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No.: **ICC-02/04-01/15**
Date: **27 October 2021**

THE APPEALS CHAMBER

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

SITUATION IN UGANDA

IN THE CASE OF
THE PROSECUTOR v. DOMINIC ONGWEN

Public with Public Annex A

Public redacted version of "Prosecution response to Sentencing Appeal Brief", 26 October 2021, ICC-02/04-01/15-1886-Conf

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INTRODUCTION

1. The Appeals Chamber should reject Ongwen's appeal[1] against the Sentencing Judgment.[2] The individual sentences and the joint sentence of 25 years imposed on Ongwen appropriately reflect the gravity of his convictions for 62 counts comprising 61 war crimes and crimes against humanity, and his substantial degree of culpability in the crimes. The Sentencing Judgment is well reasoned and Trial Chamber IX ("Chamber") adequately considered the submissions and evidence submitted by the Parties and participants. In addition, the proceedings leading up to the Sentencing Judgment were fair and Ongwen's rights were fully respected.

2. Ongwen merely disagrees with the Chamber's findings and conclusions without showing error. Many of his arguments repeat prior submissions that were properly rejected by the Chamber, fail to clearly set out the alleged errors, misrepresent the Chamber's findings in the Sentencing Judgment, or inappropriately seek to challenge the Chamber's findings in the judgment under article 74 ("Conviction Judgment" or "Judgment") through the Sentencing Appeal.[3] Accordingly, many of Ongwen's arguments under various grounds of appeal should be summarily dismissed.[4] Ongwen's arguments also fail to show any error that materially affected the Sentencing Judgment.

3. Ongwen's Sentencing Appeal should therefore be rejected and his 25-year sentence confirmed.

CONFIDENTIALITY LEVEL

4. Pursuant to regulation 23*bis*(1) of the Regulations of the Court, the Prosecution files this response as confidential since it refers to information with the same confidentiality level. The Prosecution will file a public redacted version as soon as practicable.[5]

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[1] Sentencing Appeal.
[2] Sentencing Judgment.
[3] *See e.g.* Sentencing Appeal, paras. 7, 26-27, 50, 53-55, 73, 82, 85-89, 90, 92, 95-100, fn. 196, 118, 156-165, 192-193, 209, 220, Annex A.
[4] *See below* paras. 59 (Ground 2), 71-72, 82 (Ground 3), 98-99 (Ground 4), 115 (Ground 5), 143, 147, 161 (Ground 7), 173-177, 183 (Ground 8), 200 (Ground 10), 233 (Ground 11).
[5] To the extent that there are discrepancies between the information redacted in the Sentencing Appeal and in decisions issued by the Chamber, the Prosecution's public redacted version of this document will be guided by the classification given to information by the Chamber.

SUBMISSIONS

I. APPLICABLE STANDARDS

I.A. Standard of review for sentencing decisions

5. According to the Appeals Chamber's consistent jurisprudence, the Appeals Chamber's primary task in an appeal against a sentencing decision is to review whether the Trial Chamber made any errors in sentencing the convicted person. Its role is not to determine the sentence *de novo*, unless – as stipulated in article 83 (3) of the Statute – it finds that the sentence imposed by the Trial Chamber is "disproportionate" to the crime. Only then can the Appeals Chamber "amend" the sentence and enter a new, appropriate sentence. Trial Chambers have broad discretion to determine an appropriate sentence.[6]

6. The Appeals Chamber's review of a Trial Chamber's exercise of discretion in determining a sentence is deferential: it should only intervene if (i) the Trial Chamber's exercise of discretion was based on an erroneous interpretation of the law; (ii) the Trial Chamber's exercise of discretion was based on an incorrect conclusion of fact; or (iii) as a result of the Trial Chamber's weighing and balancing of the relevant factors, the sentence was so unreasonable as to constitute an abuse of discretion.[7] The Appeals Chamber has previously held that:[8]

> With respect to an exercise of discretion based upon an alleged erroneous interpretation of the law, the Appeals Chamber will not defer to the relevant Chamber's legal interpretation, but will arrive at its own conclusions as to the appropriate law and determine whether or not the first instance Chamber misinterpreted the law.
>
> With regard to an exercise of discretion based upon an incorrect conclusion of fact, the Appeals Chamber applies a standard of reasonableness in appeals pursuant to article 82 of the Statute, thereby according a margin of deference to the Chamber's findings. The Appeals Chamber will not interfere with the factual findings of a first instance Chamber unless it is shown that the Chamber committed a clear error, namely, misappreciated the facts, took into account irrelevant facts or failed to take into account relevant facts. Regarding the misappreciation of facts, the Appeals Chamber will not disturb a Pre-Trial or Trial Chamber's evaluation of the facts just because the Appeals Chamber might have come to a different conclusion. It will interfere only where it cannot discern how the Chamber's conclusion could have reasonably been reached from the evidence before it.

[6] *Bemba et al.* SAJ, paras. 21-22; *Bemba et al.* Re-Sentencing AJ, paras. 29.
[7] *Bemba et al.* Re-Sentencing AJ, paras. 23-24, 30.
[8] *Bemba et al.* SAJ, paras. 23-24. *Kenyatta* AO5 AJ, paras. 22-25.

> In addition, the Appeals Chamber may interfere with a discretionary decision [when it] amounts to an abuse of discretion. Even if an error of law or of fact has not been identified, an abuse of discretion will occur when the decision is so unfair or unreasonable as to 'force the conclusion that the Chamber failed to exercise its discretion judiciously'. The Appeals Chamber will also consider whether the first instance Chamber gave weight to extraneous or irrelevant considerations or failed to give weight or sufficient weight to relevant considerations in exercising its discretion. The degree of discretion afforded to a Chamber may depend upon the nature of the decision in question.

7. In addition, pursuant to article 83(2) of the Statute, the appellant is required to show that the sentence 'was materially affected by error of fact or law or procedural error'.[9]

I.B. Standard for summary dismissal

8. Many of Ongwen's arguments should be summarily dismissed because Ongwen fails to clearly set out the alleged errors or to demonstrate how such errors materially affected the Sentencing Judgment.[10] Throughout his Sentencing Appeal, Ongwen often makes general or abstract submissions about alleged errors without identifying the relevant finding, and without providing arguments explaining *why* the Chamber allegedly erred or explaining how the alleged error materially affected the finding or decision.

9. The Appeals Chamber has held that, in addition to satisfying the requirements in regulation 58(2) of the Regulations of the Court, an appellant is obliged (i) to present "cogent arguments" setting out the alleged error and explain how the Trial Chamber erred;[11] and (ii) to demonstrate how the error materially affected the impugned decision under article 83(2).[12] If an appellant fails to meet these requirements, the Appeals Chamber may dismiss the arguments without analysing their substance.[13]

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[9] *Bemba et al.* Re-Sentencing AJ, para. 30; *Bemba et al.* SAJ, paras. 25.
[10] *See e.g.* Sentencing Appeal, paras. 7, 26-27, 50, 53-55, 73, 82, 85-89, 90, 92, 95-100, fn. 196, 118, 156-165, 192-193, 209, 220, Annex A. *See also below*, paras. 59 (Ground 2), 71-72, 82 (Ground 3), 98-99 (Ground 4), 115 (Ground 5), 143, 147, 161 (Ground 7), 173-177, 183 (Ground 8), 200 (Ground 10), 233 (Ground 11).
[11] *Ntaganda* AJ, para. 48 (the Appeals Chamber further held that "[i]n alleging that a factual finding is unreasonable, an appellant must explain why this is the case, for example, by showing that it was contrary to logic, common sense, scientific knowledge and experience" and "parties and participants [will] draw the attention of the Appeals Chamber to all the relevant aspects of the record or evidence in support of their respective submissions relating to the impugned factual finding").
[12] *Ntaganda* AJ, para. 48; see also para. 49 ("When raising an appeal on the ground of unfairness under article 81(1)(b)(iv) [..], the appellant is required to set out not only how it was that the proceedings were unfair, but also how this affected the reliability of the conviction decision").
[13] *Ntaganda* AJ, para. 49 (citing *Bemba* AJ Minority Opinion, para. 386); *see also Lubanga* AJ, para. 30.

10. This approach is consistent with the jurisprudence of the ICTY Appeals Chamber. For example, in *Krajišnik*, it affirmed that:[14]

> [The Appeals Chamber] has an inherent discretion to determine which of the parties' submissions merit a reasoned opinion in writing and […] may dismiss arguments which are evidently unfounded without providing detailed reasoning in writing. […] In order for the Appeals Chamber to assess a party's arguments on appeal, the party is expected to present its case clearly, logically and exhaustively. […] [T]he Appeals Chamber may dismiss submissions as unfounded without providing detailed reasoning if a party's submissions are obscure, contradictory, vague or suffer from other formal and obvious insufficiencies.

11. In that decision, as well as other ones, the Appeals Chamber of the ICTY developed a non-exhaustive list of types of submissions that, in its opinion, warranted summary dismissal, including:[15]

(i) arguments that fail to identify the challenged factual findings, that misrepresent the factual findings or the evidence, or that ignore other relevant factual findings;

(ii) mere assertions that the Trial Chamber must have failed to consider relevant evidence;

(iii) challenges to factual findings on which a conviction does not rely, and arguments that are clearly irrelevant, that lend support to, or that are not inconsistent with the challenged finding;

(iv) arguments that challenge a Trial Chamber's reliance or failure to rely on one piece of evidence;

(v) arguments that are contrary to common sense;

(vi) challenges to factual findings where the relevance of the factual finding is unclear and has not been explained by the appellant;

(vii) mere repetition of arguments that were unsuccessful at trial;

(viii) allegations that are based on material not in the record;

(ix) mere assertions unsupported by any evidence, undeveloped assertions and failures to articulate error; and

(x) mere assertions that the Trial Chamber failed to give sufficient weight to evidence or failed to interpret evidence in a particular manner.

12. As will be shown in this Response Brief, many of Ongwen's arguments in his Appeal fall

[14] *Krajišnik* AJ, para. 16.
[15] *Krajišnik* AJ, paras. 16-27. *See also* *Brđanin* AJ, paras. 17-31; *Martić* AJ, paras. 14-21; *Strugar* AJ, paras. 16-24; *Blagojević and Jokić* AJ, paras. 10-11; *Orić* AJ, paras. 13-14.

within the above categories of submissions warranting *in limine* dismissal. The Prosecution respectfully requests that the Appeals Chamber rely on these grounds, as appropriate, to summarily dismiss a large number of his arguments.

II. GROUND 1: ONGWEN'S RIGHT TO MEANINGFULLY PARTICIPATE IN THE SENTENCING PROCEEDINGS WAS RESPECTED

II.A. Introduction

13. Ongwen did not receive a translation of the whole Conviction Judgment into Acholi, the language that he fully understands and speaks, for the purpose of the sentencing proceedings. Ongwen argues, first, that as a matter of law, he had a right to receive a translation of the whole Judgement into Acholi as part of the sentencing proceedings. Second, he contends that without such a translation, his fair trial rights were violated. According to Ongwen, he was not put on proper notice of the content of the Judgment and therefore could not participate meaningfully in the sentencing proceedings, including by adequately preparing for them, presenting evidence and making informed submissions.[16]

14. Ground 1 should be rejected. There is no absolute right under the Statute, the Rules or any other applicable legal instrument for a convicted person to receive a full translation of the conviction decision into a language he or she fully understands and speaks for the purpose of the sentencing proceedings. This interpretation of the relevant portions of the Statute and the Rules is consistent with the international human rights law referred to by Ongwen.[17] Ongwen's arguments fail to show an error in the Sentencing Judgement.[18]

15. Further, the sentencing procedure adopted by the Chamber was fair and fully respected Ongwen's rights under the Statute and the Rules. In particular, Ongwen had received a simultaneous translation into Acholi of the "extensive summary of the main findings and underlying reasons"[19] of the Judgment, delivered by the Chamber in open court pursuant to article 74(5). This summary included all the elements relevant for his sentencing under rule 145 and thereby put Ongwen on proper notice of the facts that the Chamber could reasonably rely

[16] Sentencing Appeal, paras. 7-57.
[17] Sentencing Appeal, paras. 25-36.
[18] *See e.g.* Sentencing Appeal, paras. 38, 40-41, 44, 54-55.
[19] Sentence Hearing Schedule ALA Decision, para. 10; T-259-ENG, 4:16-42:2.

on to determine his sentence, including any aggravating factors. In addition, Ongwen had full Acholi translations of the decision on the confirmation of the charges and other core documents; he had followed all hearings in real-time through Acholi interpretation and throughout the proceedings; and he had had the assistance of a Defence team that included members—such as the lead counsel—who are fluent in English and Acholi.[20] Accordingly, Ongwen's right to notice under article 67(1)(a), and his rights to have adequate time and facilities to prepare and to present his defence under articles 67(1)(b) and (e), were fully respected. Ongwen's personal circumstances (*i.e.* his alleged "mental disability") also did not warrant a different approach by the Chamber. Ongwen fails to show that he was prejudiced by not receiving a translation of the whole Conviction Judgment into Acholi for the purpose of the sentencing proceedings.

16. Ongwen also fails to show how the alleged errors under Ground 1 affected the reliability of the Sentencing Judgment or materially affected it. Ground 1 should therefore be rejected.

II.B. Ongwen's rights were fully respected

II.B.1. Providing Ongwen with a full Acholi translation of the whole Judgment for the purpose of the sentencing proceedings was not required as a matter of law

17. Ongwen generally argues that under article 67(1)(f), rule 144(2)(b) and regulation 40(6) of the Regulations of the Court, he was entitled as a matter of law to receive a translation of the whole Conviction Judgment for the purpose of the sentencing proceedings.[21] This argument is unsupported and should be rejected.

II.B.1.a. Article 67(1)(f) and rule 144(2)(b) do not support Ongwen's claim

18. Article 67(1)(f) and rule 144(2)(b) did not give Ongwen the absolute right to receive a translation into Acholi of the whole Judgement for the purpose of the sentencing proceedings.[22] Under article 67(1)(f), Ongwen had the right to receive translations of documents into a language that he fully understands and speaks, "as are necessary to meet the requirements of fairness". Relatedly, under rule 144(2)(b), Ongwen had a right to be provided as soon as possible with a copy of the Judgment in a language he fully understands and speaks, to meet

[20] Notice of Appeal Extension Decision, para. 11.
[21] *See e.g.* Sentencing Appeal, paras. 38, 40-41, 44, 54-55.
[22] Notice of Appeal Extension Decision, para. 10; *Bemba* Translation Decision, para. 11. *See also Kamasinski v. Austria*, paras. 74, 84-85. *Contra* Sentencing Appeal, para. 41; *see also* paras. 7, 22-23, 41, 49, 53, 57.

the requirements of fairness under article 67(1)(f). Accordingly, these provisions make it clear that the right to translation only applies to the extent that it is "necessary to meet the requirements of fairness,"[23] and in particular "to enable the defendant to have knowledge of the case against him and to defend himself, notably by being able to put before the court his version of the events."[24]

19. Providing a convicted person with a full translation of the conviction decision for the purpose of his or her sentencing proceedings is not necessary to meet the requirements of fairness.

