor as part of the gravity assessment or as an aggravating factor.

84. In its determination, the Trial Chamber should also bear in mind that the purposes of sentencing are not only retribution and deterrence but also the resocialisation and reintegration into society of the convicted person.[96] As correctly noted by Trial Chamber VI in the *Ntaganda* Case, "[c]onsidering […] the purposes of specific deterrence and rehabilitation, the appropriate sentence should also reflect the individual circumstances of the convicted person".[97] The relevance of considering the object and purpose of sentencing, including prevention in all its aspects, is further developed below to serve as guidance for this and future cases.

85. Consistent with previous jurisprudence, the dissenting judge recalls that the new sentence should be "proportionate to the gravity of the crimes, and the individual circumstances and culpability of the convicted person".[98] Indeed, the Trial Chamber

[94] *Lubanga* Sentencing Appeal Judgment, para. 33.
[95] *See in particular* Sentencing Decision, paras 384-385.
[96] *See e.g. Katanga* Sentencing Decision, para. 144.
[97] *Ntaganda* Sentencing Decision, para. 12.
[98] *Bemba* Sentencing Decision, para. 91.

must ensure that the sentence is appropriate, fair and proportionate to Mr Ongwen's culpability and his individual circumstances as a former child soldier.

X. OTHER RELEVANT CONSIDERATIONS FOR SENTENCING

86. In light of the decision to reverse the joint sentence of 25 years imprisonment imposed and remand the matter back to the Trial Chamber for it to determine a new sentence, Judge Ibáñez Carranza finds it appropriate to set out in this section some other relevant considerations for determining an appropriate, proportionate and fair sentence. In particular, the following two aspects will be analysed: (i) Mr Ongwen's individual circumstances as a former child soldier and the long-lasting impact that this had on his personality, brain formation, future opportunities and the development of his moral values; and (ii) the object and purposes of sentencing within the specific context of the legal framework governing proceedings before the Court.

A. Mr Ongwen's individual circumstances as a former child soldier

87. As acknowledged by the Trial Chamber,[99] a significant factor in mitigation is Mr Ongwen's individual circumstances; more specifically his abduction at the age of around nine years, conscription, violent indoctrination, being forced to carry out and participate in criminal acts and the subsequent years in the LRA. As correctly held by the Trial Chamber, mitigating circumstances "are not limited by the scope of the charges, or the findings made by the Chamber in its judgment under Article 74 of the Statute".[100]

88. In its discussion, the Trial Chamber pointed out that this factor was not considered for the purposes of establishing culpability. Rather, the Trial Chamber found this factor relevant to its determination of the appropriate sentence to be imposed after conviction. It recalled that "the fact of having been (or being) a victim of a crime in any case does not constitute, in and of itself, a justification of any sort for the commission of similar

[99] Sentencing Decision, paras 65-88.
[100] Sentencing Decision, para. 54.

or other crimes".[101] The Trial Chamber had made a similar point in the Conviction Decision.[102]

89. In the Conviction Appeal Judgment, the Appeals Chamber confirmed the above finding by the Trial Chamber noting that "the trial against Mr Ongwen concerned crimes he allegedly committed between 1 July 2002 and 31 December 2005 when he had already reached adulthood" and therefore "any finding about Mr Ongwen's abduction when he was a child, his childhood or alleged indoctrination within the LRA cannot, in itself, be sufficient and thus determinative of the central issues of the case".[103]

90. However, in the Sentencing Decision, the Trial Chamber considered "that the issue of [Mr] Ongwen's personal history is relevant among the factors bearing – as a circumstance concerning the convicted person – on the appropriate gradation of the sentence to be imposed on him".[104] This is indeed correct, as at the sentencing stage, the Trial Chamber has to consider not only those factors that relate to the crimes the person has been convicted of, but also, more broadly, the individual circumstances of the convicted person. This is particularly so, given that the purposes of sentencing a convicted person is not limited to retribution and deterrence, but includes the resocialisation and reintegration into society of the individual.[105]

91. Indeed, Judge Ibáñez is of the view that Mr Ongwen's abduction and his early traumatic experiences in the coercive environment of the LRA had a long-lasting impact on his personality, brain formation, future opportunities and the development of his moral values. Below, the following aspects relevant to an adequate and fair assessment of these circumstances will be set out: (i) the legal framework for the protection of children in armed conflicts; (ii) the long-lasting effects of being a victim of the crime of conscription and use in hostilities of children below the age of 15 years; and (iii) the specific case of Mr Ongwen as victim-perpetrator.

[101] Sentencing Decision, para. 69.
[102] Conviction Decision, para. 2672.
[103] Conviction Appeal Judgment, para. 1471.
[104] Sentencing Decision, para. 70.
[105] *See e.g.* *Katanga* Sentencing Decision, para. 144.

1. Legal framework for the protection of children in armed conflicts

92. In the present case, the dissenting judge briefly surveys some of the most germane international legal instruments and conventions that protect children during armed conflict. The dissenting judge reaffirms the significance of the existing international legal framework that seeks to safeguard the rights and wellbeing of all children, especially those impacted by or risking armed conflicts. Although, as explained above, Mr Ongwen was convicted on the basis of crimes committed as an adult and not as a child, the crimes of which he was a victim as a child and the long-lasting consequences he had to endure as a result are relevant considerations for the purposes of sentencing him. It is in this context that the relevant legal framework is set out.

93. The UN Children's Rights Convention recognises that "the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding".[106] It prohibits the recruitment of children below the age of 15 into armed forces and advocates for their maximum protection during armed conflict.[107] The Optional Protocol to the UN Children's Rights Convention also recognises the need for rehabilitation and reintegration of child soldiers, through sufficient cooperation and provision of technical and financial assistance to victims.[108]

94. Broadly, this convention sets out the rights of every child, including the right to life, survival and development, protection from violence, abuse or neglect, education that enables them to fulfil their potential, to be raised by, or have a relationship with, their parents, and to express their opinions and be listened to.[109] Furthermore, its article 3 enshrines the principle of the "best interest of the child".

95. Adopted by the UNICEF in 2007, the Principles and Guidelines on Children Associated with Armed Forces or Armed Groups, also known as the UN Paris Principles, are relevant to the case at hand. They establish that "[t]he unlawful recruitment or use of children is a violation of their rights".[110] The UN Paris Principles

[106] Preamble of the UN Children's Rights Convention.
[107] Article 38(3) of the UN Children's Rights Convention.
[108] Article 7 of the Optional Protocol to the UN Children's Rights Convention.
[109] Articles 6(1), 7(1), 9(3), 12(1), 19(1), 28(1) of the UN Children's Rights Convention.
[110] UN Paris Principles, para. 3.11.

assert that children should not simply be viewed within the context of crimes allegedly committed while associated with armed forces or groups.[111] Rather, they should primarily be considered victims and thus treated "in accordance with international law in a framework of restorative justice and social rehabilitation, consistent with international law".[112]

96. The former UN Special Representative to the Secretary General for Children and Armed Conflict emphasised in her report "that all children associated with parties to conflict and encountered in security operations should be treated primarily as victims rather than as security threats".[113] She added that "[c]hildren who have been abducted, recruited, used and exposed to violence at an early age must not be doubly victimized".[114]

97. According to the UN Representative, children in armed conflicts should worry the entire international community since

> Preventing violations against children affected by armed conflict should be a primary concern of the international community. Failing to assume this collective responsibility not only further endangers the boys and girls living in insecurity, but atrocities perpetrated against children may also amplify grievances between belligerent parties and reduce their ability to overcome conflict in a peaceful manner.[115]

98. Adopted in 1997 by the participants in the Symposium on the Prevention of Recruitment of Children into the Armed Forces and Demobilization and Social Reintegration of Child Soldiers in Africa and organised by UNICEF, the Cape Town Principles and Best Practices on the Prevention of Recruitment of Children into the Armed Forces and on Demobilization and Social Reintegration of Child Soldiers in

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[111] UN Paris Principles, para. 3.6.
[112] UN Paris Principles, para. 3.6.
[113] UN Second Report of Representative for Children and Armed Conflict, para. 17.
[114] UN Second Report of Representative for Children and Armed Conflict, para. 17.
[115] UN First Report of Representative for Children and Armed Conflict, para. 15. *See also*, UN Third Report of Representative for Children and Armed Conflict, para. 89: "The Special Representative calls anew upon Member States to treat children allegedly associated with armed groups, including groups designated as terrorist groups by the United Nations, primarily as victims, prioritize their reintegration, and address the especially detrimental impact of stigma on their reintegration. She further reminds Member States that, if a child is accused of a crime during his or her association or alleged association, internationally recognized juvenile justice principles must be adhered to, including in relation to the minimum age of criminal responsibility and to ensuring that detention is used only as a measure of last resort and for the shortest possible period of time, as well as due process and international fair trial standards."

Africa (the so-called Cape Town Principles) develop strategies for preventing recruitment of children, demobilising child soldiers and helping them to reintegrate into society.