20. The legal basis for a sentencing judgment is article 76 of the Statute. As held by the Chamber, "that provision envisages that the appropriate sentence can be pronounced together with the decision on the conviction under article 74 of the Statute, rather than separately and consecutively, and therefore, logically, without the convicted person being informed of the conviction—and even less of the reasons thereof—prior to the determination of the sentence."[25] Accordingly, the Court's sentencing procedure is not always "bifurcated" into a trial judgment followed by a separate sentencing procedure,[26] and if it is not, a convicted person will not necessarily have the opportunity to make separate arguments on sentencing. In fact, in this case Ongwen did not even request a further sentencing hearing pursuant to article 76(2); rather the Chamber scheduled a separate sentencing hearing on its own initiative after it had issued the Judgment.[27]

21. Even in the event of separate sentencing proceedings, the scope of such proceedings is strictly limited and does not necessitate that a convicted person receive a translation of the whole conviction decision into a language that he or she fully understands. As the Trial Chamber held, "[t]he decision to separate the conviction and sentence does not have as its ratio to give the convicted person, or the parties in general, the possibility to make submissions on sentencing in response to the conviction under Article 74 of the Statute. Accordingly, the issue of accessibility of the reasoning for the decision under Article 74 to the convicted person does

[23] *Ali Kushayb* Language Judgment, paras. 29-30; Sentence Hearing Schedule ALA Decision, para. 9; *Bemba* Translation Decision, paras. 11-16.
[24] *Lubanga* Language Decision, pp. 5-6. *Bemba* Translation Decision, paras. 14, 16; *see also Kamasinski v. Austria*, para. 74; *Hermi v. Italy*, paras. 69-70; *Lagerblom v. Sweden*, para. 61. *See further Delalić et al.* Language Decision, paras. 6, 8; *Naletilić & Martinović* Translation Decision, p. 3.
[25] Sentence Hearing Schedule ALA Decision, para. 9.
[26] *Contra* Sentencing Appeal, paras. 46-47.
[27] Scheduling Order, para. 3.

not form part of the considerations that underlie the decision to envisage separate sentencing proceedings".[28]

22. Because of the limited scope of the sentencing proceedings, and the type of submissions and evidence that could be advanced by the parties and participants during those proceedings,[29] Ongwen was not entitled, as a matter of law, to receive a translation of the Judgement—let alone a full translation of the Judgment—prior to those proceedings.

II.B.1.b. The Chamber did not violate regulation 40(6) of the Regulations of the Court

23. Ongwen further argues that he was entitled to receive an Acholi translation of the whole Judgment for the purposes of the sentencing proceedings pursuant to regulation 40(6).[30] This argument should be rejected.

24. Regulation 40(6) does not create rights for a convicted person beyond those in article 67(1)(f) and rule 144(2)(b).[31] Rather, regulation 40 addresses the practical matter of how the Registry ensures that translations of all documents that ought to be translated under the Statute and the Rules are duly prepared by the Registry's language services. In accordance with article 52(1), the Regulations of the Court are designed to facilitate the routine functioning of the Court,[32] and they must, as regulation 1(1) states, be "read subject to the Statute and the Rules." Accordingly, regulation 40(6) does not provide a convicted person with an absolute right to receive a translation of the whole judgment into a language that he or she fully understands for the purpose of the sentencing proceedings.

25. This is not to say that regulation 40(6) is not applicable to the translation of the Judgment in this case. In fact, the Registry is already in the process of translating the Judgement[33] and Ongwen was be provided with it in due course.[34]

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[28] Sentence Hearing Schedule ALA Decision, para. 9.
[29] Sentence Hearing Schedule ALA Decision, para. 9.
[30] Sentencing Appeal, para. 24, 37, 41, 51, 54. According to regulation 40(6) of the Regulations of the Court, the Registrar shall ensure translation into the language that the suspect, accused, acquitted or convicted persons fully understand and speak, of all decisions or orders in his or her case.
[31] *See by analogy* *Ali Kushayb* Language Judgment, para. 28.
[32] *Katanga* VWU Decision Dis. Op., para. 7.
[33] Notice of Appeal Extension Decision, para. 9; Sentencing Appeal, para. 37.
[34] Ongwen's suggestion that the Registry should have commenced with the translation prior to the date when the Chamber issued the Judgment (Sentencing Appeal, para. 37) was simply unfeasible. The Appeals Chamber directed the Defence to inform LSS and the Appeals Chamber of the sections of the Conviction Decision to be prioritised for translation into Acholi, and the Registry to provide the Defence a translation of those sections on a

26. For the above reasons, Ongwen's arguments that he was entitled as a matter of law to receive a translation of the whole Judgment before the sentencing proceedings should be rejected.

II.B.2. Ongwen's fair trial rights were fully respected

27. The sentencing procedure adopted by the Chamber was fair and fully respected Ongwen's rights under the Statute and the Rules. He fails to show that he was prejudiced by not receiving a translation of the whole Conviction Judgment into Acholi for the purpose of the sentencing proceedings, and his arguments should be rejected.

II.B.2.a. Ongwen was properly put on notice of the crimes for which he was convicted and of the other facts relevant to sentencing

28. Ongwen argues that for the purposes of the sentencing proceedings, he had the right under article 67(1)(a) to know the crimes for which he was convicted and the facts underlying his conviction. According to Ongwen, because he did not receive a translation into Acholi of the whole Judgment, he was not properly appraised of the crimes for which he was convicted or the potential aggravating circumstances that the Chamber could rely on.[35] Ongwen's arguments should be rejected.

29. Article 67(1)(a) grants an accused a right to be informed of the charges in a language that he or she fully understands and speaks. This provision is inapposite to Ongwen's argument in relation to sentencing.[36] In any event, Ongwen was properly informed in Acholi of all the facts that were relevant for him to meaningfully participate in the sentencing proceedings. He had received a simultaneous translation into Acholi of an "extensive summary of the main findings and underlying reasons"[37] of the Judgment, delivered by the Chamber in open court. This summary included a comprehensive overview of the Chamber's findings on the evidence and

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rolling basis (Acholi Translation Decision, para. 6). By 12 March 2021, the Defence had identified "priority" sections of the Judgment for translation into Acholi, amounting to some 938 pages—or approximately 87% of the Judgment (Notification of Priority Sections). On 9 September 2021, the LSS indicated that the transmission of the draft translation of the priority sections identified by the Defence had been completed on 3 September 2021 (Acholi Translation Decision, para. 6). On 8 October 2021, the LSS confirmed that a draft translation of the entire Conviction Decision was provided to the Defence on the same day (Acholi Translation Decision, para. 6).

[35] Sentencing Appeal, paras. 38; 42-43, 54, 56.

[36] For Ongwen's argument in the Appeal that he was not properly put on notice of the charges, *see* Response to Conviction Appeal, Ground 6, paras. 112-119.

[37] Sentence Hearing Schedule ALA Decision, para. 10; T-259-ENG, 4:16-42:2; *see also* Judgment Summary.

conclusions, as required by article 74(5).[38] It included all the facts relevant to the Chamber's determination of the sentence under rule 145, such as information on the gravity of the crimes,[39] their impact on the victims,[40] and Ongwen's participation in the crimes and his intent.[41] It also included information on aggravating circumstances found by the Chamber to apply in this case, namely the particular defenselessness of the victims,[42] the particular cruelty of the crimes;[43] the existence of multiple victims;[44] and discriminatory motives.[45] Finally, it included the Chamber's findings on Ongwen's arguments in relation to his alleged mental incapacity, his defence of duress[46] and on his personal circumstances,[47] for which he needed no additional notice, as the underlying facts were well known to him.

30. In addition, Ongwen had been provided with full Acholi translations of the decision on the confirmation of the charges and other core documents, he had followed all hearings in real-time through Acholi interpretation and, throughout the proceedings, he benefitted from the assistance of a Defence team whose members, including the lead counsel, are fluent in English and Acholi.[48]

31. Providing Ongwen with timely access to all of the above information into Acholi ensured that his rights during the sentencing process were fully respected. The Chamber's approach was also consistent with the practice of other trial chambers, which have ensured that parts of the judgements were translated for the convicted person for the purposes of the sentencing proceedings.[49]

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[38] *Contra* Sentencing Appeal, para. 48.
[39] Judgment Summary, paras. 11-119.
[40] Judgment Summary, paras. 11-119.
[41] Judgment Summary, paras. 2, 11-14, 20, 22, 37, 39-40, 43-44, 59, 62, 72, 75, 77-85, 89-91, 94-96, 98, 100, 102, 108, 110, 115, 126.
[42] Judgment Summary, paras. 11-119. *See also* Sentencing Judgment, paras. 155, 190, 209, 228, 264.
[43] Judgment Summary, paras. 11-119. *See also* Sentencing Judgment, paras. 172, 189, 203, 240.
[44] Judgment Summary, paras. 11-119. *See also* Sentencing Judgment, paras. 154, 188, 226, 262.
[45] Judgment Summary, paras. 2, 11-14, 20, 22, 37, 39-40, 43-44, 59, 62, 72, 75, 77-85, 89-91, 94-96, 98, 100, 102, 108, 110, 115, 126. *See also* Sentencing Judgment, paras. 135. *See e.g.* paras. 156, 191, 229, 265.
[46] Judgment Summary, paras. 120-125.
[47] *See e.g.* Judgment Summary, para. 6.
[48] The Appeals Chamber also noted these matters in its recent decision on Ongwen's request for extension of time in the present appeals proceedings: Notice of Appeal Extension Decision, para. 11. *See also* Response to Conviction Appeal, para. 46. Ongwen received in Acholi those documents that were necessary to meet the requirements of fairness and were thus *essential* to ensuring that he fully understood the nature, cause and content of the charges and could adequately defend himself—specifically, the Warrant of Arrest, the DCC, the Confirmation Decision and Judge Perrin de Brichambaut's separate opinion, and witness statements relied upon by the Prosecution in the proceedings.
[49] The *Bemba et al*. Trial Chamber identified parts of the judgments to be translated into French for the purposes of sentencing (*Bemba et al.* Partial Translation Decision, paras. 11, 13). The *Ntaganda* Trial Chamber likewise

32. The right to be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks, is intended "to enable the defendant to have knowledge of the case against him and to defend himself, notably by being able to put before the court his version of the events."[50] Ongwen did not need to be familiar with all the details of the Conviction Judgement to prepare for and meaningfully participate in the sentencing proceedings. This is because the sentencing proceedings were not intended to "give [Ongwen] the possibility to make submissions on sentencing in response to the conviction."[51] Accordingly, Ongwen's right to notice under article 67(1)(a) does not extend to receiving an Acholi translation of the whole Judgment prior to his sentencing.[52] If it was otherwise, any sentence pronounced jointly with a conviction under article 76(2) would be unfair.

33. The *Bemba et al.* Appeals Chamber decision supports the above.[53] The Appeals Chamber held that "considerations of procedural fairness and the rights of the defence require that the convicted person be sufficiently put on notice of the facts that are taken into account to aggravate the sentence."[54] However, it also found that such notice need not necessarily be given through a judgment of conviction. A trial chamber may rely on facts in aggravation that could "reasonably be expected by the convicted person".[55] According to the Appeals Chamber, a convicted person may be put on "proper notice" of such facts also through the confirmation of charges decision or through the "submissions of the Prosecutor on sentencing".[56]

34. Ongwen fails to show in concrete terms that he lacked notice of any of the facts considered by the Chamber to aggravate his sentence. In particular he has not shown that the Chamber's factual findings on aggravating circumstances exceeded the Prosecution's written[57] and oral[58] sentencing submissions. To the contrary, Ongwen responded to those submissions in detail.[59] He also fails to show that the Chamber in its Sentencing Judgement considered aggravating

identified parts of the judgment to be translated into Kinyarwanda for the purposes of sentencing (*Ntaganda* Partial Translation Decision, para. 3 and fn. 2).
[50] *Lubanga* Language Decision, pp. 5-6. *Bemba* Translation Decision, paras. 14, 16; *see also Kamasinski v. Austria*, para. 74; *Hermi v. Italy*, paras. 69-70; *Lagerblom v. Sweden*, para. 61. *See further Delalić et al.* Language Decision, paras. 6, 8; *Naletilić & Martinović* Translation Decision, p. 3.
[51] Sentence Hearing Schedule ALA Decision, para. 9.
[52] *Contra* Sentencing Appeal, para. 54.
[53] *Contra* Sentencing Appeal, paras. 39, 41.
[54] *Bemba et al.* SAJ, para. 116.
[55] *Bemba et al.* SAJ, para. 116.
[56] *Bemba et al.* SAJ, para. 116.
[57] Prosecution Sentencing Brief, paras. 22-25, 50-53, 73-75, 97-100, 114-116, 125.
[58] T-260, 6:17-7:23. Ongwen received a simultaneous translation into Acholi for these submissions.
[59] T-261, 42:16-46:17.

circumstances that were not referred to in the summary of the Judgment that had been translated into Acholi.

35. In light of the above, Ongwen's arguments that the absence of an Acholi translation of the whole Conviction Judgment prior to his sentence proceedings violated his right to notice under article 67(1)(a), are unsupported. He fails to show how he was prejudiced and his arguments should be rejected.

II.B.2.b. Ongwen had adequate time and facilities to prepare and present his defence

36. Closely related to the above, Ongwen argues that because he did not receive an Acholi translation of the whole Conviction Judgment, he was prevented from meaningfully preparing for the sentencing hearing and making informed submissions during the hearing, in violation of his rights under articles 67(1)(b) and (e).[60] These arguments are equally unsupported and should be rejected.

37. As noted above,[61] Ongwen received a simultaneous translation into Acholi of an "extensive summary of the main findings and underlying reasons"[62] of the Judgment which was delivered by the Chamber in open court pursuant to article 74(5). This summary included all the elements relevant to sentencing under rule 145 and thereby put Ongwen on proper notice of the facts that the Chamber could reasonably rely on for determining his sentence.[63]

38. In addition, Ongwen had the opportunity to make additional submissions on sentencing in a separate hearing.[64] He had more than 2 months' notice of that hearing, and could make written submissions before the hearing and seek the admission of additional evidence in the proceedings.[65] Ongwen and his defence team actively participated in the hearing, made oral submissions and responded to the Prosecution's written and oral submissions.[66] Before the hearing, Ongwen filed written sentencing submissions[67] and sought the introduction of 18 additional items of evidence.[68] Ongwen himself gave an unsworn statement during the

[60] Sentencing Appeal, paras. 38, 42-43, 54, 56.
[61] *See above* para. 29.
[62] Sentence Hearing Schedule ALA Decision, para. 10; T-259-ENG, 4:16-42:2.
[63] *Bemba et al.* SAJ, para. 116. *See also above* paras. 29-30.
[64] Scheduling Order.
[65] Scheduling Order.
[66] T-260; T-261.
[67] Defence Sentencing Brief.
[68] First Defence Evidence Request; Second Defence Evidence Request; Third Defence Evidence Request.

sentencing hearing.[69]

39. Ongwen fails to demonstrate in concrete terms how his rights under articles 67(1)(b) and (e) were violated in this case or how he was prejudiced. His arguments should therefore be rejected.

II.B.2.c. Ongwen's personal circumstances did not warrant a different approach by the Chamber

40. Ongwen also argues that he required an Acholi translation of the whole Conviction Judgement for the purposes of the sentencing proceedings for additional reasons based on his personal circumstances, namely his alleged mental disability. According to Ongwen, he needed "extra time to read material in Acholi".[70] This argument too should be rejected.

41. First, the underlying assumption of Ongwen's argument—namely that he is currently mentally 'disabled'—is not supported by the evidence. Ongwen's submission that the Chamber "acknowledged [Ongwen's] current mental disabilities" and his "substantially diminished mental capacity"[71] is inaccurate. In the context of considering whether to mitigate his sentence, the Chamber expressly rejected Ongwen's prior submissions to that effect.[72] It found that none of the information before it "point[ed] to anything exceptional" regarding Ongwen's mental health during the proceedings.[73] This was based, among other considerations, on its findings that Ongwen "spoke lucidly" in the sentencing hearing for an extended period of time, "sustaining a structured and coherent declaration, while speaking largely freely".[74] The Chamber also noted that Ongwen "demonstrated a great and detailed understanding of the trial, including of legal and procedural matters".[75] In any event, at least for the purpose of the proceedings of this Court, mental disability is a largely functional concept, and is not synonymous with the existence or suspected existence of a mental health condition as such. Thus, even if Ongwen was diagnosed with some mental illnesses during the trial by a mental health practitioner,[76] this did not mean that he has "mental disabilities" broadly conceived or

[69] T-261, 3:20-37:16.
[70] Sentencing Appeal, paras. 6, 49-50.
[71] Sentencing Appeal, fn. 83, para. 166.
[72] Sentencing Judgment, para. 98.
[73] Sentencing Judgment, para. 103.
[74] Sentencing Judgment, para. 104.
[75] Sentencing Judgment, para. 104.
[76] Judgment, para. 2576, in which the Chamber noted that Professor de Jong diagnosed Ongwen at the time of the examination during the trial with "post-traumatic stress disorder (severe), major depressive disorder (severe) and other specified dissociative disorder."

that the exercise of his rights was necessarily impaired in any way. Quite separate from the questions whether Ongwen's mental health excused or mitigated his conduct, it was for Ongwen to alert the Chamber—and, if necessary, seek its assistance—if it considered that his ability to participate in the Court's proceedings was in jeopardy due to his medical condition. Having failed to do so, and given the contrary evidence that Ongwen was in fact adequately engaged in the proceedings, his attempt to now raise this matter on appeal appears opportunistic, and must be rejected.[77]

42. Second, Ongwen's argument that he "require[d] extra time to read material in Acholi"[78] is beside the point. Ongwen was not provided with a written Acholi translation of the Judgment, but rather with an oral translation of its summary. His reading capacity therefore should have no impact on the Sentencing Judgment or any other decision by the Chamber in this case.

II.B.2.d. The level of familiarity with a judgment that a convicted person requires for the sentencing proceedings is not the same as that required for appeals proceedings

43. Consistent with the practice in other appeals,[79] the Appeals Chamber in this case "granted an accommodation of the briefing schedule", because Ongwen had not yet received a translation of the Judgement into Acholi. Ongwen argues that the Appeals Chamber's acknowledgement that the fair conduct of the appeals proceedings required that he have access to a translation of the whole Conviction Judgment implies that he also needed access to such a translation for the fair conduct of the sentencing proceedings.[80] This is incorrect and Ongwen's argument should be rejected.

44. First, the Appeals Chamber did not suspend the appeals proceedings until Ongwen had a translation of the whole Judgement, as he had requested.[81] Rather, the Appeals Chamber struck a balance between Ongwen's right to translation and expeditious appeals proceedings and granted him an additional 45 days to file his notice of appeal and the appeal brief.[82] Pursuant

[77] Sentencing Judgment, para. 98. *See also* Response to Conviction Appeal, paras. 56-62.
[78] Sentencing Appeal, para. 49.
[79] *Ntaganda* Extension of Time Decision, paras. 1-7; *Ntaganda* Second Extension of Time Decision, paras. 12-15; *Gbagbo* Extension of Time Decision, paras. 16, 18, 20-21, 23-26.
[80] Sentencing Appeal, para. 52; *see also* para. 6.
[81] Request for Suspension of Appeals Proceedings.
[82] Notice of Appeal Extension Decision, paras. 12-13. By the time Ongwen filed his notice of appeal and the appeal brief against the Conviction Judgment, he had not yet received a full translation of the Judgment. However, in the meantime, Ongwen has been provided with such translation. The Appeals Chamber directed the Defence to inform LSS and the Appeals Chamber of the sections of the Conviction Decision to be prioritised for translation into Acholi, and the Registry to provide the Defence a translation of those sections on a rolling basis (Acholi Translation

to regulation 61, the Appeals Chamber also allowed Ongwen to "seek a variation of the grounds of appeal" once he had received a full translation of the Judgment.[83]

45. Second, the Appeals Chamber's ruling on Ongwen's request for an extension of time in the appeals proceedings does not demonstrate that the Trial Chamber erred by proceeding to sentence Ongwen without him first having access to an Acholi translation of the whole Conviction Judgment.[84] This is because the role of an appellant is quite distinct from that of a convicted person making submissions during sentencing proceedings. An appellant is obliged to (i) present "cogent arguments" setting out the alleged error and explain how the trial chamber erred;[85] and (ii) demonstrate how the error materially affected the impugned decision.[86] Thus, a convicted person must have at least some familiarity with the appealed judgment in a language that he or she fully understands and speaks. However, even in relation to the latter point, this does not mean that Mr Ongwen must necessarily be familiar with every particular of the Judgement in order to ensure the effective exercise of his right to appeal. To the contrary, as the Appeals Chamber has reminded Ongwen, it is necessary to consider "the circumstances as a whole and the convicted person's ability to understand the details of his conviction by other means."[87] Furthermore, Ongwen is not coming to this case anew—but rather he is assisted by counsel, has been provided with full Acholi translations of other core documents during his trial, and "has followed all hearings in real-time through Acholi interpretation—including the oral summary of the reasons for the [Judgment]".[88]

46. Conversely, the level of familiarity with the judgment that a convicted person requires for sentencing proceedings is not the same. Otherwise, any sentence pronounced by a trial chamber together with a judgment of conviction pursuant to article 76(1)—a practice followed as a matter of law by the UN *ad hoc* tribunals[89]—would be fundamentally unfair. Significantly,

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Decision, para. 6). By 12 March 2021, the Defence had identified "priority" sections of the Judgment for translation into Acholi, amounting to some 938 pages—or approximately 87% of the Judgment (Notification of Priority Sections). On 9 September 2021, the LSS indicated that the transmission of the draft translation of the priority sections identified by the Defence had been completed on 3 September 2021 (Acholi Translation Decision, para. 6). On 8 October 2021, the LSS confirmed that a draft translation of the entire Conviction Decision was provided to the Defence on the same day (Acholi Translation Decision, para. 6).

[83] Notice of Appeal Extension Decision, paras. 9, 11.

[84] *Contra* Sentencing Appeal, para. 52.

[85] *Ntaganda* AJ, para. 48. *See also Lubanga* AJ, para. 31; *see* also para. 18; *Bemba et al.* SAJ, para. 24.

[86] *Ntaganda* AJ, para. 48; *see* also para. 49.

[87] Notice of Appeal Extension Decision, para. 10.

[88] Notice of Appeal Extension Decision, para. 11.

[89] The Statute and the Rules of Procedure and Evidence of the ICTY do not foresee separate sentencing proceedings for a convicted person, with the exception of proceedings following a guilty plea. See e.g. ICTY Statute, article

the scope of sentencing proceedings is limited and is not intended to be a procedure in which a convicted person responds to his conviction.[90] Accordingly, Ongwen did not need to be familiar with all the details of the Judgement to meaningfully prepare for and participate in his sentencing proceedings.

47. In sum, Ongwen fails to show any unfairness in the Trial Chamber's approach or any error in the Sentencing Judgment. Ground 1 should therefore be rejected.

II.C. The alleged errors do not affect the reliability of the Sentencing Judgment or materially affect it

48. In any event, Ongwen fails to show how the alleged errors under Ground 1 affected the reliability of the Sentencing Judgment or materially affected it. This is a further reason to reject this ground.

49. Ongwen's arguments that the absence of an Acholi translation of the Conviction Judgment for the purpose of the sentencing proceedings affected the reliability of the Sentencing Judgment and materially affected it[91] are unsupported.

50. First, and as shown above, Ongwen's rights to translation under articles 67(1)(f) and rule 144(2)(b), as well as his right to notice under article 67(1)(a) and his rights to have adequate time and facilities to prepare and to present his defence under articles 67(1)(b) and (e) were fully respected.[92] Ongwen's exercise of these rights was not impaired by the fact that he did not receive a translation of the whole Judgment into Acholi for the purpose of the sentencing proceedings. In fact, Ongwen and his defence team presented additional evidence during the sentencing proceedings,[93] made extensive written submissions,[94] actively participated in the sentencing hearing, made oral submissions and responded to the Prosecution's written and oral submissions.[95]

51. Second, although Ongwen generally argues that his fair trial rights were violated, he fails

23(1); ICTY Rules, rules 62bis, 86(C) and 100(A). *See also* ICTR Statute, article 22(1), ICTR Rules, rules 62(B), 86(C).*See also* ICTR Statute, article 22(1), ICTR Rules, rules 62(B), 86(C).
[90] Sentence Hearing Schedule ALA Decision, para. 9.
[91] Sentencing Appeal, para. 57.
[92] *Contra* Sentencing Appeal, paras. 55-56.
[93] First Defence Evidence Request; Second Defence Evidence Request; Third Defence Evidence Request.
[94] Defence Sentencing Brief.
[95] T-260; T-261.

to point to any concrete part of the Sentencing Judgment that was affected by the alleged violation. It is not sufficient for an appellant to make a general claim that an error materially affected the impugned decision. Instead, Ongwen has a duty to "indicate, with sufficient precision", how the alleged errors under Ground 1 would have affected the reliability of the Sentencing Judgment or materially affected it.[96] He must show that the "Chamber would have rendered a decision that is substantially different from the decision that was affected by the error, if it had not made the error'."[97] Ongwen has not done so. Similar to a recent appeal in the *Ali Kushayb* case, where the Appeals Chamber found that an error had no impact on the impugned decision,[98] Ongwen has likewise failed to present examples of any arguments that he could have made or evidence that he could have presented, if he had had access to an Acholi translation of the whole Judgment during the sentencing proceedings. In addition, he has not shown how potential arguments or evidence would have affected the Chamber's Sentencing Judgment.

52. For the reasons set out above, Ground 1 should be rejected.

III. GROUND 2: THE CHAMBER PROPERLY ALLOWED THE VICTIMS' SUBMISSIONS

III.A. Introduction

53. During the sentencing hearing, the Common Legal Representatives for Victims ("LRVs") presented the views and concerns of the victims, including by quoting some of their views categorically opposing the use of *mato oput*—a traditional justice mechanism in Northern Uganda—for Ongwen.[99] In Ground 2, Ongwen argues that the Chamber erred by treating these quoted views as testimonial evidence "from the bar table," and by relying on them for the purposes of the Sentencing Judgment.[100]

54. This argument misrepresents the Sentencing Judgment and misunderstands how the

[96] *Kony et al.* Admissibility AD, para. 48; *Bemba* First Abuse Process AD, paras. 102, 106; 133-134; *Gbagbo* Third Detention AD, para. 18.
[97] *Gbagbo* Judgment on jurisdiction and stay of the proceedings, para. 44, citing, *Ntaganda* DRC Arrest Warrant AD, para. 84; *Lubanga* AJ, paras. 19-20; *Ngudjolo* AJ, paras. 20-21.
[98] *Ali Kushayb* Detention Decision OA9, paras. 45-47.
[99] Sentencing Judgment, paras. 13, 39.
[100] Sentencing Appeal, para. 58, 66-84.

Chamber treated the LRVs' submissions, and accordingly should be rejected. The Chamber did not admit the victims' views as evidence, nor did it rely on the LRVs' submissions to establish facts for the purposes of the Sentencing Judgment.

55. In addition, any alleged error would not have materially affected the Sentencing Judgment. Ground 2 should therefore be rejected.

III.B. The Chamber did not admit and treat the LRVs' submissions as evidence

56. In its Scheduling Order setting out the rules of the conduct of the sentencing proceedings, the Chamber permitted the participating victims, through their respective legal representatives, to participate in the sentencing proceedings,[101] as had been the practice in the trial. The LRVs thereafter informed the Chamber that they did not intend to present additional evidence to the Chamber for the purposes of sentencing, but that they would share the views and concerns of their clients.[102] The LRVs did so by filing written sentencing submissions[103] and by actively participating in the sentencing hearing.[104] As noted by the Chamber, the LRVs devoted a section of their joint written submissions to presenting the views and concerns of some the participating victims, as expressed by those participating victims themselves, including by "quot[ing] the views of some of their clients."[105]

57. During the sentencing hearing, Ongwen objected to the LRVs' submissions. He argued that the quotes conveying the victims' views and concerns should be expunged from the record on the grounds that they constituted testimonial evidence submitted in violation of the law and the directions of the Chamber.[106]

58. In its Sentencing Judgment, the Chamber rejected Ongwen's objections, holding as follows:[107]

> The Chamber does not adhere to the argument of the Defence. The submissions by the legal representatives of the views and concerns of the participating victims, even if they take the form of direct quotation of communications by some victims, *are not evidence*. They are submissions of authorised participants in the proceedings, and are considered by the Chamber as any other submissions made before it in the proceedings. The fact

[101] Scheduling Order, p. 6.
[102] Victims Notification Regarding Sentencing, paras. 1-2.
[103] Victims Joint Sentencing Submissions.
[104] T-260, 36:25-53:9.
[105] Sentencing Judgment, para. 13.
[106] T-261, 38:7-39:10; *see also* Sentencing Judgment, para. 13.
[107] Sentencing Judgment, para. 13 (emphasis added).