99. In particular, the Cape Town Principles state that governments should adopt national legislation on voluntary and compulsory recruitment with a minimum age of 18 years and should establish proper recruitment procedures and the means to enforce them.[116] Those responsible for illegally recruiting children should be brought to justice.[117]

100. Adopted by the African Member States of the Organization of African Union in 1990, the African Charter on the Rights and Welfare of the Child recognises "that the child, due to the needs of his [or her] physical and mental development requires particular care with regard to health, physical, mental, moral and social development, and requires legal protection in conditions of freedom, dignity and security".[118] In particular, all parties "shall take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain in particular from recruiting any child".[119]

101. The above international legal instruments are instructive to understand that Mr Ongwen's abduction and hardships endured as a result of his conscription into the LRA, violent indoctrination, being forced to carry out and participate in criminal acts, deprived him of the enjoyment of basic and fundamental human rights, as a child. These deprivations were not only material but impacted his dignity as a human being. Indeed, as explained in the next sections, these deprivations had damaging and long-lasting consequences on his personality, brain formation, future opportunities and the development of his moral values.

2. Long-lasting effect of being a former child soldier

102. Judge Ibáñez Carranza wishes to reinforce at the outset that whilst several legal commentary and submissions are incorporated to enrich and strengthen this opinion, these views are incorporated only to highlight any long-lasting effect(s) of being a

[116] Cape Town Principles, principles 1-4.
[117] Cape Town Principles, principle 4.
[118] Preamble of the African Charter on the Rights and Welfare of the Child.
[119] Article 22(2) of the African Charter on the Rights and Welfare of the Child.

former child soldier and their relevance for sentencing purposes. No credence is given to the notion that Mr Ongwen should not be punished, given that he is a former child soldier and that he committed the charged crimes when he was an adult. On the contrary, as explained above, this opinion and the majority of the Appeals Chamber concur with the Trial Chamber in this respect. The views expressed remain pertinent in the consideration of Mr Ongwen's individual circumstances as significant mitigating circumstances in this case.

103. In the 2019 *Lubanga* Reparations Judgment, the Appeals Chamber stressed the need to recognise the damage to the "project of life" in child soldiers. In particular, the Appeals Chamber recalled that:

> 'the concept of "damage to a life plan", adopted in the context of State responsibility at the IACtHR, may be relevant to reparations at the Court'. In identifying the harm to direct victims of, specifically, Mr Lubanga's crimes, the Appeals Chamber included '[i]nterruption and loss of schooling' and '[t]he non-development of "civilian life skills" resulting in the victim being at a disadvantage, particularly as regards employment'. The Appeals Chamber emphasises that it is crucial, in the reparations provided, that the specific situation of the children at issue in this case is recognised and that their harm is appropriately remedied through the particular reparations provided.[120]

104. In Judge Ibáñez Carranza's separate opinion to the 2019 *Lubanga* Reparations Judgment, she elaborated on the concept of damage to the "project of life" in child soldiers. She noted that "it is crucial to address, among others, the specific damage caused to the project of life for those who, at the time of the crimes, were children or young adolescents, who lost opportunities, capacities and perspectives of personal development and fulfilment as valuable human beings both for themselves and their community".[121]

105. Judge Ibáñez Carranza explained that:

> As such, "damages to the project of life are the consequence of a psychosomatic collapse of such a magnitude that, for the victim, it means the frustration or lessening of his/her project of life", thereby "creating an existential vacuum, a 'grief invading someone who loses the source of gratification and the spectrum to develop his/her stand for life'".[122]

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[120] *Lubanga* Reparations Judgment, para. 38 (footnotes omitted).
[121] *Lubanga* Separate Opinion of Judge Ibáñez Carranza, p. 7.
[122] *Lubanga* Separate Opinion of Judge Ibáñez Carranza, para. 101 (footnote omitted).

106. Furthermore, Judge Ibáñez Carranza noted the seriousness of the harm to the victims' project of life because it had "destroyed the concrete expectations and vital opportunities of children to build capacities and fully enjoy their rights. This is in contradiction with the internationally recognised principle of the best interest of the child".[123] She further noted that it is necessary to consider

> how children were specifically victimised, taking into account the effects that such victimisation had in their prospective project of life, and also damages to the very core of their physical and moral integrity, including the possibility of having experienced sexual attacks as a result of the violent context to which they were exposed.[124]

107. Gerry *et al.*, drawing upon their expertise in modern slavery law and criminal responsibility, submitted that "'non-punishment' of victims of modern slavery/human trafficking includes the non-liability of former child soldiers who commit crimes when they continue to suffer the effects of their victimhood through compromised mental health".[125] They noted that the Trial Chamber "did not consider or express any legal principles for evaluating the effect of being a child soldier nor the mental health nexus" in the trial or sentencing phases.[126] They discussed "the need to recognise the long-term effects of being a child soldier".[127] They stressed the importance of applying relevant legal principles to the question of Mr Ongwen's criminal responsibility in light of the fact that he was "*made* into a child soldier by the means and purposes of others" and that he "suffered as a consequence".[128]

108. In the view of Professor Baines *et al.*, Mr Ongwen should be considered a child soldier:

> We submit that the categorization of "child soldier" applies regardless of the age at which the individual is demobilized, decommissioned, and reintegrated. Hence,

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[123] *Lubanga* Separate Opinion of Judge Ibáñez Carranza, para. 106.
[124] *Lubanga* Separate Opinion of Judge Ibáñez Carranza, para. 260.
[125] Observations of Gerry *et al.*, p. 3. *See also* para. 6.
[126] Observations of Gerry *et al.*, paras 4-5.
[127] Observations of Gerry *et al.*, para. 6.
[128] Observations of Gerry *et al.*, paras 9-10. In this regard, the *amici* posited that "Mr Ongwen's case provides an opportunity to acknowledge the import of crimes committed against him as a child and to ensure that the lasting effects of such criminality are taken into consideration consistent with the principle of culpability", and that this requires a factual enquiry into "the experiences suffered by those such as Mr Ongwen and any continuing effects" (Observations of Gerry *et al.*, paras 12-14).

> Dominic Ongwen, in light of his age of abduction into the LRA, should be considered a child soldier to this day.[129]

109. They argued that "Dominic Ongwen's trial demonstrated a clear failure to properly balance criminal justice issues with children's human rights considerations", including because Mr Ongwen was not afforded the rehabilitative and restorative mechanisms required by the UN Children's Rights Convention.[130] The *amici* stressed the need for the Court to be "consistent, predictable, and principled in assessing and determining the long-term effects of trauma on child soldiers," including by recognising that "victims can victimize".[131]

110. Professor Baines *et al.* noted that children in contexts of war are often targeted for indoctrination as child soldiers precisely because of their malleability.[132] Regarding neuroscience and mental development, Professor Baines *et al.* submitted that "where trauma has resulted in brain impairment, there may be circumstances and psychopathologies that are worsened by prolonged periods of abuse," and that in such cases "a presumption of adult capacity may and should be rebutted in law".[133] They submitted that Mr Ongwen's mental and moral development were impacted by his experience as a child soldier, which "resulted in a destruction of [his] ability to understand the immorality of his actions".[134]

111. While for reasons fully set out in the Conviction Appeal Judgment, the dissenting judge does not endorse any suggestion that Mr Ongwen's mental capacity was destroyed for the purposes of article 31(1)(a) of the Statute, she does agree with the *amici* insofar as they state that Mr Ongwen's experiences impacted on his personality, brain formation, future opportunities and the development of his moral values.

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[129] Observations of Clarke *et al.*, para. 8.
[130] Observations of Clarke *et al.*, para. 12.
[131] Observations of Clarke *et al.*, para. 13.
[132] Observations of Clarke *et al.*, para. 24.
[133] Observations of Clarke *et al.*, para. 33.
[134] Observations of Clarke *et al.*, para. 34.

112. Dr Chamberlain Bolaños has explained that "children recruited in armed groups often lose their social and family ties, and may become addicted to drugs, all of which makes their future reintegration into society and economic life complicated".[135]

113. Furthermore, Dr Schauer elaborated on the psychological impact of child soldiering, which includes exposure to traumatic stress[136] and post-traumatic stress disorder ("PTSD").[137] She explained that child soldiers are victimised two-fold from being victims of abuses from soldiers and subsequently being victims of stigmatisation due to the atrocities they go on to commit.[138] A concomitant of their stigmatisation is that former child soldiers "have a particularly high risk to be left out or marginalized by international programmes in the reintegration process" and become "especially vulnerable for reintegration failure".[139]

114. The trauma in the child's formative years may affect their central nervous system and cause memory impairments.[140] Furthermore, statistically, 10 to 25 percent of child soldier survivors never recover from PTSD[141] and "the more violence children had been forced to commit against others, the more PTSD symptoms could be expected".[142]

115. Dr Schauer also noted that "[b]eyond psychological suffering from the symptoms of PTSD, traumatized populations show significantly elevated levels of physical morbidity and mortality"[143] and that "psychological exposure and suffering from trauma can cripple individuals and families even into the next generations".[144] During her testimony before Trial Chamber I in the *Lubanga* Case, Dr Schauer also noted that

> [a]mong a number of at risk populations, children of war and child soldiers are a particularly vulnerable group and often suffer from devastating long-term consequences of experienced or witnessed acts of violence. Child war survivors have to cope with repeated traumatic life events, exposure to combat, shelling and other life threatening events, acts of abuse such as torture or rape, violent death

[135] C. Chamberlain Bolaños, *Children and the International Criminal Court: Analysis of the Rome Statute through a Children's Rights Perspective* (Intersentia, 2014), p. 20.
[136] *Lubanga* Schauer Report, p. 10.
[137] *Lubanga* Schauer Report, p. 12.
[138] *Lubanga* Schauer Report, p. 29.
[139] *Lubanga* Schauer Report, p. 34.
[140] *Lubanga* Schauer Report, p. 23.
[141] *Lubanga* Schauer Report, p. 15.
[142] *Lubanga* Schauer Report, p. 16.
[143] *Lubanga* Schauer Report, p. 16.
[144] *Lubanga* Schauer Report, p. 25.