> that they are communicated to the Chamber in the words of the victims themselves, rather than being paraphrased by their legal representatives, in no way transforms such submissions into evidence. Indeed, the concerned victims express their own views as participants in the proceedings, rather than as witnesses to any fact purportedly underlying relevant findings requested of the Chamber.

59. Ongwen's arguments under Ground 2 merely repeat his prior submissions. The ICTY Appeals Chamber has held that it "will, as a general rule, summarily dismiss submissions that merely repeat arguments that did not succeed at trial without any demonstration that the Trial Chamber's rejection of them constituted an error warranting the intervention of the Appeals Chamber."[108] This Appeals Chamber should do the same and dismiss Ground 2 on that basis alone.[109]

60. In any event, Ongwen's submissions should also be rejected because they misrepresent the Sentencing Judgment and misunderstand how the Chamber treated the LRVs' submissions. Ongwen's arguments disregard the Chamber's findings, which make it clear that the Chamber did not treat the LRVs' presentation of their clients' views and concerns as evidence. Instead, the Chamber held that "[t]hey are submissions of authorised participants in the proceedings, and are considered by the Chamber as any other submissions made before it in the proceedings."[110] This is consistent with article 76(1), which permits a Chamber to consider "the evidence presented and *submissions* made during the trial that are relevant to the sentence".

61. Nor did the Chamber rely on the LRVs' submissions to establish facts in its Sentencing Judgment.[111] To the contrary, the Chamber expressly held that "these submissions do not constitute evidence and do not underlie any findings of fact".[112] Instead, the Chamber referred to the LRVs' submissions[113] and assessed them in light of submissions made by Ongwen's Counsel.[114] The Chamber noted a statement by Ongwen's Defence, which "appeared to be

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[108] *Krajišnik* AJ, para. 24; *Martić* AJ, para. 14; *Strugar* AJ, para. 16; *Halilović* AJ, para. 12; *Blagojević and Jokić* AJ, para. 10; *Brđanin* AJ, para. 16; *Galić* AJ, paras. 10 and 303; *Simić* AJ, para. 12; *Gacumbitsi* AJ, para. 9.
[109] *See e.g. Krajišnik* AJ, para. 16: "[The Appeals Chamber] has an inherent discretion to determine which of the parties' submissions merit a reasoned opinion in writing and […] may dismiss arguments which are evidently unfounded without providing detailed reasoning in writing. […] In order for the Appeals Chamber to assess a party's arguments on appeal, the party is expected to present its case clearly, logically and exhaustively. […] [T]he Appeals Chamber may dismiss submissions as unfounded without providing detailed reasoning if a party's submissions are obscure, contradictory, vague or suffer from other formal and obvious insufficiencies."
[110] Sentencing Judgment, para. 13.
[111] *Contra* Sentencing Appeal, paras 58, 81-84.
[112] Sentencing Judgment, para. 38.
[113] Sentencing Judgment, paras. 21-23, 30, 37-39.
[114] *See e.g.* Sentencing Judgment, paras. 24-25, 30.

based on anecdotal or personal assessment on the part of associate counsel",[115] and stated that "in these specific circumstances in which the Defence bases an argument on its own interpretation of the interests of the victims of the crimes for which […] Ongwen was convicted, it is appropriate to refer directly to the submission of the victims as an expression of their will and opinion".[116]

62. Ongwen further argues that his right under article 67(1)(e) to examine witnesses was violated,[117] that the Chamber erroneously admitted "anonymous testimonial evidence",[118] and that the Chamber violated rule 68 on the admission prior recorded testimony.[119] These arguments are all predicated on a misunderstanding of the Sentencing Judgment. Because the Chamber did not admit or use the LRVs' submissions as evidence for the purposes of the Sentencing Judgment, the law on testimonial evidence under the Statute and the Rules is simply inapplicable to those submissions.

63. In sum, Ongwen fails to show any error in the Sentencing Judgment. Ground 2 should therefore be rejected.

III.C. The alleged errors do not materially affect the Sentencing Judgment

64. Ongwen also fails to show how the alleged errors under Ground 2 would have materially affected the Sentencing Judgment.[120] This is another reason to reject this ground.

65. As noted above, contrary to the assumption underlying Ongwen's arguments under Ground 2, the Chamber did not admit or rely on the victims' views referred to in the LRVs submissions as evidence to inform its findings of fact.[121] Accordingly, Ongwen fails to demonstrate that the "Chamber would have rendered a decision that is substantially different from the decision that was affected by the error, if it had not made the error'."[122]

66. For the reasons set out above, Ground 2 should be rejected.

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[115] Sentencing Judgment, para. 14.
[116] Sentencing Judgment, para. 38 (footnote omitted).
[117] Sentencing Appeal, paras. 75, 80.
[118] Sentencing Appeal, para. 74.
[119] Sentencing Appeal, para. 75.
[120] *Contra* Sentencing Appeal, paras. 81-83.
[121] Sentencing Judgment, para. 38.
[122] *Gbagbo* Judgment on jurisdiction and stay of the proceedings, para. 44 (citing *Ntaganda* DRC Arrest Warrant AD, para. 84); *Lubanga* AJ, paras. 19-20; *Ngudjolo* AJ, paras. 20-21.

IV. GROUND 3: THE CHAMBER APPROPRIATELY CONSIDERED ONGWEN'S EVIDENCE AND SUBMISSIONS REGARDING ACHOLI TRADITIONAL JUSTICE MECHANISMS

IV.A. Introduction

67. The Chamber carefully considered, and correctly rejected, Ongwen's request that the Chamber impose a short sentence, or "time served", or suspend his sentence,[123] and order that he submit to Acholi traditional justice.[124] The Chamber held that the relief requested by Ongwen was precluded as a matter of law by the Rome Statute, which provides an exhaustive list of available punishments, in which cultural rituals or other traditional justice mechanisms do not appear.[125] The Chamber also reviewed Ongwen's arguments in light of the trial record, and held as a factual matter that nothing in Ongwen's submissions regarding traditional justice would properly bear upon the determination of his sentence.[126] These conclusions were legally and factually sound.

68. Ongwen's arguments under Ground 3[127] should be rejected because they fail to show an error in the Sentencing Judgment. In addition, any alleged error would not have materially affected the Sentencing Judgment. Ground 3 should therefore be rejected.

IV.B. The Chamber did not err regarding Acholi traditional justice mechanisms

IV.B.1. The Chamber appropriately considered Ongwen's submissions and evidence regarding Acholi traditional justice

69. Ongwen argues that the Chamber "ignored" or "disregarded" his evidence and submissions regarding Acholi traditional justice.[128] That is inaccurate. The Chamber devoted

[123] Sentencing Judgment, para. 17 (quoting from the Defence Closing Brief, para. 733), para. 18 (quoting from the Defence Sentencing Brief, para. 39); *see also* Defence Sentencing Brief, para. 182-183 (seeking sentence of time served or, alternatively, no more than ten years).
[124] Sentencing Judgment, paras. 15-43.
[125] Sentencing Judgment, paras. 26-27.
[126] Sentencing Judgment, paras. 27-43.
[127] Sentencing Appeal, paras. 85-112.
[128] *See e.g.*, Sentencing Appeal, paras. 85, 90-93, 97, 99.

nearly thirty paragraphs of the Sentencing Judgment to this issue, carefully addressing Ongwen's arguments one by one.[129] The Chamber's discussion makes clear that it paid close attention to Ongwen's submissions regarding traditional justice, even when they were unclear or inconsistent over time.[130] The Chamber further carefully considered the evidence submitted by Ongwen on this point.[131] Although Ground 3 is framed in terms of an alleged failure by the Chamber to engage with the issue, in fact Ongwen raises a mere disagreement with the Chamber's conclusions.

IV.B.2. The Chamber correctly held that Acholi traditional justice had no bearing on the determination of his sentence

70. The Chamber correctly held that it may only impose a punishment that is specified in article 77 of the Statute.[132] Ongwen does not directly dispute this legal holding, which was based on Appeals Chamber jurisprudence.[133]

71. Ongwen nevertheless argues that the Chamber should have considered Acholi traditional justice as a matter of "complementarity".[134] Ongwen did not make this argument during the sentencing proceedings. The Appeals Chamber has previously held that it would not be appropriate for it to address the substance of arguments that are raised for the first time on appeal, as the Chamber did not have an opportunity to consider such arguments at first instance. That would exceed the scope of the Appeals Chamber's corrective function.[135] Ongwen's argument should therefore be summarily dismissed. In addition, Ongwen offers no indication of how the principle of complementarity (which is not mentioned in article 77 or 78 of the Statute) might apply to this case. This argument should be dismissed *in limine* also on that basis.[136]

72. Ongwen also argues that the Chamber should have considered traditional justice as a

[129] Sentencing Judgment, paras. 15-43.
[130] Sentencing Judgment, paras. 25.
[131] *See e.g.*, Sentencing Judgment, paras. 16, 28, 34, 43.
[132] Sentencing Judgment, paras. 26-27.
[133] *See Bemba et al.* SAJ, paras. 77, referred to in Sentencing Judgment, para. 26.
[134] Sentencing Appeal, paras. 85-86.
[135] Disclosure AD, para. 45; *see also Lubanga* Regulation 55 AD, para. 109.
[136] As held by the Appeals Chamber, an appellant's failure to present "cogent arguments" setting out the alleged error and explain how the Trial Chamber erred may result in the summary dismissal of such arguments. *See Ntaganda* AJ, paras. 48-49 (citing *Bemba* AJ Minority Opinion, para. 386); *see also Lubanga* AJ, para. 30. *See also Krajišnik* AJ, para. 26, where the Appeals Chamber of the ICTY has held that mere assertions unsupported by any evidence or undeveloped assertions will be rejected *in limine*.

"mitigating factor" and a "personal circumstance", areas in which he suggests the Chamber had unlimited discretion.[137] These arguments are also effectively new. Ongwen never suggested at sentencing that traditional justice was a mitigating circumstance, and he made only one reference to traditional justice rituals as "personal circumstances" in a section of his sentencing brief about social rehabilitation.[138] Ongwen's present arguments on appeal appear to be calculated to circumvent the Chamber's ruling that traditional justice mechanisms fall outside the available punishments under articles 23 and 77 of the Statute.[139] Consequently, this argument too should be dismissed *in limine*.

73. In any event, Ongwen does not explain how the mere existence of traditional justice mechanisms could "mitigate" his guilt or constitute a relevant "personal circumstance". If Ongwen had in fact submitted to a traditional justice process, such post-offence conduct could have been considered under rule 145(2)(a)(ii), including as a demonstration of remorse. However, as the Chamber correctly noted, Ongwen has done no such thing.[140] Consequently, the Chamber correctly found that Ongwen's hypothetical invocation of Acholi traditional justice had no bearing on the determination of his sentence.[141]

IV.B.3. The Chamber properly received Ongwen's sentencing evidence in writing

74. During the sentencing proceedings, Ongwen submitted various items of additional evidence, as well as the prior recorded testimony (including newly prepared expert reports) of seven witnesses under rule 68(2)(b). He further requested that three proposed expert witnesses testify live and that their newly prepared expert reports be received under rule 68(3).[142] The Chamber received *all* of the proposed Defence sentencing evidence, although it determined that further questioning of the proposed expert witnesses by the Parties and Participants was not necessary, and accepted their reports in writing.[143]

75. Ongwen now claims that the Chamber erred in not hearing live testimony from Defence witnesses D-0114, D-0133, and D-0160. He argues that the Chamber misunderstood the

[137] Sentencing Appeal, paras. 87-88, 92, 95-99.
[138] Defence Sentencing Brief, para. 54.
[139] Sentencing Judgment, paras. 26-27.
[140] Sentencing Judgment, para. 42.
[141] Sentencing Judgment, para. 43.
[142] Decision on Defence Evidence Request, paras. 8, 17.
[143] Decision on Defence Evidence Request, paras. 14, 20-22; *see also id.* paras. 24-27 (receiving, as submissions rather than evidence, three organisational letters submitted by the Defence).

"purpose" of the proposed testimony, and that the lack of live testimony "resulted in a clear lack of understanding of Acholi cultural beliefs and practices".[144] According to Ongwen, this alleged error was compounded by the Chamber's reliance on non-Acholi witnesses, which he says led the Chamber to adopt a "biased" view of Acholi traditional justice.[145] None of these arguments have merit.

76. First, Ongwen has identified no procedural error in the Chamber's decision to receive the proposed sentencing evidence under rule 68(2)(b), instead of rule 68(3).[146] Ongwen does not appear to argue on appeal that such an approach was unavailable under the Rules. Instead, he seems to argue that the Chamber abused its discretion in the concrete circumstances of this case. That is incorrect.

77. The Chamber properly exercised its discretion to admit the proposed evidence under rule 68(2)(b) instead of rule 68(3). The Chamber carefully considered whether receiving the experts' reports in writing might cause any prejudice to the Parties or Participants, including to Ongwen. The Chamber noted that the proposed evidence had been obtained very recently before sentencing, and that Ongwen had given no indication that any additional information might be necessary or relevant beyond that included in the reports.[147] The Chamber also made clear that it would make no distinction in terms of the weight given to written testimony compared to oral testimony.[148] Under these circumstances, the Chamber did not abuse its discretion, and did not err, in receiving the proposed evidence in writing. In any event, the Chamber's acceptance of the additional evidence in writing did not cause any prejudice to Ongwen.

78. Second, the "purpose" for which Ongwen proposed this evidence[149] is irrelevant, because the Chamber received all of the proposed Defence evidence. Had the Chamber excluded evidence based on a misunderstanding of the purpose for which it was offered, that might be different, but here the Chamber received and considered all of the evidence proposed by the Defence. The Chamber also carefully considered Ongwen's submissions, in which he had every opportunity to explain Acholi traditional justice and its alleged relevance to the determination

[144] Sentencing Appeal, paras. 96, 106-111.
[145] Sentencing Appeal, paras. 100-105.
[146] Decision on Defence Evidence Request, paras. 20-22.
[147] Decision on Defence Evidence Request, para. 20.
[148] Decision on Defence Evidence Request, para. 20.
[149] Sentencing Appeal, para. 96.

of his sentence.

79. Third, the Chamber properly relied upon the trial testimony of Professors Tim Allen and Seggane Musisi, who testified as expert witnesses. The Chamber noted that Professor Allen's testimony was based upon extensive work in the field,[150] and the Chamber had previously found his trial testimony to be credible and reliable.[151] Professor Musisi—although not Acholi—is Ugandan, teaches in Uganda, and testified during trial regarding the interplay of psychiatry and Acholi traditions and culture.[152] To suggest that the evidence of these academics was unreliable or inadmissible merely because of their ethnicity or national origin—and that the Chamber itself therefore adopted a "biased" view—has no basis in law or fact, and should be rejected. Ongwen's argument is nothing but a disagreement with the Chamber's assessment of the evidence.

80. Ongwen also fails to recognise that the testimony of Professors Allen and Musisi was entirely consistent with other evidence, as emphasised by the Chamber. In particular, Ongwen says nothing about the Ugandan court decision noted by the Chamber, in which the Ugandan court stated that the Acholi ritual of *mato oput* was not effectively regulated, was "shrouded in legal ambiguity", and should "not serve to displace, undermine or delay" criminal proceedings.[153]

81. Finally, although Ongwen speculates on appeal that his proposed live witnesses might have provided answers to questions about Acholi tradition justice which he attributes to the Chamber,[154] this is unfounded. The Chamber received *all* of the sentencing evidence proposed by the Defence. At no point prior to sentencing did Ongwen suggest that his proposed experts could have provided further information on these topics, beyond what was included in their written reports. The Chamber cannot be faulted for not receiving purported evidence which was never offered. Ongwen's arguments should therefore be rejected.

IV.B.4. Ongwen has identified no factual error related to Acholi traditional justice

82. Ongwen's statement of Ground 3 begins with the phrase "The Chamber erred in fact…",

[150] Sentencing Judgment, para. 32.
[151] Judgment, para. 595.
[152] Judgment, para. 602.
[153] Sentencing Judgment, para. 34.
[154] Sentencing Appeal, paras. 108-110.

but Ongwen identifies no actual factual finding of the Chamber which he claims to be erroneous.[155] Similarly, despite reference to "errors of fact" in paragraphs 85, 89, and 100 of the Sentencing Appeal, and repeated suggestions that the Chamber "failed to appreciate correctly the relevant cultural beliefs and practices of the Appellant",[156] Ongwen largely fails to identify and discuss any factual findings of the Chamber. The Appeals Chamber's consideration of Ground 3 should be limited to factual errors identified with particularity by Ongwen. Unsubstantiated arguments should be summarily dismissed.[157]

83. Ongwen alleges that the Chamber's "acceptance of [Professor Tim] Allen's opinion [expressing scepticism of *mato oput*] as fact, despite his immediately prior statement expressing the importance and regularity of rituals and imprecise translation of Acholi terms into English terms, is an error of fact."[158] This argument is confusing and misrepresents the Sentencing Judgment. The Chamber did not accept Professor Allen's opinion "as fact". The Chamber cited Allen's testimony as containing "valuable" "observations",[159] but it did not directly adopt any portion of Professor Allen's testimony in a factual finding. Moreover, as discussed above, Professor Allen's comments were consistent with other evidence in the trial record. Ongwen may disagree with Professor Allen's observations, and with the Chamber's ultimate decision that Acholi traditional justice had no bearing on the determination of his sentence. However, he offers no basis for arguing that the Chamber reached an erroneous factual conclusion, other than to invite this Appeals Chamber to credit his sentencing evidence and reject the evidence and submissions relied upon by the Trial Chamber.

84. Ongwen also argues that the Chamber "seemingly conclude[d] that *Mato Oput* holds no value in the Acholi community and that only Western ideas of retribution are sufficient to address the crimes for which the Appellant has been convicted", and that such a "finding" was "in sharp contrast with evidence in the trial record showing that *Mato Oput* is deeply embedded in Acholi society".[160] This argument fails on many levels: first, a Chamber's view about

[155] Sentencing Appeal, p. 30 (Ground 3).
[156] Sentencing Appeal, para. 90; *see also id.* paras. 94, 95, 99 (alleging a failure to "appreciate correctly" the relevant cultural belief and practices), paras. 92, 96, 97 (alleging that the Chamber failed "to appreciate", "did not appreciate", "did not consider", or "failed to consider" cultural beliefs and practices).
[157] *See e.g.* *Krajišnik* AJ, para. 18: "The Appeals Chamber recalls that an appellant is expected to identify the challenged factual finding and put forward its factual arguments with specific reference to the page number and paragraph number. […] As a general rule, where an appellant's references to the Trial Judgement are missing, vague or incorrect, the Appeals Chamber will summarily dismiss that alleged error or argument."
[158] Sentencing Appeal, para. 102 (citing the testimony of Professor Allen at T-28-ENG, 74:17-24).
[159] Sentencing Judgment, paras. 32-33.
[160] Sentencing Appeal, para. 103.

sentencing principles, and which ideas may be "sufficient" to address the crimes of conviction, does not constitute a factual finding, but a legal finding.[161] Second, nowhere in the Sentencing Judgment did the Chamber find that *mato oput* or other Acholi traditional justice mechanisms "hold no value" in the Acholi community. The Chamber found "that Acholi traditional justice mechanisms are not in widespread use in Acholi areas of Northern Uganda, *to the extent that they would stand in lieu of formal justice*."[162] The Chamber also noted that the entire discussion of Acholi traditional justice "presupposes an element of expression of remorse on the part of the perpetrator", which in Ongwen's case was completely missing.[163] None of these statements amount to a finding that traditional justice has "no value" in the Acholi community, and each of these statements is well-supported by the record.

85. Because Ongwen has failed to clearly set out any factual error in the Sentencing Judgment, Ground 3 should be rejected.

IV.C. The alleged errors do not materially affect the Sentencing Judgment

86. In any event, Ongwen has not demonstrated that any of the alleged errors under Ground 3 materially affected the determination of his sentence. Ground 3 should also be rejected on this basis.

87. First, the Chamber made clear that its conclusion about available punishments under articles 23 and 77 of the Statute (unchallenged by Ongwen on appeal) was a sufficient and independent basis to reject Ongwen's request that Acholi traditional justice be incorporated into his sentence.[164] Any alleged error in the Chamber's substantive discussion of Acholi traditional justice therefore could not have materially affected Ongwen's sentence.

88. Second, Ongwen fails to articulate any concrete way in which his sentence would have been different in the absence of the errors that he alleges. Ongwen argues that Acholi traditional justice would facilitate his social rehabilitation, and speculates that the Chamber's failure to discuss this possibility "*may* have impacted the length of the imposed sentence."[165] He similarly claims that, if the Chamber had placed more weight on traditional justice "as a complement to

[161] Sentencing Judgment, paras. 26-27.
[162] Sentencing Judgment, para. 34 (emphasis added).
[163] Sentencing Judgment, para. 42.
[164] Sentencing Judgment, para. 27.
[165] Sentencing Appeal, para. 94 (emphasis added).

'formal', 'western' justice, the sentence imposed against the Appellant *may* have been reduced."[166] However, these speculative assertions, and Ongwen's repeated but undeveloped invocation of the "materially affected" standard,[167] fail to connect the alleged errors to any particular aspect of the Chamber's determination of the sentence. Consequently, they fail to show that the alleged errors materially affected Ongwen's sentence.

89. For the reasons set out above, Ground 3 should be dismissed.

V. GROUND 4: THE CHAMBER DID NOT ERR IN SENTENCING ONGWEN FOR BOTH WAR CRIMES AND CRIMES AGAINST HUMANITY FOR THE SAME UNDERLYING CONDUCT

V.A. Introduction

90. Under Ground 4, Ongwen argues that the Chamber erroneously sentenced him for both war crimes and crimes against humanity relating to the same underlying conduct, thus extending the Chamber's impermissible concurrent convictions into impermissibly concurrent sentences.[168]

91. These arguments should be rejected. Ongwen misunderstands the two-step sentencing process under the Court's legal framework, which requires a trial chamber to determine an individual sentence for every crime for which a person is convicted, before determining the joint sentence. Ongwen also overlooks that the Chamber expressly took into account the factual overlap between the two sets of crimes in its determination of the joint sentence.

92. Ongwen further fails to show the material impact of the alleged error on the Sentencing Judgment. Ground 4 should therefore be rejected.

V.B. The Chamber correctly individually sentenced Ongwen for war crimes and crimes against humanity based on the same underlying conduct

93. First, the Chamber's determination of separate sentences for war crimes and crimes

[166] Sentencing Appeal, para. 111 (emphasis added).
[167] *See e.g.*, Sentencing Appeal, paras. 85, 89, 90, 98, 99, 102, 104, 110, 111.
[168] Sentencing Appeal, para. 113.

against humanity based on the same underlying conduct[169] was in accordance with the Court's mandatory two-step sentencing process under article 78(3). This process requires a trial chamber to first determine an individual sentence for *each* crime that fully reflects the convicted person's culpability for that crime. It follows that given Ongwen was convicted separately for war crimes and crimes against humanity, he had to be sentenced individually for each crime. The Statute provides no discretion to trial chambers to do otherwise.[170]

94. The individual sentences then serve to inform the trial chamber's calculation of the joint sentence—the *actual* penalty imposed on the convicted person that seeks to achieve the Court's primary sentencing objectives of retribution and deterrence.[171] In determining the joint sentence, a chamber must account for any overlap in the factual circumstances underlying the individual sentences.

95. In this case, Ongwen ignores that the Chamber expressly took into account the overlap in the facts underlying the two sets of crimes in determining the joint sentence.[172] Moreover, as shown below in response to Ground 11 of the Sentencing Appeal, the Chamber ultimately and reasonably found the extent of any overlap to have no practical impact on the joint sentence, given the circumstances of the case.[173] Ongwen merely disagrees with the Chamber's conclusion, and does not otherwise point to any indications in the Sentencing Judgment of error by the Chamber to substantiate his argument.[174]

96. Second, the Chamber's determination of separate sentences for concurrent war crimes and crimes against humanity was also consistent with the Court's jurisprudence. In *Ntaganda*, the Appeals Chamber held that the Trial Chamber was required under article 78(3) of the Statute to pronounce an individual sentence for each crime, and interpreted the Trial Chamber as having applied an individual sentence to each war crime and crime against humanity.[175]

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[169] Sentencing Judgment, paras. 156 (counts 2 & 3), 161 (counts 4 & 5), 191 (counts 12 & 13), 194 (counts 14 & 15), 196 (counts 16 & 17), 229 (counts 25 & 26), 232 (counts 27 & 28), 234 (counts 29 & 30), 265 (counts 38 & 39), 267 (counts 40 & 41), 269 (counts 42 & 43), 298, (counts 51 & 52), 303 (counts 53 & 54), 308 (counts 55 & 56), 319 (counts 58 & 59), 343 (counts 62 & 63), 347 (counts 64 & 65), 351 (counts 66 & 67).
[170] *Ntaganda* SAJ, paras. 129, 133.
[171] Article 78(3) of the Statute; *Ntaganda* SAJ, paras. 129, 133; Sentencing Judgment, para. 60; *Ntaganda* SJ, para. 9; *Al Mahdi* SJ, para. 66.
[172] Sentencing Judgment, paras. 146, 183, 221, 256, 285, 334, 376, 379-382.
[173] *See below* para. 223.
[174] Sentencing Appeal, para. 119.
[175] *Ntaganda* SAJ, para. 139 (stating that the Trial Chamber sentenced Ntaganda to "30 years for murder as a crime against humanity and 30 years for murder as a war crime; 28 years for rape as a crime against humanity and 28

Similarly in *Katanga*, the Trial Chamber imposed individual sentences of 12 years' imprisonment for murder as a crime against humanity, and 12 years' imprisonment for murder as a war crime.[176]

97. Third, Ongwen's arguments are premised on his view that war crimes and crimes against humanity based on the same conduct are not distinct offences.[177] Ongwen provides no authority for this proposition; nor could he, since his proposition is plainly incorrect. As already addressed in response to his Conviction Appeal,[178] war crimes and crimes against humanity are distinguished by different contextual elements, as the Chamber correctly observed,[179] and they protect different interests. Accordingly, the Chamber did not err by convicting him of both war crimes and crimes against humanity based on the same underlying conduct. While the Chamber jointly analysed these crimes for the purposes of sentencing arriving at identical sentences, the crimes themselves entailed distinct factual and legal findings in the Trial Judgment to establish their contextual elements.[180]

98. Fourth, Ongwen improperly relies upon his submissions regarding the alleged violation of *ne bis in idem* in his appeal of the Trial Judgment[181] without developing the arguments in his Sentencing Appeal or explaining how his arguments regarding the concurrent convictions for war crimes and crimes against humanity automatically translates to his individual sentences for the two sets of crimes.[182] This argument has already been addressed in response to Ongwen's Conviction Appeal[183] and should be dismissed *in limine*. In any event, the Chamber did not violate the principle of *ne bis in idem* in determining individual sentences for war crimes and crimes against humanity. As stated above, the Chamber properly applied the Court's sentencing framework, as endorsed by the Appeals Chamber in *Ntaganda*.[184]

99. Finally, Ongwen adds in a footnote his view that the underlying conduct of rape and sexual slavery; and sexual slavery and forced marriage were also the same and therefore should

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years for rape as a war crime; 12 years for sexual slavery as a crime against humanity; and 12 years for sexual slavery as a war crime").
[176] *Katanga* SJ, para. 146.
[177] Sentencing Appeal, paras. 117-118.
[178] Appeal, paras. 277-293; Response to Conviction Appeal, paras. 138-146.
[179] Sentencing Judgment, para. 376. *See also Čelebići* AJ, para. 412. *See also* Judgment, paras. 2818-2821.
[180] Judgment, paras. 2673-2682 (crimes against humanity), 2683-2693 (war crimes).
[181] Appeal, paras. 277-282.
[182] Sentencing Appeal, para. 118.
[183] Response to Conviction Appeal, paras. 141, 146.
[184] *See above* paras. 93, 96. *See also below* para. 227.

not have been subject to "double sentencing".[185] In doing so he again repeats his submissions in his Conviction Appeal, to which the Prosecution has already responded.[186] Ongwen does not develop this argument further insofar as it relates to his sentence appeal, and it should therefore be dismissed *in limine* for his failure to substantiate the alleged errors on appeal. In any event, for the reasons already articulated in the Prosecution's response to his Conviction appeal, his arguments should be rejected: the Chamber did not err by convicting him of rape and sexual slavery, and sexual slavery and inhumane acts (forced marriage). Rape and sexual slavery have elements distinct from each other, as do rape and inhumane acts (forced marriage). Accordingly it was not impermissibly cumulative for the Chamber to have entered convictions for all these offences, nor to have entered sentences for each of them.[187]

100. In sum, Ongwen fails to show any error in the Sentencing Judgment. Ground 4 should therefore be rejected.

V.C. The alleged errors do not materially affect the Sentencing Judgment

101. Ongwen also fails to explain how the alleged error materially affected the Sentencing Judgment.[188] As demonstrated above, he merely disagrees with the Chamber's finding that the overlapping circumstances of war crimes and crimes against humanity had no practical impact on the joint sentence.[189] He further mischaracterises the Chamber's findings by alleging that this conclusion allowed it to avoid addressing the overlapping facts of the two sets of crimes.[190] He otherwise provides no concrete indication in the Sentencing Judgment of any error by the Chamber.