> of a parent or friend, witnessing loved ones being tortured or injured, separation from family, being abducted or held in detention, insufficient adult care, lack of safe drinking water and food, inadequate shelter, explosive devices and dangerous building ruins in proximity, marching or being transported in crowded vehicles over long distances and spending months in transit camps. These experiences can hamper children's healthy development and their ability to function fully even once the violence has ceased.[145]

116. The expert also noted studies indicating that "abduction and the consequent trauma have a negative impact on their education and cognitive abilities", and that "usually children who have been child soldiers for a long time do not demonstrate 'civilian life skills' as they have difficulties with interpersonal contacts".[146] On the basis of studies in various countries, including Uganda, Dr Schauer indicated that the post-traumatic stress experienced by children used in hostilities "tends to persist, possibly for the remainder of the individual's life", suggesting that "the response to war-related trauma by ex-combatants and child soldiers in countries directly affected by war and violence is complex and frequently leads to severe forms of multiple psychological disorders".[147]

117. Dr Schauer further noted that research indicates that "former child soldiers have difficulties in controlling aggressive impulses and have little to handle life without violence", noting that "[t]hese children show ongoing aggressiveness within their families and communities even after relocation to their home villages".[148]

118. Dr. Wessels has explained that "not all child soldiers are affected by war in the same way"[149] but the "[…] children's suffering does not end with the fighting but harms them over a longer term. The lingering effects have led to portrayals of former child soldiers as people crippled by mental health issues or as hardened killers who have no moral compass".[150]

119. In the view of the dissenting judge, the above shows that the condition of victim-perpetrator is unique, particularly in the case of persons that were victimised in their early childhood. Children that have been conscripted and used in hostilities are forced

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[145] *Lubanga* Sentencing Decision, para. 39.
[146] *Lubanga* Sentencing Decision, Dissenting Opinion of Judge Odio Benito, para. 11.
[147] *Lubanga* Sentencing Decision, para. 40.
[148] *Lubanga* Sentencing Decision, para. 41.
[149] M. Wessels, *Child Soldiers: form violence to protection*, (2006), p. 127.
[150] M. Wessels, *Child Soldiers: form violence to protection*, (2006), p. 128.

to experience highly traumatic events that often include physical and psychological harms. Generally, these harms leave scars for the rest of their lives and have long-lasting effects on their personality, the development of his brain and moral values, and future opportunities.

120. It follows that Mr Ongwen, as a former child soldier himself, must have experienced traumatic events that affected the formation of his personality, the development of his brain and moral values, scarring him for life. In cases such as this one, these circumstances ought to be properly considered as relevant and unique personal circumstances at the sentencing stage.

3. The case of Mr Ongwen as a victim-perpetrator

(a) The Trial Chamber's findings

121. In the Sentencing Decision, the Trial Chamber noted that a significant consideration for determining Mr Ongwen's individual sentences for the crimes he was convicted of, was his abduction by the LRA when he was around nine years old.[151]

122. In his submissions before the Trial Chamber, the Prosecutor had submitted that "Mr Ongwen's abduction as a child and his experience in the LRA as a child and adolescent are relevant to the Chamber's sentencing determination, and they warrant some reduction in his sentence".[152] However, the Prosecutor submitted that "they do not directly diminish his responsibility" and that "[t]he Chamber must balance any understandable sympathy with Mr Ongwen's misfortune at a young age with respect for those he victimised as an adult".[153] The Prosecutor recommended "a total joint sentence of not less than 20 years of imprisonment", indicating that "[a]lthough the Chamber could impose a total joint sentence higher than the highest of the individual sentences", this was "unnecessary in this case".[154]

123. The Defence had submitted that the Trial Camber should consider the time Mr Ongwen spent "captive" in the LRA since his abduction in 1987 at age nine and

[151] Sentencing Decision, para. 65.
[152] Sentencing Decision, para. 66, *referring to* Prosecution Sentencing Brief, para. 154.
[153] Sentencing Decision, para. 66, *referring to* Prosecution Sentencing Brief, para. 154.
[154] Prosecution Sentencing Brief, para. 159.

one-half as a "serious mitigating factor".[155] It had emphasised in this respect that Mr Ongwen "was abducted during a developmental age, continued to develop in the bush, did so in an unfavourable environment, was under the control of Joseph Kony".[156] The Defence had contended that but for "his individual circumstances, Dominic Ongwen would not have committed the crimes for which he has been convicted" and that this was a mitigating factor when considering the appropriate sentence.[157]

124. For their part, the legal representatives for the victims had acknowledged that Mr Ongwen was abducted at a young age and was "faced with many sufferings himself'", but they did not regard "this part of his history as a reason justifying the path he chose to take in the LRA and warranting any reduction of his sentence".[158] In particular, they argued that "victims cannot share the position […] that it is unlikely that Mr Ongwen would have committed the crimes he did in 2002-2005 had he not been abducted on his way to school in 1987", but that "[v]ictims are, on the contrary, of the opinion that Mr Ongwen would not have committed the crimes he did in 2002-2005 had he escaped from the LRA or chosen to behave in a different manner while in a position of power in the LRA".[159]

125. In its determination of the matter, the Trial Chamber recalled that Mr Ongwen was born in or around 1978 and was abducted into the LRA in 1987 on his way to school.[160] It noted that several testimonies portrayed Mr Ongwen prior to his abduction in positive terms such as "very active student", "very good child" and "well behaved".[161] The Trial Chamber noted the testimony of a witness that after about three and a half months of Mr Ongwen being recruited by the LRA, "he was really depressed, but didn't have anything to do".[162] It found that around 1991, Mr Ongwen was informed by another abductee that his parents had been killed and he cried.[163]

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[155] Sentencing Decision, para. 67, *referring to* Defence Sentencing Brief, paras 64,67. *See also* paras 65-84.
[156] Sentencing Decision, para. 67, *referring to* Defence Sentencing Brief, para. 78.
[157] Sentencing Decision, para. 67, *referring to* Defence Sentencing Brief, para. 78.
[158] Sentencing Decision, para. 67, *referring to* T-260, p. 55, lines 20-23.
[159] Sentencing Decision, para. 67, *referring to* T-260, p. 56, lines 17-24.
[160] Sentencing Decision, paras 71, 73.
[161] Sentencing Decision, paras 71-72.
[162] Sentencing Decision, para. 72.
[163] Sentencing Decision, para. 76.

126. The Trial Chamber noted the expert evidence of Dr Catherine Abbo regarding Mr Ongwen's development:

> Dr Abbo prepared a report and testified before the Chamber in relation to the issue of mental disease or defect. As part of her work, Dr Abbo conducted a developmental assessment of Dominic Ongwen, a task squarely within her specific professional competence, and found that he attained the highest level of moral development (the post conventional level), that he impressed as demonstrating above average intelligence, and noted under "societal development" that, just like street gang socialisation, there was bush socialisation that could have helped Dominic Ongwen to cope. She concluded in her report that Dominic 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". She stated that while "[e]very minute of everyday traumatic experiences of [Dominic Ongwen], from the time he was abducted" had an impact on the development of Dominic Ongwen's brain, "favourable early childhood experiences" contributed to his continued resilience.[164]

127. The Trial Chamber acknowledged that Mr Ongwen's abduction and subsequent early years in the LRA "brought to him great suffering, and led to him missing out on many opportunities which he deserved as a child".[165] The Trial Chamber emphasised the need "to strike a difficult balance between all the conflicting considerations" and noted that

> […] As part of this balancing exercise, the Chamber deems that Dominic Ongwen's personal history and circumstances of his upbringing, since his young age, in the LRA – in particular his abduction as a child, the interruption of his education, the killing of his parents, his socialisation in the extremely violent environment of the LRA – must be given a certain weight in the determination of the length of each individual sentence. The present considerations must therefore be read as incorporated into the individual assessments conducted below concerning each crime.[166]

128. The Trial Chamber was "not persuaded by the victims' submission that the 'exceptional magnitude' of the crimes of which Dominic Ongwen was found guilty and the presence of several aggravating circumstances 'neutralise any limited impact that the Defence is portraying as mitigating factors'".[167] It held in this regard that, while

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[164] Sentencing Decision, para. 81, *referring to* Dr Abbo's Report, UGA-OTP-0280-0732, at 0754 (footnotes omitted).
[165] Sentencing Decision, para. 83.
[166] Sentencing Decision, para. 87.
[167] Sentencing Decision, para. 88.

recognising "the several factors and circumstances indicating the utmost gravity of the crimes at issue and the high degree of culpability on the part of Dominic Ongwen", Mr Ongwen's abduction and early experience in the LRA "constitute specific circumstances bearing a significant relevance in the determination of the sentence".[168]

129. The Trial Chamber propounded that Mr Ongwen's extremely grave crimes and the degree of his culpable conduct would have crossed the threshold for the exceptional sentence of life imprisonment, thereby rendering the ordinary statutory limit of a 30-year imprisonment term "disproportionately low".[169] But upon considering all the relevant factors, including his individual circumstances, the Trial Chamber decided against sentencing Mr Ongwen to life imprisonment.[170]

130. In particular, the Trial Chamber noted that it was confronted "in the present case with 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 which he later became a prominent member and leader".[171] It further noted that it "was greatly impressed by the account given by Dominic Ongwen at the hearing on sentence about the events to which he was subjected upon his abduction when he was only 9 years old".[172]

131. According to the Trial Chamber, "[t]he circumstances of Dominic Ongwen's childhood are indeed compelling", noting in particular that "Dominic Ongwen did not, at first, choose to be part of the LRA, but was abducted and integrated into it when he was still a child, whose education was thus abruptly interrupted and replaced by socialisation in the extremely violent environment of the LRA".[173] While reiterating that this "in no way justifies or rationalises the heinous crimes he willfully chose to commit as a fully responsible adult", the Trial Chamber expressed the view that "these circumstances […] make the prospective of committing him to spend the rest of his life

[168] Sentencing Decision, para. 88.
[169] Sentencing Decision, para. 387.
[170] Sentencing Decision, paras 386-387.
[171] Sentencing Decision, para. 388.
[172] Sentencing Decision, para. 388.
[173] Sentencing Decision, para. 388.

in prison (despite the hypothetical early release or reduction of sentence after 25 years of imprisonment under Article 110 of the Statute) excessive".[174]

132. The Trial Chamber stressed that Mr Ongwen's "personal background [did not] overshadow his culpable conduct and the suffering of the victims".[175] Nevertheless, "the specificity of his situation cannot be put aside in deciding whether he must be sentenced to life imprisonment for his crimes".[176]

133. Finally, the Trial Chamber established that "[e]nvisaging a concrete prospect for Dominic Ongwen to eventually re-build his life – while adequately punished for the crimes committed – in a new, more healthy environment than the extremely violent one of the LRA in which he grew up and operated at length" was one of the "driving forces" for its ultimate consideration on the appropriate joint sentence.[177] The Trial Chamber expressed its belief "that such a concrete opportunity shall not be denied to Dominic Ongwen, given his peculiar personal background".[178] Referring to "[t]he possibility of a reduction of the sentence after (at least) 25 years of imprisonment – envisaged by Article 110 of the Statute when life imprisonment is pronounced", it found it to be "at this point in time, too much of a hypothetical and speculative" element incapable of "outweigh[ing] the undeniable value of foreseeing today a more concrete prospect of re-insertion into society after an (adequately long) prison sentence".[179]

134. It was on the basis of these considerations "that the Chamber has decided not to sentence Dominic Ongwen to the – exceptional – penalty of life imprisonment".[180]

135. Having excluded the possibility of imposing the minimum joint sentence (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 61 crimes.[181] The majority considered this sentence "to be

[174] Sentencing Decision, para. 388.
[175] Sentencing Decision, para. 389.
[176] Sentencing Decision, para. 389.
[177] Sentencing Decision, para. 390.
[178] Sentencing Decision, para. 390.
[179] Sentencing Decision, para. 390.
[180] Sentencing Decision, para. 391.
[181] Sentencing Decision, paras 392-396. In its view, "no imprisonment for a period shorter than 25 years could constitute an adequate, proportionate and just joint sentence in light of all relevant circumstances of the present case" (Sentencing Decision, para. 391). Judge Pangalangan concurred with the individual

proportionate to the crimes Dominic 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".[182]

(b) The expert reports

136. Judge Ibáñez Carranza notes that expert reports were considered in the sentencing proceedings, one prepared by Prosecution expert witness P-0445 (Dr Abbo) and one prepared by Prosecution expert witness P-0447 (Professor Weierstall-Pust). The dissenting judge remains of the view that the Trial Chamber did not err in finding that the conclusions contained in these reports are incompatible with a finding of a destruction of Mr Ongwen's mental capacity or with his mental capacity having been substantially diminished.[183] However, it is noted that these reports were prepared for the sole purpose of determining whether Mr Ongwen's mental capacity had been destroyed within the meaning of article 31(1)(a) of the Statute.[184] To the knowledge of the dissenting judge, neither these nor other experts were asked to present their views as to the impact that the traumatic experiences that Mr Ongwen underwent as a child had on his personality, the development of his brain and moral values, and future opportunities for the purposes of mitigating circumstances in sentencing.

137. Notwithstanding the above, Judge Ibáñez Carranza is of the view that several of the findings and conclusions reached by P-0445 and P-0447 are relevant to determine the impact that Mr Ongwen's abduction as a defenceless child of about nine years of age and his upbringing in the LRA had on his personality, the development of his brain and moral values, and future opportunities.

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sentences imposed by the majority of the Trial Chamber for the 61 crimes for which Mr Ongwen was convicted, but in his view, a higher joint sentence of 30 years of imprisonment was warranted given the extreme gravity of the crimes and the deep and permanent physical and psychological harm caused to the victims and their families. Judge Pangalangan was of the view that a joint sentence of 30 years would not disregard Mr Ongwen's individual circumstances, rather it would appropriately guard against the Court giving too much weight to them in light of the heinous character of the crimes for which he was convicted (Partly Dissenting Opinion of Judge Pangalangan, paras 13 and 17).

[182] Sentencing Decision, para. 396.

[183] Conviction Appeal Judgment, VI.E.1.(d) (Grounds of appeal 30, 34, 36 and 43: Alleged errors in the Trial Chamber's assessment of culture and mental health) and VI.E.1.(e) (Ground of appeal 33: Alleged errors in the Trial Chamber's consideration of P-0445's evidence); Majority Judgment, section V.G.3.(a) (Alleged failure to reassess the findings of the Prosecution's experts).

[184] P-0445's Report, UGA-OTP-0280-0732, at 0732; P-0447's First Report, UGA-OTP-0280-0674, at 0676.

138. The dissenting judge notes in this regard that in the "General Conclusion" section of 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 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.*[185]

139. In a different part of the report, namely in her concluding remarks on "Comment on Free Will, The Mind and the Brain", P-0445 further considered that:

> It is understandable that the crimes [Mr Ongwen] is charged with happened during the time he was an adult, however, his actions cannot be looked at in isolation from the context in which his brain, the organ that controls thinking, feeling, behavior was wired. According to the Rome statute Article 31(1)(a),on which I was required to anchor my assessment, [Mr Ongwen] can be seen as criminally responsible for the crimes he allegedly committed. *However, important mitigating factors include being abducted during a developmental age, continuing to develop in a bush, unfavourable environment and being under control of [Joseph Kony]. Like other children, [Mr Ongwen] as a child and an adolescent had no choice over the environment he lived in when he committed the alleged crimes against humanity. As an adolescent, he was vulnerable and lacked control over his immediate environment. This means, he can't be blamed for falling to escape negative influences in his whole environment*.[186]

140. P-0445 explained in her report that she "chose to assess Mr Ongwen's criminal capacity at the level of an adolescent 10 to 14 years" because there may be indications that Mr Ongwen's psychosocial development was arrested at the time of abduction.[187] When asked about this during her testimony, the expert explained as follows:

> As I indicated in my report first, that time of – that was stated that he had – he was abducted, that's one. The second thing is that the document, some of the documents that I reviewed had indications that he had child-like behaviours. Third, some of the descriptions of the depressive symptoms by, particularly by Professor Ovuga and Dr Akena, indicated some symptoms that we find in

[185] P-0445's Report, UGA-OTP-0280-0732, at 0756 (emphasis added).
[186] P-0445's Report, UGA-OTP-0280-0732, at 0755 (emphasis added).
[187] P-0445's Report, UGA-OTP-0280-0732, at 0734.