102. Moreover, even if, *arguendo*, the Chamber erred in sentencing Ongwen for both war crimes and crimes against humanity relating to the same underlying conduct, this would not have affected the joint sentence. This is because, as further developed below in response to Ground 11,[191] the Chamber found that the overlapping factors between these sentences "did not weigh noticeably" on its determination of the joint sentence.[192] Ongwen was "convicted for a

[185] Sentencing Appeal, fn. 196.
[186] Appeal, paras. 294-297; Response to Conviction Appeal, paras. 147-149.
[187] Response to Conviction Appeal, paras. 147-149.
[188] *Contra* Sentencing Appeal, para. 119.
[189] Sentencing Appeal, para. 119, citing Sentencing Judgment, fn. 691. *See below* para. 235.
[190] Sentencing Appeal, para. 116, citing Sentencing Judgment, para. 379.
[191] *See below* paras. 219-224, 235.
[192] Sentencing Judgment, para. 381.

large number of crimes which he committed by way of a number of distinguishable criminal conducts […] each carrying its own distinct blameworthiness not otherwise absorbed within any other crime and corresponding individual sentence[s]".[193]

103. For the reasons set out above, Ground 4 should be rejected.

VI. GROUND 5: THE CHAMBER DID NOT RELY ON ONGWEN'S ACTIONS OUTSIDE THE CHARGED PERIOD TO AGGRAVATE THE SENTENCE

VI.A. Introduction

104. Under Ground 5, Ongwen argues that the Chamber erred in law by relying on his alleged criminal activities falling outside the temporal scope of the charges (*i.e.* before 1 July 2002) to aggravate the sentence.[194] According to Ongwen, the Chamber should not have considered crimes of which he was not convicted in the Judgment.[195] He argues that rule 145(2)(b)(i) allows a chamber to consider as an aggravating circumstance "[a]ny relevant prior convictions for crimes under the jurisdiction of the Court or of a similar nature," but notes that he had not been convicted for any crimes committed prior to 1 July 2002.[196]

105. These arguments misrepresent the Sentencing Judgment and misunderstand the context in which the Chamber referred to Ongwen's criminal conduct prior to 1 July 2002. In particular, the Chamber did not rely on that criminal conduct to aggravate Ongwen's sentence.

106. In addition, Ongwen fails to show how any alleged error would have materially affected the Sentencing Judgment. Ground 5 should therefore be rejected.

VI.B. The Chamber did not err in its findings on aggravating circumstances

107. Ongwen's arguments that the Chamber relied on his alleged criminal conduct prior to the

[193] Sentencing Judgment, para. 381.
[194] Sentencing Appeal, paras. 123-124, 129-136.
[195] Sentencing Appeal, paras. 124, 134 relying on *Bemba et al.* SAJ, para. 113: "The convicted person is sentenced for the crime or offence *for which he or she was convicted*, not for *other* crimes or offences that that person may also have committed, but in relation to which no conviction was entered. This applies even when, based on the factual findings entered by the Trial Chamber, it may be concluded that these other crimes or offences were actually established at trial. If it were otherwise, the sentencing phase could, in fact, be used to enlarge the scope of the trial – which would be incompatible with the Court's procedural framework."
[196] Sentencing Appeal, paras. 125-128.

charged period, in the absence of a prior conviction within the meaning of rule 145(2)(b)(i), are based on three sets of examples from the Sentencing Judgment. None of them demonstrate an error in the Sentencing Judgment.

VI.B.1. The Chamber did not rely on evidence of Ongwen's prior criminal conduct to aggravate the sentence

108. First, Ongwen argues that the Chamber erroneously relied on evidence indicating that between 1996 and 1998 he abducted several girls, raped them and made them his so-called "wives", to aggravate his sentence.[197] This argument misunderstands the context in which the Chamber referred to that evidence: it did not refer to it to aggravate the sentence, but in the context of assessing Ongwen's individual circumstances as a mitigating circumstance. Most significantly, there is no indication that the Chamber also considered such evidence to aggravate Ongwen's sentence.

109. When assessing Ongwen's individual circumstances under article 78(1) and rules 145(1)(b), 145(1)(c) and 145(3),[198] and in particular when considering his abduction as a child and the consequences that his abduction had on his life as an adult,[199] the Chamber noted that Ongwen had committed crimes against young girls already between 1996 and 1998.[200] It found that in spite of Ongwen's early "adaption into the LRA, including with its violent methods",[201] and his "suffer[ing] following his abduction into the LRA",[202] he nevertheless made "a steep and purposeful rise in the LRA hierarchy",[203] which included the early commission of crimes.[204]

110. The Chamber concluded that "Ongwen's abduction and early experience in the LRA constitute[d] specific circumstances bearing a significant relevance in the determination of the sentence".[205] It then gave significant weight to this evidence of his earlier personal experiences to mitigate Ongwen's sentence. Although it considered that life imprisonment "would surely

[197] Sentencing Appeal, paras. 123, 130; referring to the Chamber's findings at Sentencing Judgment, paras. 80, 84.
[198] Sentencing Judgment, para. 62.
[199] Sentencing Judgment, paras. 65-89.
[200] Sentencing Judgment, paras. 80, 84.
[201] Sentencing Judgment, para. 84.
[202] Sentencing Judgment, para. 83.
[203] Sentencing Judgment, para. 85.
[204] Sentencing Judgment, para. 84.
[205] Sentencing Judgment, para. 88; *see also* para. 87.

[have been] in order in the present case",[206] the Chamber—by Majority[207]—concluded that because Ongwen was abducted and integrated into the extremely violent environment of the LRA when he was a child,[208] the appropriate joint sentence would be imprisonment for 25 years.[209]

111. In sum, the Chamber referred to this evidence in the context of describing Ongwen's earlier experiences in the LRA. It found that those formative experiences which included the adaption into the LRA's violent environment and contributed to Ongwen's "early commission of crimes"[210] constituted significant mitigating circumstances. There is nothing in its Sentencing Judgment to indicate that the Chamber also considered any such earlier criminal activity to aggravate his sentence. Ongwen's contrary arguments should be rejected.

VI.B.2. The Chamber did not consider Ongwen's acts of SGBC which took place before the charged period to aggravate the sentence

112. Second, Ongwen argues that when determining the sentence for his direct perpetration of sexual and gender-based crimes ("SGBC"), the Chamber erroneously considered as aggravating circumstances abductions committed before the charged period[211] and the fact that Ongwen had fathered children before the charged period.[212] These arguments do not correctly represent the Sentencing Judgment and the limited scope of the Chamber's references to Ongwen's conduct predating the charges.

113. In particular, the Chamber did not rely on P-0226's abduction—which occurred "around 1998"[213] —to aggravate Ongwen's sentence.[214] Instead, it considered as aggravating the fact that the victims of the crimes (including P-0226) were particularly defenceless within the meaning of rule 145(2)(b)(iii).[215] What mattered in the Chamber's assessment was not when P-0226 was abducted, but that *at the time of charges* she was in a state of defencelessness and

[206] Sentencing Judgment, paras. 383-386.
[207] Judge Pangalangan partly dissented from this conclusion. While he agreed with the majority's finding on the individual sentences, he would have imposed a joint sentence of 30 years' imprisonment (Partly Dis. Op. Judge Pangalangan, paras. 1, 8).
[208] Sentencing Judgment, para. 388.
[209] Sentencing Judgment, para. 392.
[210] Sentencing Judgment, para. 84.
[211] Sentencing Appeal, paras. 123, 131, referring to Sentencing Judgment, para. 287.
[212] Sentencing Appeal, paras. 123, 131-132, referring to Sentencing Judgment, para. 292 and fn. 548.
[213] Sentencing Judgment, para. 80.
[214] *Contra* Sentencing Appeal, para. 131.
[215] Sentencing Judgment, para. 287.

that Ongwen was "aware of [her] young age, making [her] particularly defenceless with respect to the crimes.[216]

114. Nor did the Chamber rely on the fact that already before the charged period Ongwen had fathered children with girls who were forced to be his "wives", to aggravate his sentence.[217] Rather, the Chamber referred to this fact when assessing the gravity of the crime of forced marriage. According to the Chamber, this crime created an "association" of a continuous and ongoing nature between Ongwen and the victims.[218] It noted that this association was exacerbated by the fact that as a result of the forced marriages, Ongwen had fathered children with some of the victims. However, the Chamber expressly stated that in assessing the nature of this association, it focussed on the nature of the association between Ongwen and the victims that existed as a result of this crime *during the period of the charges*, and treated as irrelevant the fact that he fathered some of these children before 1 July 2002.[219] Again, no error in the Chamber's approach arises.

VI.B.3. The Chamber did not rely on Ongwen's conduct before the charged period to impose the joint sentence

115. Third, Ongwen generally argues that when determining the joint sentence, the Chamber must likewise have relied on facts that occurred before the period of the charges, in particular for SGBC.[220] However, Ongwen's argument is unclear since he merely refers to three paragraphs in the Sentencing Judgment, without explaining why and how they support his argument.[221] It should be summarily dismissed on that basis alone.[222]

116. Nothing in these paragraphs indicates that the Chamber relied on Ongwen's conduct

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[216] Sentencing Judgment, para. 287. It is not clear whether Ongwen challenges the Chamber's reliance on P-0226 becoming Ongwen's "wife" (Sentencing Appeal, para. 131). In any event, the Chamber found that P-0226 became Ongwen's "wife" well within the charged period. The Chamber noted that P-0226 was only seven years old when she was abducted around 1998 and that she was around 12 years old when she became Ongwen's so-called "wife" (Sentencing Judgment, paras. 80, 287).
[217] Sentencing Appeal, paras. 123, 131-132.
[218] Sentencing Judgment, para. 292.
[219] Sentencing Judgment, fn. 548: "Insofar as the bearing of children fathered by Dominic Ongwen constitutes a consequence, and a significant part of the (continuing) imposition, as a matter of fact, of a forced 'marriage' on the women concerned, it is of no relevance for the point made here by the Chamber that not all such children were actually conceived during the specific, narrower timeframe of the crime of forced marriage of which Dominic Ongwen was convicted under Count 50." *Contra* Sentencing Appeal, para. 132, fn. 216.
[220] Sentencing Appeal, para. 133.
[221] Sentencing Appeal, fn. 218, referring to Sentencing Judgment, paras. 378, 384, 385.
[222] *See e.g.* *Krajišnik* AJ, para. 16.

before the charged period to impose the joint sentence. Rather, the Chamber merely noted the partial overlap between Ongwen's relevant conduct for some SGBC;[223] referred to the extreme gravity of the numerous crimes of which Ongwen was convicted;[224] and concluded that Ongwen fully intended all of these crimes and played a key role in their commission.[225]

117. If Ongwen is seeking to argue that because his individual sentences were affected by the above two alleged errors, so too was his joint sentence, this argument must also fail. As shown above, the Chamber did not so err. While the Chamber referred to evidence of Ongwen's criminal conduct prior to the charged crimes in a few instances, it did not rely on that evidence to aggravate his sentence. Nor is there any indication that it relied on such evidence in determining the joint sentence. Accordingly, his arguments that the Chamber erred in determining both his individual sentences for SGBC, and his joint sentence, must be rejected.

118. In sum, Ongwen fails to show any error in the Sentencing Judgment. Ground 5 should therefore be rejected.

VI.C. The alleged errors do not materially affect the Sentencing Judgment

119. Ongwen also fails to show how the alleged errors under Ground 5 would have materially affected the Sentencing Judgment.[226] This is another reason to reject this ground.

120. By his own admission, Ongwen is unable to show how the alleged errors materially affected the Sentencing Judgment. He states that "[i]t is not possible to determine what weight the Chamber gave to [Ongwen's crimes committed before the temporal scope of the charges] and only the Chamber can answer that question".[227] Accordingly, Ongwen fails to indicate with sufficient precision, how the alleged errors under Ground 5 would have materially affected the Sentencing Judgment.[228]

121. In any event, contrary to the assumption underlying Ongwen's arguments under Ground 5, the Chamber did not rely on his alleged criminal activities falling outside the temporal scope of the charges to aggravate his sentence. As shown above, Ongwen's arguments misrepresent

[223] Sentencing Judgment, para. 378.
[224] Sentencing Judgment, para. 384.
[225] Sentencing Judgment, para. 385.
[226] *Contra* Sentencing Appeal, paras. 135-136.
[227] Sentencing Appeal, para. 135.
[228] *Kony et al.* Admissibility AD, para. 48; *Bemba* First Abuse Process AD, paras. 102, 106, 133-134; *Gbagbo* Third Detention AD, para. 18.

the Sentencing Judgment and misunderstand the context in which the Chamber referred to Ongwen's criminal conduct prior to 1 July 2002. The Chamber was clear about what factors it relied on and for what purposes. In particular, there is no indication that the Chamber relied on Ongwen's actions outside the charged period to aggravate his sentence. Accordingly, Ongwen fails to demonstrate that the "Chamber would have rendered a decision that is substantially different from the decision that was affected by the error, if it had not made the error'."[229]

VII. GROUND 6: THE CHAMBER CORRECTLY REJECTED ONGWEN'S FAMILY LIFE AS A MITIGATING CIRCUMSTANCE

VII.A. Introduction

122. Under Ground 6, Ongwen argues that the Chamber improperly relied on the crimes that he was convicted of to reject his family circumstances as a mitigating factor. Ongwen submits that he and his children have a right to family life and that his children should not be without paternal care for an unreasonably long period of time because of their father's criminal conduct.[230] These arguments should be rejected. Ongwen misunderstands the Chamber's reasoning, ignores the purpose of sentencing and fails to show an error in the Sentencing Judgment.