> adolescents. So these are some of the reasons really why I thought I needed to go back to the developmental period.[188]

141. P-0445 also testified during trial about the traumatic environment in which Mr Ongwen was developing from the age of nine years. She explained in this regard that:

> 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.[189]

142. Equally relevant and telling are some of the findings reached by P-0447. In his report, when addressing the question of whether Mr Ongwen has been exposed to one or multiple traumatic events, he noted that:

> 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.[190]

143. In his report, P-0447 also referred to the complex and long-lasting damaging consequences experienced by former child soldiers:

> The next relevant issue that has to be solved is the nature of the mental health consequences Mr. Ongwen might have suffered from, in case that he was exposed to one or multiple traumatic events. Mental health consequences of trauma are manifold and do not necessarily only cover Posttraumatic Stress Disorder (PTSD) […] Individuals suffering from traumatic experiences can show different response to trauma related suffering, e.g. in terms of surrender […], the avoidance of trauma reminders […], dissociative responses […] or even suicidality […], the seeking for safety […] or the repelling of potential further harm (reactive/defensive aggressive behavior […]. All these mental health consequences (and many more) could be diagnosed in the case of Mr. Ongwen […] *That early traumatic experiences […] have an even more profound impact on an individual's mental health, as they can leave lasting imprints in the individual, especially when they occur in relevant developmental periods, has been outlined in detail by Dr. Schauer* […].[191]

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[188] P-0445, T-166, p. 15, lines 17-23.
[189] P-0445, T-166, p. 21, lines 6-12.
[190] P-0447's First Report, UGA-OTP-0280-0674, at 0697.
[191] P-0447's First Report, UGA-OTP-0280-0674, at 0678-0679 (emphasis added).

144. In the concluding section of his report, P-0447 finds that "there is no doubt that Mr. Ongwen experienced potentially traumatic events".[192]

145. The expert witness also testified on the impact of prolonged exposure to trauma as follows:

> 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.[193]

146. During his testimony, P-0447 also referred to the possibility that as a result of the trauma, Mr Ongwen may have 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 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.[194]

147. The above shows that Mr Ongwen's early abduction and the traumatic experiences he went through as a result of his conscription into the LRA, violent indoctrination, being forced to carry out and participate in criminal acts as a child and as an adolescent, had damaging and long-lasting consequences. Whilst not amounting to a destruction of his mental capacity within the meaning of article 31(1)(a) of the Statute and not resulting in substantially diminished capacity pursuant to rule 145(2)(a)(i) of the Rules, these experiences negatively affected his personality, brain formation, future opportunities and the development of his moral values. In these circumstances, it is undoubtedly correct to accord significant weight in mitigation to these circumstances.

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[192] P-0447's First Report, UGA-OTP-0280-0674, at 0700.
[193] P-0447, T-170, p. 23, lines 7-12.
[194] P-0447, T-169, p. 74, lines 2-9.

(c) Mr Ongwen's statement

148. During the hearing held before the Appeals Chamber, Mr Ongwen addressed the bench. Among the statements he made, Mr Ongwen asked for someone to explain what the concept of peace "means so that I can understand".[195] Mr Ongwen also referred to some of his traumatic experiences as a child soldier, including being forced to "disembowel […] adults" and "drink some of the blood",[196] and explained that the resulting trauma "is something that nobody can get rid of from you".[197]

149. The dissenting judge finds it compelling that Mr Ongwen "asked the international community to help [him] rehabilitate [his] life".[198] He also stated that "[t]he only thing that [he] know[s] -- the only thing that [he] knew, the only thing that [he] was taught about was guns" and asked the international community to "[t]each [him] right from wrong".[199] Mr Ongwen "sincerely ask[ed] [us] to help [him]", to "[r]ehabilitate [him] and teach [him] the right things to do […] because [he] would like at some point in [his] life, at some opportunity in [his] life to be somebody who also teaches other people about their human rights".[200]

150. In dissenting judge's view, given the hardships that Mr Ongwen underwent as a child and the long-lasting impact that these had on him, this Court has an obligation to ensure that the sentence imposed on Mr Ongwen serves not only retributive purposes but also properly takes into account the need to make all possible efforts to assist him in his resocialisation and reintegration into society.

151. In this case and given the communicative and performative power of international criminal justice[201], and, more concretely, of international criminal judgments, this case also provides an important opportunity to recognise the human rights violations of which Mr Ongwen was a victim when he was only a defenceless child and which have never been adjudicated by a court. Indeed, the law's expressive function has been widely recognised and acknowledged. It has been noted that "[b]y performing an

[195] T-267, p. 37, line 24 to p. 38, line 2.
[196] T-267, p. 38, lines 21-23.
[197] T-267, p. 39, lines 10-11.
[198] T-267, p. 42, lines 8-9.
[199] T-267, p. 43, line 21 to p. 44, line 2.
[200] T-267, p. 44, lines 11-14.
[201] C. Stahn, *Justice as message*, Oxford University Press (2020).

expressive function, courts often serve as a unique site for public discourse" and that this "expressive function may, in fact, be the most significant one that courts perform".[202]

152. The expressive value of international criminal judgments has been noted in terms of "the crafting of historical narratives, their authentication as truths, and their pedagogical dissemination to the public".[203] It has been argued that in performing this function, judges can invalidate unpersuasive interpretations of the past – thereby combatting denial and attempts at revisionism – while at the same time promoting societal solidarity around the narratives they declare as authoritative.[204] Importantly for this case, it has also been claimed that international criminal judgments can express renewed solidarity with the victims by formally acknowledging their victim status.[205]

153. It is indeed on the basis of this expressive nature of judicial decisions, and specifically international criminal judgments, that recognising in this case the crimes of which Mr Ongwen was a victim provides the means to acknowledge his victim status and, in so doing, the opportunity to re-instate the dignity that was taken away from him when he was only a defenceless child.

B. Object and purposes of sentencing

154. Given the specific nature of the serious crimes under the jurisdiction of the Court – which entail grave violations of international human rights – and considering the violent contexts in which these crimes generally take place, as well as the essential values enshrined in the Statute, namely the peace, security and well-being of the world,

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[202] J. Mazzone, *When Courts Speak: Social Capital and Law's Expressive Function*, Hein Online (1999), pp. 1039-1066 at p. 1041.
[203] M. A. Drumbl, *Atrocity, Punishment, and International Law*, Cambridge (2007), p. 173; T. A. Borer, Truth Telling as a Peace Building Activity: A Theoretical Overview, in T.A. Borer, *Telling the Truths: Truth Telling and Peace Building in Post-Conflict Societies*, University of Notre Dame Press (2006), pp. 20-21; C. Brants and K. Klep, *Transitional Justice: History-Telling, Collective Memory, and the Victim-Witness*, International Journal of Conflict and Violence (2013), p. 45.
[204] B. Sander, *The Expressive Turn of International Criminal Justice: A Field in Search of Meaning*, Leiden Journal of International Law (2019), pp. 851-872, *referring to* T. Waters, *A Kind of Judgment: Searching for Judicial Narratives After Death*, The George Washington International Law Review (2010).
[205] B. Sander, *The Expressive Turn of International Criminal Justice: A Field in Search of Meaning*, Leiden Journal of International Law (2019), pp. 851-872, *referring to* J. Doak, *The Therapeutic Dimension of Transitional Justice: Emotional Repair and Victim Satisfaction in International Trials and Truth Commissions*, International Criminal Law Review (2011), pp. 263-298; and J. O'Connell, *Gambling with the Psyche: Does Prosecuting Human Rights Violators Console Their Victims?*, Harvard International Law Journal (2005), pp. 295-345, at pp. 317, 321-322.

it becomes relevant to discern the object and purposes of sentencing within the specific legal framework that governs proceedings before this Court. This is a crucial element that the Trial Chamber should bear in mind when determining a sentence anew as a result of the determination of the dissenting judge to remand the matter.

155. To that end, this section will first briefly set out the theories of punishment that have developed in the realm of criminal law and will afterwards specifically focus on the object and purposes of punishment in the specific field of international criminal law and international criminal justice.

1. Theories of punishment in criminal law

156. Traditionally, the theories of punishment in criminal law have aimed at answering a basic question in any judicial system: why is it possible and correct to punish someone that has committed a crime? In a nutshell, it is possible to identify three different theoretical approaches: absolute, relative and unified or mixed.

(a) Absolute theory: Retribution

157. The basic idea of the absolute theory is quite simple: imposing an evil on someone who has previously done another evil is something fair, this being enough to support the criminal system.[206] The main absolute theory is the retribution. According to Kant (1797), the punishment can never simply serve as a means to promote another good, both for the convicted person him or herself and for civil society, but must be imposed only because the individual has committed a crime.[207] In his view, this is because a person can never be used as merely as a means for the purposes of another person.[208] Understood in this light, punishment is a categorical imperative, and, therefore, it can only look to the past and punish in the present moment following the criteria of justice.[209]

[206] *See in this regard* D. Rodríguez Horcajo, *Teoría de la Pena*, Eunomía. Revista en Cultura de la Legalidad (2019), pp. 219-232, p. 223.
[207] I. Kant, *La metafísica de las costumbres*, Tecnos (1797 – 2008 edition), p. 166.
[208] I. Kant, *La metafísica de las costumbres*, Tecnos (1797 – 2008 edition), p. 166.
[209] D. Rodríguez Horcajo, *Teoría de la Pena*, Eunomía. Revista en Cultura de la Legalidad (2019), pp. 219-232, p. 223.

158. Retribution relates to the principle of proportionality between crime and punishment, which has been understood as the *lex talionis*.[210] For Kant, this is the only criterion for determining the sentence that can ensure a fair resolution of the conflict.[211]

159. A second important author propounding retributive theories is Hegel. For him, the penalty is a second (justified) coercion that overcomes a previous one.[212] In his view, the penalty is thus an affirmation of the law at the expense of the offender, without considering consequences beyond the punishment itself.[213]

(b) Relative theories: Prevention

160. The relative theories emerge as a reaction to the absolute theories to justify punishment on the basis of its orientation towards purposes foreign to the punishment itself, and, especially, due to its ability to prevent future crimes.[214] Preventive theories have been categorised as general prevention and special prevention. Each of these has, in turn, a positive and a negative aspect.[215] While the focus to discern general from special prevention is on the prevention of crimes as a role assigned to the penalty: one that is addressed to all members of society -general prevention- and one that is addressed to the actually convicted person -special prevention-; the focus to discern positive from negative is on the means to achieve said prevention: deterrence -negative prevention- or "benign" -positive prevention-.[216]

161. It may be argued that the first structured theories of prevention were those of negative general prevention (deterrence), devised by two contemporary authors: Feuerbach and Bentham.[217] According to Feuerbach, the punishment would operate *vis-*

[210] D. Rodríguez Horcajo, *Teoría de la Pena*, Eunomía. Revista en Cultura de la Legalidad (2019), pp. 219-232, p. 223.
[211] I. Kant, *La metafísica de las costumbres*, Tecnos (1797 – 2008 edition), p. 167.
[212] G.W.F. Hegel, *Grundlinien der Philosophie des Rechts*, Suhrkamp (1821 – 1993 edition), p. 99.
[213] G.W.F. Hegel, *Grundlinien der Philosophie des Rechts*, Suhrkamp (1821 – 1993 edition), pp. 100, 104.
[214] D. Rodríguez Horcajo, *Teoría de la Pena*, Eunomía. Revista en Cultura de la Legalidad (2019), pp. 219-232, p. 225.
[215] *See e.g.* D. Rodríguez Horcajo, *Teoría de la Pena*, Eunomía. Revista en Cultura de la Legalidad (2019), pp. 219-232, p. 225.
[216] D. Rodríguez Horcajo, *Teoría de la Pena*, Eunomía. Revista en Cultura de la Legalidad (2019), pp. 219-232, p. 225.
[217] D. Rodríguez Horcajo, *Teoría de la Pena*, Eunomía. Revista en Cultura de la Legalidad (2019), pp. 219-232, p. 225.

á-vis society as psychological coercion, dissuading the commission of crimes.[218] For his part, Bentham bases the protective capacity of the legal interests in criminal law on the fear of possible punishment in the event of committing a crime, generating in the individuals reasons to comply with criminal regulations.[219]

162. Positive general prevention arises as a reaction to the above theories that were perceived by some as creating extreme fear of criminal law.[220] These theories affirm that general prevention can be achieved through more subtle methods, not repressing potential criminals but positively affirming the law itself in front of the whole of society.[221] According to Jakobs, the penalty would operate as a system that reaffirms the confidence of society in the rules against the disavowal of the same contained in their infraction.[222]

163. On the other hand, according to the theory of special prevention, the penalty seeks to prevent the person upon whom it is imposed from committing a crime again.[223] This idea stems primarily from Franz von Liszt. This author suggests that the penalty reduces the chances of recidivism through three mechanisms: correction, intimidation and innocuousness.[224] Each of them would achieve special prevention in relation to a specific type of criminal: the first, against criminals capable of correction; the second, against criminals who do not need correction; and, the third, against criminals incapable of correction.[225] And, following the traditional classification, correction (resocialisation) would be the manifestation of positive special prevention, while intimidation and innocuousness would be the sign of negative special prevention.[226]

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[218] P.J.A. Feuerbach, *Revision der Grundsätze und Grundbegriffe des positiven peinlichen Rechts*, Hennigsche Buchhandlung (1799), pp. 49-52.
[219] J. Bentham, *The rationale of punishment*, Prometheus Books (1830 – 2009 edition), pp. 61-75.
[220] C. Roxin, Strafrecht Allgemeiner Teil, Band I, C. H. Beck (2006), p. 83; E. Peñarada Ramos, La pena: Nociones generales in *Introducción al Derecho penal*, second edition, Civitas Thomson Reuters, pp. 255-293.
[221] S. Mir Puig, *Derecho Penal. Parte General*, tenth edition, Reppertor (2016), p. 89.
[222] G. Jakobs, La pena como reparación del daño in *Dogmática y Criminología. Dos visiones complementarias del fenómeno delictivo. Homenaje a Alfonso Reyes Echandía*, Legis (2005), pp. 339-351 at pp. 344-345.
[223] S. Mir Puig, *Derecho Penal. Parte General*, tenth edition, Reppertor (2016), p. 91.
[224] F. Von Liszt, *Der Zweckgedanke im Strafrecht*, ZStW, vol. 3 (1883), pp. 1-47, p. 34.
[225] F. Von Liszt, *Der Zweckgedanke im Strafrecht*, ZStW, vol. 3 (1883), pp. 1-47, p. 36.
[226] D. Rodríguez Horcajo, *Teoría de la Pena*, Eunomía. Revista en Cultura de la Legalidad (2019), pp. 219-232, p. 227.

(c) Unified or Mixed theory

164. Given the insufficiencies that both the absolute and the relative theories showed on their own, practically all of the modern doctrine strongly agree on the so-called unified or mixed theory. Indeed, contemporary criminal doctrine has combined the absolute and the relative theories to affirm the preventive justification of the penalty (with more or less emphasis on a specific theory) but simultaneously accept the idea of retribution as central to this institution.[227] According to this approach, retribution plays a negative role, as a limit to the purpose of preventing further crimes, in such a way that the penalty seeks this objective but without neglecting ideas such as proportionality and blameworthiness.[228]

165. Roxin has been one of the main proponents of this theory. In his view, this theory assumes the name of "dialectic", because it brings together the points of view of the retributionist theories and prevention through a synthesis.[229] Roxin attributes to the punishment the purpose of protection of legal interests.[230] According to him, this goal is achieved by attributing to the punishment different functions at different stages of the proceedings, making it unnecessary to decide whether to prioritise prevention or retribution.[231] Thus, Roxin considers that (i) prior to the judicial application of the punishment provided for in the law, general prevention applies; (ii) in the judicial application, special and general prevention as well as retribution apply; and (iii) in the execution of the sentence, special prevention prevails.[232]

166. In other words, for Roxin, it is important that at the time of determining an appropriate sentence, both the purposes of retribution and prevention are taken into account. In particular, the punishment is imposed in accordance with the purpose of special prevention, its maximum limit lies in the degree of blameworthiness of the convicted person and its minimum limit is the collective awareness.[233]

[227] D. Rodríguez Horcajo, *Teoría de la Pena*, Eunomía. Revista en Cultura de la Legalidad (2019), pp. 219-232, p. 228.
[228] D. Rodríguez Horcajo, *Teoría de la Pena*, Eunomía. Revista en Cultura de la Legalidad (2019), pp. 219-232, p. 228.
[229] C. Roxin, *Sentido y límites de la pena estatal*, Reus (1976).
[230] C. Roxin, *Sentido y límites de la pena estatal*, Reus (1976).
[231] C. Roxin, *Sentido y límites de la pena estatal*, Reus (1976).
[232] C. Roxin, *Sentido y límites de la pena estatal*, Reus (1976).
[233] C. Roxin, *Sentido y límites de la pena estatal*, Reus (1976).

167. In the view of Judge Ibáñez Carranza, all of the above-mentioned purposes must be taken into account when deciding on the imposition of a sentence.

2. Object and purpose of sentencing in international criminal law and international criminal justice

168. Although the Statute does not explicitly describe any purposes or objectives of sentencing, for the reasons that follow the dissenting judge considers that the Court's legal framework reflects the mixed or unified approach described above, incorporating elements of both the absolute and the relative theories of punishment, including an additional perspective of positive general prevention that is unique to the international criminal law and international criminal justice arena, as explained below.

169. Some of the passages included in the preamble may assist in discerning the object and purposes of sentencing at the Court. The preamble states in relevant part that the States Parties recognise that the unimaginable atrocities that deeply shock the conscience of humanity threaten the peace, security and well-being of the world. It is noted that the Court is founded on the idea that "the most serious crimes of concern to the international community as a whole must not go unpunished", thus affirming retribution purposes. It also affirms that the States Parties are "determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes", thus affirming preventive purposes in all its aspects, as explained below.

170. In Judge Ibáñez Carranza's view, the legal framework governing proceedings before the Court enshrines the approach proposed by the mixed or unified theory, referring to retribution as well as special and general prevention in both their negative and positive aspects. In relation to the latter, the legal framework makes allowance for an additional perspective in terms of the positive general prevention in the specific context of international criminal law and international criminal justice that includes contributions to the promotion of restorative justice and reconciliation as a way to advance the enforcement of the rule of law and therefore sustainable peace. This additional perspective is in line with the core values set out in the Rome Statute.