123. The Chamber correctly and reasonably concluded that "while Dominic Ongwen may harbour certain notions about his responsibilities as a father, it would be improper and even cynical, in the circumstances of the present case, to consider his fatherhood as a circumstance somehow warranting mitigation of his sentence."[231] The Chamber did not believe that Ongwen was "genuinely motivated by the responsibility to take care of his children, when he so obviously and so cruelly failed to take care of them when he had the chance," noting that the children were born in the bush to women and girls abducted into the LRA and were then "kept with their mothers in the same coercive environment".[232]

124. Ongwen also fails to show how any alleged error would have materially affected the

[229] *Gbagbo* Judgment on jurisdiction and stay of the proceedings, para. 44 (citing, *Ntaganda* DRC Arrest Warrant AD, para. 84); *Lubanga* AJ, paras. 19-20; *Ngudjolo* AJ, paras. 20-21.
[230] Sentencing Appeal, para. 145.
[231] Sentencing Judgment, para. 123.
[232] Sentencing Judgment, para. 123.

Sentencing Judgment. Ground 6 should therefore be rejected.

VII.B. The Chamber did not err by not treating Ongwen's family life as a mitigating circumstance

VII.B.1. The Chamber's assessment was reasonable and correct

125. Ongwen argues that the Chamber used the fact that he was convicted of SGBC to reject his family circumstances as a mitigating factor.[233] This argument misunderstands the Chamber's reasoning and fails to show how the Chamber erred.

126. First, the Chamber did not reject Ongwen's family circumstances as a mitigating factor because Ongwen was convicted of SGBC, but because he had previously failed to care for the children's wellbeing. The Chamber noted that several of his children were born to women and girls abducted into the LRA and then kept in the same coercive environment with their mothers.[234] It underlined that this coercive environment was not inevitable, since Ongwen had a "realistic possibility of escaping or leaving the LRA".[235] Given Ongwen's disregard for the children's wellbeing in the past, the Chamber concluded that it "could not believe that [he] is genuinely motivated by the responsibility to take care of his children, when he so obviously and so cruelly failed to take care of them when he had the chance".[236] The Chamber did not err or abuse its discretion in so finding.

127. Second, Ongwen's argument that the manner in which his children were conceived (*i.e.* through rape) was immaterial,[237] must equally be rejected. As explained above, the Chamber did not rely on evidence of Ongwen's conduct before the charged period to impose the sentence.[238] In any event it was reasonable for it to consider the fact that some of Ongwen's children were born out of rapes which occurred during the charged period against his so-called "wives", when assessing Ongwen's family circumstances, because this was relevant context to assessing the coercive environment in which they later lived.[239]

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[233] Sentencing Appeal, para. 143.
[234] Sentencing Judgment, para. 123.
[235] Sentencing Judgment, para. 123.
[236] Sentencing Judgment, para. 123.
[237] Sentencing Appeal, para. 145 and 149.
[238] *See above*, paras. 108-118.
[239] Sentencing Judgment, para. 123.

128. Third, Ongwen's reliance on the Court's jurisprudence is inapposite.[240] Neither in the *Katanga* decision referred to by Ongwen[241] nor in any other decision by the Court where a chamber found that the convicted person's family situation warranted mitigation of the sentence, did the chambers consider the convicted person's failure to comply with their family duties during the charged period.[242]

129. In any event, the family situation of a convicted person is considered as a mitigating factor in sentencing only in exceptional circumstances.[243] In this case, the only exceptional aspects of Ongwen's family situation are that he had "so obviously and so cruelly failed to take care of [his children] when he had the chance",[244] and that his children's life in the coercive environment of the LRA was not inevitable, since Ongwen had a "realistic possibility of escaping or leaving the LRA".[245] In these circumstances the Chamber was correct to reject his family circumstances as a mitigating factor.

VII.B.2. Ongwen conflates aspects of implementation of his sentence with factors relevant to determining its length

130. Ongwen argues that mitigation of his sentence was warranted on account of his and his children's right to family life, citing to provisions of the Convention on the Rights of the Child and the UN Standard Minimum Rules for the Treatment of Prisoners. This argument should be rejected because it misunderstands the scope of these legal instruments, and in particular their relevance for the Chamber's determination of his sentence.

131. First, the fact that prisoners are separated from their families, including their children, is an inevitable consequence of their imprisonment. The Trial Chamber in *Bemba et al.* emphasised that the impact of incarceration on family relationships is common to convicted persons and cannot be taken into account in mitigation.[246] The ECtHR has held that criminal proceedings always entail certain consequences for the private life of an individual who has committed a crime, and that these are compatible with Article 8 of the ECHR (the right to private and family life), provided that they do not exceed the normal and inevitable

[240] Sentencing Appeal, para. 147-148.
[241] *Katanga* Article 110 Review of Sentence Decision, paras. 108-110.
[242] *Katanga* SJ, para. 84-85; *Bemba et al.* Re-Sentencing Decision, para. 62, 66, 90, 96, 149, 197, 244, 248.
[243] *Bemba* SJ, para. 78; *Ntabakuze* AJ, para. 284; *Babić* SAJ, paras. 50-51.
[244] Sentencing Judgment, para. 123.
[245] Sentencing Judgment, para. 123.
[246] *Bemba et al.* Re-Sentencing Decision, para. 90.

consequences of such a situation.[247]

132. Second, the Convention on the Rights of the Child is concerned with the rights and interests *of children*, which are not in any event absolute. Ongwen fails to show how the Convention implies any right for a convicted person to a mitigated sentence on account of being a parent or how it demonstrates that the Chamber erred in determining his sentence.

133. Third, Ongwen's reliance on the UN Standard Minimum Rules for the Treatment of Prisoners similarly misunderstands this instrument's scope, and accordingly its relevance for determining a sentence. The Rules set out standards relating to the treatment of detainees and prisoners and are used by monitoring agencies to assess such treatment. They are irrelevant for determining an appropriate sentence. International courts and tribunals have frequently referred to them in relation to *enforcement* of the convicted person's sentence, but not in relation to determination of a sentence.[248] Ongwen simply recites the provisions relating to visits and correspondence, and does not explain how these provisions are relevant to the issue at hand, let alone how they show error by the Chamber in determining his sentence.[249]

134. In conclusion, Ongwen shows no error in the Chamber's decision to reject Ongwen's family circumstances as a mitigating factor for sentencing. Ground 6 should therefore be rejected.

VII.C. The alleged errors do not materially affect the Sentencing Judgment

135. Ongwen also fails to show how the alleged errors under Ground 6 would have materially affected the Sentencing Judgment.[250] This is another reason to reject this ground of appeal.

136. During the sentencing proceedings, Ongwen acknowledged that family circumstances are generally not considered a mitigating factor in sentencing.[251] If taken into account, family ties have been considered by international criminal courts and tribunals as part of an overall assessment of the convicted person's personal circumstances, and generally given little

[247] *Jankauskas v. Lithuania (no. 2)*, para. 76.
[248] *Erdemović* TJ (1996), para. 74; *See also* the Preamble of Enforcement of Sentence Agreements conducted between the ICC and Argentina. The Court concluded similar enforcement agreements with Austria, Belgium, Denmark, Finland, Georgia, Mali, Norway, Serbia and Sweden.
[249] Sentencing Appeal, para. 141.
[250] *Contra* Sentencing Appeal, paras. 135-136.
[251] Defence Sentencing Brief, para. 148.

weight.[252] Therefore even if, *arguendo*, the Chamber had erred in considering Ongwen's family circumstances as a mitigating factor, such error would not have had any impact on Ongwen's joint sentence of 25 years' imprisonment.[253] This is because of the "extreme gravity of the numerous crimes of which Dominic Ongwen was convicted" and the existence of several aggravating circumstances,[254] which the Chamber considered would have warranted a joint sentence of life imprisonment save for the presence of the established mitigating factors.[255]

VIII. GROUND 7: THE CHAMBER CORRECTLY FOUND THAT ONGWEN DID NOT SUFFER FROM SUBSTANTIALLY DIMINISHED MENTAL CAPACITY, AND THAT HIS CURRENT MENTAL HEALTH DID NOT WARRANT A REDUCTION IN SENTENCE

VIII.A. Introduction

137. The Chamber carefully examined Ongwen's claim that he suffered from substantially diminished mental capacity, a mitigating circumstance under rule 145(2)(a)(i).[256] The Chamber recalled, and reiterated, its finding at trial that Ongwen did not suffer from any mental disease or defect at the time of the crimes.[257] The Chamber summarised the relevant evidence, and explained its reasons for not relying at sentencing on the expert evidence of Defence experts Prof. Ovuga and Dr. Akena.[258] The Chamber also addressed Ongwen's specific arguments one by one, before concluding that the mitigating circumstance of substantially diminished mental capacity did not apply.[259] The Chamber further fully considered Ongwen's additional argument that he should receive a reduced sentence because of his *current* mental health condition. The Chamber noted that health is considered in mitigation only in exceptional circumstances, and rejected Ongwen's arguments, having concluded that there was no information available to it that pointed to anything exceptional in Ongwen's mental health.[260]

[252] *Bemba* SJ, para. 78; *Ntabakuze* AJ, para. 284; *Babić* SAJ, paras. 50-51.
[253] *See e.g. Nahimana et al.* AJ, para. 1108.
[254] Sentencing Judgment, para. 384.
[255] Sentencing Judgment, para. 386.
[256] Sentencing Judgment, paras. 90-100.
[257] Sentencing Judgment, paras. 93, 100; Judgment, paras. 2450-2580.
[258] Sentencing Judgment, paras. 93-95.
[259] Sentencing Judgment, paras. 96-100.
[260] Sentencing Judgment, paras. 101-105.

138. Ongwen now argues that the Chamber applied an incorrect evidentiary standard and should have reassessed the evidence relating to his mental health under the balance of probabilities standard.[261] Ongwen repeats his arguments advanced during the sentencing proceedings about the evidence of two Prosecution experts, the Defence experts, Professor De Jong, and the alleged inferences to be drawn from the adjustment of the trial schedule.[262] Further, Ongwen argues that his current health, namely his alleged "mental disabilities", should have been considered as a mitigating circumstance or given weight as part of the Chamber's assessment of his personal circumstances.[263]

139. None of Ongwen's arguments demonstrates any error in the Sentencing Judgment. He repeats arguments from the sentencing stage of proceedings, ignores the Chamber's reasoning, and merely disagrees with the Chamber's findings. In addition, Ongwen fails to articulate how the alleged errors would have materially impacted the sentence. For all these reasons, Ground 7 should be rejected.

VIII.B. The Chamber correctly rejected "substantially diminished mental capacity" as a mitigating circumstance

VIII.B.1. The Chamber applied the correct legal standard

140. Ongwen argues that the Chamber applied the wrong evidentiary standard when considering the mitigating circumstance of "substantially diminished mental capacity", set out in rule 145(2)(a)(i) of the Rules. He states that the Chamber erred by failing to reassess the relevant evidence under the balance of probabilities standard.[264] This argument should be rejected.

141. First, the Chamber correctly articulated the applicable standard for its assessment of mitigating circumstances—"on the balance of probabilities"—at the outset of the Sentencing Judgment.[265] There is no indication that the Chamber did not apply this standard in subsequent reasoning. The Appeals Chamber has confirmed that when a trial chamber correctly articulates the burden and standard of proof, it must be assumed that it proceeded on the basis of the correct

[261] Sentencing Appeal, paras. 155, 156, 162.
[262] Sentencing Appeal, paras. 156-170.
[263] Sentencing Appeal, paras. 171-187.
[264] Sentencing Appeal, para. 155.
[265] Sentencing Judgment, para. 54.

understanding of those concepts.[266] In addition, the Chamber clearly distinguished between its earlier conclusion at trial, and its conclusion on the "mitigating circumstance" of substantially diminished capacity (and also the impact of mental health "at the time of sentencing").[267] This language leaves no doubt that the Chamber appreciated the difference in applicable standards in the trial and sentencing stages of the proceedings.

142. Second, the Chamber did not find a degree of mental incapacity that was simply insufficient, but rather determined that Ongwen suffered from *no* mental disease or defect whatsoever at the time he committed the crimes.[268] This conclusion was based not only on the expert evidence, but also on a careful assessment of Ongwen's cognitive and volitional faculties, based on evidence from persons who fought with him or who were very close to him at the time.[269] In light of those clear and specific findings, Ongwen's suggestion that the Chamber should have re-assessed the findings of Prosecution experts, Defence experts and Professor De Jong using the balance of probabilities standard, should be rejected.[270] Having found that he suffered from *no* mental disease or defect at the relevant time, the Chamber did not need to venture into a further discussion on whether a mental disorder or disease "was more likely than not".[271]

VIII.B.2. The Chamber correctly and reasonably assessed the evidence of the Prosecution Experts, the Defence Experts, and Professor De Jong

143. Ongwen argues that the Chamber erred in its assessment of the findings of the Prosecution experts, the Defence experts, and Professor De Jong, and asserts that their evidence showed that it is "more likely than not" that he had a mental disorder at the times material to the charges and therefore suffered from "substantially diminished mental capacity" under rule 145(2)(a)(i).[272] Ongwen mostly repeats his submissions at the sentencing stage,[273] without articulating an error in the Chamber's reasoning. The ICTY Appeals Chamber has held that it "will, as a general rule, summarily dismiss submissions that merely repeat arguments that did not succeed at trial without any demonstration that the Trial Chamber's rejection of them

[266] *Ntaganda* AJ, para. 594.
[267] Sentencing Judgment, paras. 93, 100, 103.
[268] Sentencing Judgment, para. 100.
[269] Sentencing Judgment, para. 100; Judgment, paras. 2450-2580.
[270] Sentencing Appeal, paras. 155, 156, 162.
[271] *Contra* Sentencing Appeal, paras. 153-155.
[272] Sentencing Appeal, para. 157.
[273] *Compare* Sentencing Appeal, paras. 156-165 with Defence Sentencing Brief, paras. 86-101.

constituted an error warranting the intervention of the Appeals Chamber."[274] This Chamber should consider this approach and dismiss these arguments *in limine*. In any event, Ongwen's arguments are unfounded.