(a) Purpose of retribution

171. In the *Katanga* Case, Trial Chamber II referred to the above-mentioned passages of the preamble and found that "[t]here must, therefore, be punishment for crimes which 'threaten the peace, security and well-being of the world' and the sentence should act as a deterrent".[234]

172. In addition to the relevant passages of the preamble discussed above, the importance of the retribution in the context of sentencing at the Court is confirmed by other aspects of the applicable legal framework. First, article 78(1) of the Statute[235] as well as rule 145(1)(a) of the Rules[236] require proportionality between the harm done by and the culpability of the offender and his or her punishment. Second, the inclusion of sentencing criteria such as the gravity of the crime in article 78(1) of the Statute, the extent of the damage caused, the nature of the unlawful behaviour and the degree of participation of the convicted person in rule 145(1)(c) of the Rules "can best be explained with a view to retributive considerations".[237] As Werle and Epik explain,

> These criteria define the harm done by and the culpability of the offender, they lie in the past and do not play any role in determining a sentence that follows primarily preventive purposes for which the risk of recidivism, the need for public reassurance or the dangerousness of a perpetrator would be decisive.[238]

173. In relation to retribution as one of the main purposes of sentencing, the ICTY Appeals Chamber stated that:

> It is important to state that retribution should not be misunderstood as a way of expressing revenge or vengeance. Instead, retribution should be seen as an objective, reasoned and measured determination of an appropriate punishment which properly reflects the […] culpability of the offender, having regard to the international risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offender's conduct. Furthermore,

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[234] *Katanga* Sentencing Decision, para. 37.
[235] "In determining the sentence, the Court shall, in accordance with the Rules of Procedure and Evidence, take into account such factors as the gravity of the crime and the individual circumstances of the convicted person".
[236] "In its determination of the sentence pursuant to article 78, paragraph 1, the Court shall: […] Bear in mind that the totality of any sentence of imprisonment and fine, as the case may be, imposed under article 77 must reflect the culpability of the convicted person".
[237] G. Werle and A Epik, Theories of Punishment in Sentencing Decisions of the International Criminal Court in *Why Punish Perpetrators of Mass Atrocities*, Cambridge University Press (2020), pp. 323-352 at p. 327.
[238] G. Werle and A Epik, Theories of Punishment in Sentencing Decisions of the International Criminal Court in *Why Punish Perpetrators of Mass Atrocities*, Cambridge University Press (2020), pp. 323-352 at p. 327.

> unlike vengeance, retribution incorporates a principle of restraint; retribution requires the imposition of a just and appropriate punishment, and nothing more.[239]

174. Similarly, in the *Bemba* Case, Trial Chamber III held that "[r]etribution is not to be understood as fulfilling a desire for revenge, but as an expression of the international community's condemnation of the crimes. In this way, a proportionate sentence also acknowledges the harm to the victims and promotes the restoration of peace and reconciliation".[240]

175. It follows from the above that retribution is not about vengeance. As one of the primary goals of sentencing, it provides a measurement tool for the sentencing process and restrains the extent of punishment permissible in a given case by demanding proportionality between the penalty and the degree of blameworthiness. It also serves to express the condemnation for the crimes, the condemnation of the convicted person and it acknowledges the harm suffered by the victims. Finally, it serves to express the international community's condemnation for the crimes committed.

(b) Purpose of prevention

176. In relation to preventive purposes (special and general), Judge Ibáñez Carranza notes that deterrence is but one aspect of the general and special prevention, namely its negative expression consisting in dissuading the society (general prevention) or the convicted person (special prevention) from committing crimes in the future. Judge Ibáñez Carranza notes in this regard that the jurisprudence of this and other international courts has at times referred to deterrence also as a positive aspect of general prevention and while this may be somewhat confusing, the jurisprudence is nonetheless instructive in setting out the broader goals of punishment in the specific context of international criminal law and international criminal justice.

177. In relation to general and special prevention in their negative aspect (deterrence), in the *Blagojević and Jokić* Case, the ICTY Trial Chamber confirmed that

> The deterrent effect of punishment consist in discouraging the commission of similar crimes. The primary effect sought is to turn the perpetrator away from future wrongdoing (individual or specific deterrence), but it is presumed that

[239] *Kordić and Čerkez* Appeal Judgment, para. 1075.
[240] *Bemba* Sentencing Decision, para. 11.

> punishment will also have the effect of discouraging others from committing the same kind of crime under statute (general deterrence).[241]

178. The ICTY Appeals Chamber has further held that "deterrence refers to the attempt to integrate or to reintegrate those persons who believe themselves to be beyond the reach of international criminal law".[242] It indicated that "[i]n modern criminal law this approach to general deterrence is more accurately described as deterrence aiming at reintegrating potential perpetrators into the global society".[243] The dissenting judge considers this finding relevant, noting however that the terminology employed may not be entirely accurate. In this regard, when referring to "deterrence" as attempts to reintegrate convicted persons into the global society, the ICTY Appeals Chamber appears to be in fact referring to general prevention in its positive aspect.

179. In similar terms, in the *Babić* Case, the ICTY Trial Chamber highlighted that "[w]ith regard to general deterrence, imposing a punishment serves to strengthen the legal order in which the type of conduct involved is defined as criminal, and to reassure society of the effectiveness of its penal provisions".[244] In the above jurisprudence, it is possible to discern the positive aspect of general prevention (somewhat confusingly referred to by the ICTY as deterrence) in the specific context of international criminal law and international criminal justice.

180. The ICTY Appeals Chamber has also set out in clear terms the sentencing purpose of positive prevention as follows:

> The sentencing purpose of affirmative prevention appears to be particularly important in an international criminal tribunal, not the least because of the comparatively short history of international adjudication of serious violations of international humanitarian and human rights law. The unfortunate legacy of wars shows that until today many perpetrators believe that violations of binding international norms can be lawfully committed, because they are fighting for a 'just cause.' Those people have to understand that international law is applicable to everybody, in particular during times of war. Thus, the sentences rendered by the International Tribunal have to demonstrate the fallacy of the old Roman principle of *inter arma silent leges* (amid the arms of war the laws are silent) in relation to the crimes under the International Tribunal's jurisdiction.[245]

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[241] *Blagojević and Jokić* Trial Judgment, para. 822.
[242] *Kordić and Čerkez* Appeal Judgment, para. 1078.
[243] *Kordić and Čerkez* Appeal Judgment, para. 1078.
[244] *Babić* Sentencing Decision, para. 45.
[245] *Kordić and Čerkez* Appeal Judgment, para. 1082.

181. As correctly held by the ICTY Trial Chamber, after noting that the specific purpose of the ICTY was "the prosecution of persons for crimes committed in the former Yugoslavia during a conflict situation, based on the principles of international humanitarian law", "[i]t was anticipated that through criminal proceedings, the Tribunal would contribute to peace and reconciliation in the former Yugoslavia, and beyond, through the establishment of the truth and the promotion of the rule of law".[246]

182. Specifically in relation to restoring and maintaining peace, in the *Bralo* Case, the ICTY Trial Chamber stated that

> As a preliminary matter, the Trial Chamber draws attention to the purposes of punishment in the context of the Tribunal. The Tribunal was established to prosecute individuals who committed serious violations of international humanitarian law in the course of conflicts in the states of the former Yugoslavia, as a measure to contribute to the restoration and maintenance of peace in that region. That aim must be borne in mind by a Trial Chamber in the sentencing process.[247]

183. Similarly, in the *D. Nikolić* Case, the ICTY Trial Chamber noted that in its determination of the appropriate sentence, it was for that chamber "to come as close as possible to justice for both victims and their relatives and the Accused, justice being of paramount importance for the restoration and maintenance of peace".[248]

184. Positive special prevention is also a relevant consideration in international criminal law and international criminal justice. In the *Kordić and Čerkez* Case, the ICTY Appeals Chamber considered that "[t]he sentencing purpose of rehabilitation aims at the reintegration of the offender into society".[249]

185. In the context of the Court, in the sentencing decisions rendered in the *Katanga*, *Bemba and Al-Mahdi* Cases,[250] as developed below, preventive purposes have also been considered. This includes the new perspective of positive general prevention, that is

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[246] *Obrenović* Sentencing Decision, para. 45.
[247] *Bralo* Sentencing Decision, para. 21.
[248] *D. Nikolić* Sentencing Decision, para. 4
[249] *Kordić and Čerkez* Appeal Judgment, para. 1079. In the *Deronjić* Case, the Appeals Chamber cautioned that while relevant, rehabilitation should not be given undue weight (*Deronjić* Sentencing Appeal Judgment, paras 136, 137).
[250] *Katanga* Sentencing Decision, para. 38; *Bemba* Sentencing Decision, para. 11; *Al Mahdi* Sentencing Decision, para. 67.

contributions to the promotion of restorative justice and reconciliation as a way to advance the enforcement of the rule of law and therefore sustainable peace.

186. It follows from the above that, according to the established jurisprudence, in the context of international criminal law and justice, the preventive purposes of sentences are not only about deterrence. Positive general prevention also encompasses efforts to contribute to the restoration and maintenance of peace in the region affected by violent conflicts.

(c) Unified purposes

187. In determining a fair, appropriate and proportionate sentence, all the above-mentioned purposes, namely retribution and prevention, need to be taken into account. As to the prominence that ought to be given to the preventive purposes of sentencing, the ICTY Appeals Chamber has correctly held that while prevention is important, the duty of a chamber "remains to tailor the penalty to fit the individual circumstances of the accused and the gravity of the crimes", noting in this regard that "[b]y doing so, Trial Chambers contribute to the promotion of and respect for the rule of law and respond to the call from the international community to end impunity, while ensuring that the accused are punished solely on the basis of their wrongdoing and receive a fair trial".[251]

188. In this regard, Trial Chamber II in the *Katanga* Case stated that when determining the sentence it had to ensure that it "reflects the degree of culpability while contributing to the restoration of peace and reconciliation in the communities concerned".[252] This important jurisprudence clearly reflects the mixed or unified approach set out in the previous section of this opinion.

189. The same chamber considered that

> the role of the sentence is two-fold: on the one hand, punishment, or the expression of society's condemnation of the criminal act and of the person who committed it, which is also a way of acknowledging the harm and suffering

[251] *D. Nikolić* Sentencing Appeal Judgment, para. 45.
[252] *Katanga* Sentencing Decision, para. 38.

> caused to the victims; and, on the other hand, deterrence, the aim of which is to deflect those planning to commit similar crimes from their purpose.[253]

190. Trial Chamber III similarly found that "a proportionate sentence also acknowledges the harm to the victims and promotes the restoration of peace and reconciliation".[254] The same was affirmed by Trial Chamber VIII in the *Al Mahdi* Case:

> With regard to retribution, the Chamber clarifies that it is not to be understood as fulfilling a desire for revenge, but as an expression of the international community's condemnation of the crimes, *which, by way of imposition of a proportionate sentence, also acknowledges the harm to the victims and promotes the restoration of peace and reconciliation*.[255]

191. The specific purpose of sentencing as an expression of positive general prevention in the context of international criminal law and international criminal justice, namely "contributions to the promotion of peace and reconciliation", has also been acknowledged repeatedly by the Assembly of States Parties in numerous resolutions as a "relevant consideration in sentencing decisions".[256]

192. In the view of the dissenting judge, in the context of international criminal law and international criminal justice sentencing serves various purposes, including notably retribution and prevention in all its variants. In relation to prevention, given the specific context of violence in which international crimes generally take place and the nature of these crimes, an additional perspective of positive general prevention emerges. According to the jurisprudence of the Court and that of other international tribunals, and as illustrated in the recent developments before the Assembly of States Parties, this positive aspect includes contributions to the promotion of peace and reconciliation as a relevant consideration in sentencing decisions. The inclusion of these type of considerations at the sentencing stage is important to promote the restoration of the rule of law and therefore sustainable peace, and accords with the values enshrined in the preamble of the Rome Statute. The legal framework governing the work of the Court enshrines the so-called mixed or unified approach, incorporating retributive and preventive elements, including in particular a new perspective of positive general

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[253] *Katanga* Sentencing Decision, para. 38 (footnote omitted).
[254] *Bemba* Sentencing Decision, para. 11.
[255] *Al Mahdi* Sentencing Decision, para. 67.
[256] Assembly of States Parties, Resolution ICC-ASP/20/Res.5, 9 December 2021, p. 2; Assembly of States Parties, Resolution ICC-ASP/19/Res.6, 16 December 2020, p. 2; Assembly of States Parties, Resolution ICC-ASP/18/Res.6, 6 December 2019, p. 2; Assembly of States Parties, Resolution ICC-ASP/17/Res.5, 12 December 2018, p. 2.

prevention that emerges and is unique to the realm of international criminal law and international criminal justice.

193. Therefore, in the determination of a fair, proportionate and appropriate sentence, a trial chamber must first focus on the person that has been found guilty and consider the retributive purpose of sentencing. It should then consider special prevention in its negative aspect but also, importantly, in its positive aspect to promote the resocialisation of the convicted person. Thereafter, a trial chamber should consider the general prevention, also in both its negative (general deterrence), and positive aspects. In relation to the latter, Judge Ibáñez Carranza wishes to highlight, in particular, contributions to the promotion of restorative justice and reconciliation as a way to advance the enforcement of the rule of law and therefore sustainable peace.

194. All of the above considerations apply in the instant case. Thus, in its determination of a new sentence for Mr Ongwen, the Trial Chamber should take all of them into account.

XI. CONCLUSION

195. As a result of the issuance of this partly dissenting opinion, the dissenting judge feels at peace with her conscience. The analysis and conclusions reached in this opinion expresses the fundamental reasons upon which Judge Ibáñez Carranza must dissent from a discrete but significant aspect of the decision rendered by the majority of the Appeals Chamber. The dissenting judge reiterates that the Appeals Chamber has unanimously rejected Mr Ongwen's appeal against the Conviction Decision and has unanimously rejected 10 of the 11 grounds of appeal raised in the context of the sentencing appeal proceedings. In the context of ground of appeal 12, Judge Ibáñez Carranza partly dissents with respect to the allegation of double counting of the factor of multiplicity of victims. In this regard, the dissenting judge finds that this issue has been determinative of the joint sentence ultimately imposed on Mr Ongwen which, otherwise, would have been lower.

196. The dissenting judge considers it appropriate at this concluding stage to recapitulate all the points made in this opinion.

a. There has been a clear legal error in the reasoning of the Trial Chamber. It attached weight twice to the number of victims, as part of the gravity assessment and as an aggravating factor in relation to 20 out of the 61 individual sentences imposed on Mr Ongwen. This resulted in unfairness in the sentencing proceedings, causing prejudice to Mr Ongwen and, ultimately, led to an incorrect exercise of discretion by the Trial Chamber as a consequence of which the Trial Chamber imposed a disproportionate joint sentence. The error had thus a material impact on the individual sentences imposed and, in particular, on the ultimate joint sentence of 25 years of imprisonment;

b. The most appropriate relief in this case is to reverse the joint sentence impose and to remand the matter for the Trial Chamber to impose a new sentence;

c. Mr Ongwen's abduction, conscription, violent indoctrination, being forced to carry out and participate in criminal acts, when he was still a defenceless child of about nine years of age and his upbringing in the coercive environment of the LRA had a long-lasting impact on his personality, the development of his brain and moral values, and future opportunities. These circumstances merit significant weight in mitigation when imposing a new sentence on Mr Ongwen;

d. In addition, Judge Ibáñez Carranza wishes to use this opportunity to acknowledge the violation of Mr Ongwen's basic human rights that affected his dignity as a human being. Given the expressive nature of judicial decisions, and specifically of international criminal judgments, recognising in this case the crimes of which Mr Ongwen was a victim provides the means to acknowledge his victim status and re-instate the dignity that was taken away from him when he was a defenceless child;

e. In sentencing proceedings, trial chambers should always consider the object and purpose of sentencing. In the context of international criminal law and international criminal justice, sentencing serves various purposes, including notably retribution and prevention in all its variants. In relation to the preventive purpose, all its aspects ought to be considered, and because of the nature and the context of the crimes, in particular the positive aspect of general prevention is of relevance. This includes, according to the jurisprudence of the Court and

that of 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 advance the enforcement of the rule of law and therefore sustainable peace; and

f. The above aspects ought to be considered to achieve the imposition of a sentence that is fair for the victims, the convicted person and the affected communities. Furthermore, the sentence must also be perceived as fair by the international community as a whole. These elements are also applicable to the case of Mr Ongwen, particularly considering the context of violence and circumstances in which the crimes occurred, as described in the Conviction Decision.

XII. FINAL REMARKS AND DETERMINATION

197. As a concluding remark, the dissenting judge wishes to reemphasise that the proposed outcome does not seek to undermine the suffering of the victims of the crimes committed by Mr Ongwen. This suffering has been duly and unanimously acknowledged in the Conviction Decision and Sentencing Decision as confirmed by the Appeals Chamber in today's judgments. Furthermore, this opinion is without prejudice to the ensuing reparations proceedings. A new sentence should be imposed that is still long enough to acknowledge the gravity of those crimes and to recognise the suffering of the victims while at the same time ensuring fairness and proportionality to Mr Ongwen's culpability and his individual circumstances.

198. In light of the considerations set out in this opinion, Judge Ibáñez Carranza deems it appropriate to reverse the joint sentence of 25 years of imprisonment and remand the matter to the Trial Chamber for it to determine a new sentence. In its consideration of the matter anew, the Trial Chamber must ensure that the sentence is appropriate, fair and proportionate to Mr Ongwen's culpability and his individual circumstances as a former child soldier, and that it serves the object and purposes of sentencing, as developed in this opinion.

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

Judge Luz del Carmen Ibañez Carranza

Dated this 15th day of December 2022

At The Hague, The Netherlands