144. First, Ongwen challenges the Chamber's assessment of the evidence of Professor Weierstall-Pust (P-0447)[275] by citing discrete aspects of his evidence.[276] However, these citations are taken out of context and do not accurately represent the expert's ultimate conclusion that Ongwen did not suffer from a mental disease or defect at the time he committed the crimes. While Professor Weierstall-Pust noted that "the diagnosis of a trauma-spectrum disorder required that the individual was exposed to at least one potentially traumatic event", he also emphasized that trauma is of a subjective nature and does not necessarily lead to a trauma-related mental disorder.[277] In the case of Ongwen, he found that the evidence did not justify "'[…] the diagnosis of a manifest mental disorder […] between 2002 and 2005'".[278] In any event, in his opinion, even the existence of a trauma-related disorder is not sufficient of itself to draw any conclusions about mental capacity at the times material to the charges, especially since "every mental disorder fluctuates over time".[279] Ongwen has not identified anything unreasonable in the Chamber's analysis or approach to this evidence.

145. Second, the fact that Doctor Abbo (P-0445) accepted that Ongwen was exposed to many traumatic events equally does not support his argument.[280] Neither he nor the other mental health experts who testified at trial disputed that the environment to which Ongwen was exposed *could* lead to mental health issues.[281] Yet, like Professor Weierstall-Pust, Doctor Abbo also concluded that Ongwen did not suffer from a mental disease or defect at the time he

[274] *Krajišnik* AJ, para. 24; *Martić* AJ, para. 14; *Strugar* AJ, para. 16; *Halilović* AJ, para. 12; *Blagojević and Jokić* AJ, para. 10; *Brđanin* AJ, para. 16; *Galić* AJ, paras. 10, 303; *Simić* AJ, para. 12; *Gacumbitsi* AJ, para. 9.
[275] *See* Judgment, paras. 2486-2496.
[276] Sentencing Appeal, para. 158-159.
[277] Judgment, para. 2489 (further recalling the opinion that, since an individual may process a potentially traumatic event in a number of ways, "the relationship between the experiences […] and potential mental health symptoms must be specified, as there doesn't necessarily have to be a relation between the exposure with violence and trauma and the development of impairments").
[278] Judgment, para. 2491: P-0447 agreed that Ongwen was exposed to potentially traumatic events, and that it was "plausible" that he "showed some signs of mental disorder" during the material times, his *overall conclusion* was that the evidence did not justify "[…] the diagnosis of a manifest mental disorder […] between 2002 and 2005".
[279] *See* Judgment, para. 2490.
[280] *Contra* Sentencing Appeal, para. 160.
[281] For example, P-0447 explained in detail his conclusions about appetitive aggression (P-0447, UGA-OTP-0280-0674, at 0679), which is only one example of how potentially traumatic events may not result in any mental health issues. P-0445 explicitly agreed (P-0445, T-166, 57: 8-15) with P-0447's finding that research suggests that the majority of persons exposed to war trauma, "remain unaffected or at least not impaired in a clinically relevant sense" (P-0447, UGA-OTP-0280-0674, at 0679).

committed the crimes.[282] Thus, on the evidence before it, the Chamber reasonably concluded that it cannot be simply assumed that because Ongwen was exposed to potentially traumatic events, that he necessarily processed that experience so as to lead to a mental disease or disorder. Indeed it found that for Ongwen, "this trauma did not lead to a mental disease or disorder and had no lasting consequences from that viewpoint".[283] Ongwen has not shown that the Chamber erred in assessing Doctor Abbo's evidence, nor in its conclusions.

146. Third, insofar as the evidence of Defence experts Professor Ovuga (D-0042) and Doctor Akena (D-0041) is concerned, the Chamber explained in detail in the Conviction Judgment why it did not rely on their evidence.[284] In its Sentencing Judgment, the Chamber specifically referred to this analysis, and explained that the same underlying premises and methodological concerns precluded it from relying on D-0042's additional sentencing report.[285] Ongwen disagrees with the Chamber's assessment, but fails to identify any error in its reasoning.[286]

147. Finally, Ongwen's arguments relating to Professor De Jong's report are undeveloped,[287] and should be summarily dismissed. In any event, the Chamber reasonably explained that it did not rely on Prof. De Jong's report because it was prepared for the purpose of examining Ongwen's health *at the time of trial* and not at the time of his conduct relevant under the charges.[288]

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[282] Sentencing Judgment, para. 81: "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 a commander. […] [F]avourable early childhood experiences" contributed to his continued resilience". *See also* Judgment, paras. 2479-2485.
[283] Sentencing Judgment, para. 83.
[284] Judgment, paras. 2522-2574. In the Judgment, the Chamber identified six specific factors affecting the reliability of D-0041's and D-0042's evidence, which led it to conclude that "it cannot rely on that evidence, and in particular not on the diagnoses of mental disorders in Dominic Ongwen which are advanced therein" (Judgment, para. 2574). The identified factors relate predominantly to the methodology employed by the experts: (i) the blurring of the Defence experts' role as treating physicians and forensic experts, leading to a loss of objectivity in their reports and testimony (Judgment, paras. 2528-2531); (ii) the Defence experts' failure to apply scientifically validated methods and tools as a basis for their forensic reports, based on specific identified shortcomings (Judgment, paras. 2532-2535); (iii) the unexplained contradictions and inconsistencies in the Defence experts' observations and conclusions, and the Defence experts' failure to acknowledge or explain them (Judgment, paras. 2536, 2543-2544); (iv) the Defence experts' failure to engage sufficiently with other available sources of relevant information, including contemporary witness evidence, Court transcripts, or clinical notes from other professionals amounting to an "unjustifiable and fundamental failure" which invalidated their conclusions in itself (Judgment, paras. 2545, 2547-2552); (v) the Defence experts' failure to properly address the possibility of malingering (Judgment, para. 2568); and (vi) the "very general" nature of the Defence experts' analysis and findings, which were "not clearly anchored" in the times and factual contexts material to the charges (Judgment, para. 2569).
[285] Sentencing Judgment, para. 95.
[286] Sentencing Appeal, para. 163.
[287] Sentencing Appeal, para. 163.
[288] Sentencing Judgment, para. 97; Judgment, paras. 2464, 2468, 2471, 2482, 2485, 2488, 2559, 2576-2577.

148. In sum, Ongwen fails to show that the Chamber erred in assessing the evidence of these witnesses and in finding that at the relevant time Ongwen had no mental disease or defect, and as such did not suffer from substantially diminished mental capacity under rule 145(2)(a)(i).

VIII.B.3. The Chamber properly considered and correctly rejected Ongwen's arguments related to the trial schedule

149. Ongwen misrepresents the Sentencing Judgment when he argues that the Chamber failed to assess the fact that it took measures to adjust the trial schedule as a factor showing that he "more likely than not suffered from substantially diminished mental capacity"[289]. The Chamber *did* consider this argument and firmly rejected it as unfounded.[290] Ongwen simply disagrees with the Sentencing Judgment.

150. The Chamber correctly and reasonably concluded that Ongwen's interpretation of the Chamber's managerial decisions during trial was "untenable". It emphasised: "Suffice it to say that at no point, even in the context of such decisions of trial management, did the Chamber find or otherwise express the view that Dominic Ongwen suffered from 'significantly diminished capacity' as implied by the Defence."[291] It even noted that Ongwen's argument appeared opportunistic, since previously the Defence had taken the opposite view and claimed that the Chamber had ignored Ongwen's mental health and had not taken adequate measures during the trial.[292] Ongwen fails to show that this analysis was unreasonable or clearly erroneous.

VIII.B.4. The Chamber properly considered the evidence of P-0099, P-0101, P-0214, P-0226, P-0227, P-0235 and P-0236

151. Ongwen further challenges the Chamber's reliance on the evidence of seven women who were held as so-called wives or otherwise captive in "Ongwen's immediate proximity at various times over the course of around 20 years," and whose testimonies revealed nothing to indicate that they "observed behaviour on the part of Dominic Ongwen suggestive of a mental disease or defect".[293] He argues that the Chamber failed to consider and give weight to the cultural

[289] Sentencing Appeal, para. 166.
[290] Sentencing Judgment, para. 98.
[291] Sentencing Judgment, para. 98.
[292] Sentencing Judgment, para. 98.
[293] Sentencing Appeal, paras. 168-169, quoting Sentencing Judgment, para. 93 (and in turn, quoting Judgment, para. 2519).

aspects of the witnesses' observations, namely "that in the relevant culture some persons may interpret behaviours as spirit possession."[294] Ongwen made the same submissions in his appeal against the Conviction Judgment.[295] For the reasons as set out below and in the Prosecution's Response to the Conviction Appeal,[296] this argument should be rejected as unfounded. Nor do his arguments show that the Chamber erred in finding that at the time he committed the crimes he did not have a mental defect or disease and accordingly did not suffer from substantially diminished mental capacity under rule 145(2)(a)(i).

152. First, in relation to Ongwen's remarks about the witnesses being "lay persons",[297] the Chamber did not consider the evidence of the seven women for diagnoses of mental disease or defect. The Chamber made it very clear that "save for the experts within the scope of their expertise, the witnesses in the case are not qualified to make such diagnoses".[298] Instead, the Chamber assessed "whether any descriptions [by these witnesses] in particular of the conduct of Dominic Ongwen correspond to symptoms of mental disorders."[299] It found they did not.[300]

153. Second, the Chamber clearly stated that "the possibility that witnesses may regard symptoms of mental disorders as spirit possession is immaterial, insofar as they would still describe certain symptoms, irrespective of the cause attributed to them".[301] The Chamber was therefore not ignorant of the cultural aspect of their testimony, but reasonably considered these aspects when assessing their evidence. Ongwen's submissions misrepresent the Chamber's analysis. Moreover, they do not show that the Chamber erred in finding that at the relevant time Ongwen had *no* mental defect or disease, and as such did not suffer from substantially diminished mental capacity under rule 145(2)(a)(i).

154. In conclusion, the Chamber reasonably found that at the relevant time, Ongwen had no mental disease or defect. This finding was soundly based on the reliable expert evidence of three Prosecution experts[302] and the corroborating evidence heard at trial from witnesses who

[294] Sentencing Appeal, para. 169.
[295] Appeal, paras. 382-388.
[296] Response to Conviction Appeal, paras. 243-245.
[297] Sentencing Appeal, para 169.
[298] Judgment, para. 2501.
[299] Judgment, para. 2501.
[300] Sentencing Judgment, para. 93, relying on findings in Judgment, para. 2519.
[301] Judgment, para. 2501.
[302] In addition to Professor Abbo and Professor Weierstall-Pust, the Chamber also relied on Professor Mezey, who it concluded was "of great assistance to the Chamber in making its findings" (Judgment, para. 2478, *see also* paras. 2470-2477).

spent a considerable period of time in close proximity of Ongwen, living and fighting alongside him and who—when asked questions about him or his personality—gave no answers indicating he was suffering from symptoms of mental disease or defect. Quite to the contrary, evidence about Ongwen's actions at the time, such as his involvement in careful planning of complex operations, were found by the Chamber to have been incompatible with mental disorder.[303] In light of its conclusion, it was also reasonable and correct for the Chamber to have rejected substantially diminished mental capacity as a mitigating circumstance in this case. None of Ongwen's arguments demonstrate otherwise.

VIII.C. The Chamber correctly declined to consider Ongwen's current mental health as a mitigating factor in determining his sentence

VIII.C.1. The Chamber correctly found that Ongwen's mental health did not amount to an exceptional circumstance

155. Ongwen does not challenge the Chamber's observation that "poor health is mitigating only in exceptional cases."[304] Instead he argues that the Chamber failed to sufficiently articulate the "exceptional circumstances standard" and failed to consider his purported "mental disabilities" that were allegedly "recorded in the trial record."[305] His arguments misrepresent the Sentencing Judgment, merely disagree with the Chamber's conclusions, and fail to show any error in the Chamber's analysis. They should be rejected.[306]

156. First, the Chamber explained in clear terms its understanding of "exceptional circumstances" in the context of assessing whether a convicted person's mental health could amount to a mitigating factor for the purpose of sentencing. It did so by referring to ICTY cases in which judges were faced with the same consideration in relation to different factual scenarios.[307] Contrary to Ongwen's suggestion,[308] the purpose of citing this jurisprudence was not to find a comprehensive definition of "exceptional circumstances" (there is none), but to demonstrate that a person's health warrants mitigation only in very rare cases and that the management of a convicted person's health is primarily a matter for the enforcement of the

[303] Sentencing Judgment, para. 93, relying on findings in Judgment, para. 2580, 2517, 2519, 2520, 2521.
[304] Sentencing Appeal, para. 171.
[305] Sentencing Appeal, paras. 171-188.
[306] *See also* Response to Conviction Appeal, paras. 56-62.
[307] Sentencing Judgment, para. 103.
[308] Sentencing Appeal, paras. 172, 174.

sentence. To make its approach even more tangible, the Chamber specifically listed concrete scenarios where it considered that such a finding could be made, namely "a very serious health condition, or perhaps terminal disease".[309]

157. Second, the Chamber clearly and reasonably concluded that Ongwen's mental health did not amount to a "very serious health condition" that warranted mitigation.[310] The Chamber reached this conclusion because "none of the information available to [it] as to Dominic Ongwen's mental health at various times during its detention at the seat of the Court, or even Defence submissions, point to anything exceptional."[311] The Chamber further noted the clear and structured manner in which Ongwen provide his unsworn statement during the sentencing proceedings and that he showed a detailed understanding of the proceedings.[312] However, as noted in response to Ground 10 below,[313] this latter finding was not decisive for the Chamber's decision to reject Ongwen's current mental health as a mitigating circumstance.

158. Finally, having found that Ongwen's current mental health did not constitute a relevant mitigating circumstance for determining the length of the sentence, the Chamber was not required to consider it again separately under the label of "personal circumstances".[314] As recognised 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."[315] In any event, because the Chamber held that nothing on the record indicated that Ongwen's mental health was exceptionally affected,[316] these same factual findings would equally apply to Ongwen's mental health being considered under the label of "personal circumstances". Ongwen therefore makes no showing that the Chamber would have reached a different conclusion, or imposed a different sentence, had it assessed his current mental health as a "personal circumstance" rather than a potential mitigating circumstance.

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[309] Sentencing Judgment, para. 103.
[310] Sentencing Judgment, paras. 103-105.
[311] Sentencing Judgment, para. 103.
[312] Sentencing Judgment, para. 104. *See also below*, response to Ground 10.
[313] *See below* paras. 201-203.
[314] *Contra* Sentencing Appeal, para. 177.
[315] *Bemba et al.* SAJ, para. 4; Sentencing Judgment, para. 55.
[316] Sentencing Judgment, para. 103.

VIII.C.2. Ongwen's references to information and evidence on the record do not show any error in the Chamber's reasoning and findings

159. Ongwen argues that the Chamber erred in finding that there was no evidence on the record indicating that his current mental health was exceptionally affected,[317] by rearguing his prior submissions and pointing to discrete facts on the record.[318] In particular, he refers to (i) his requests for medical examinations under rule 135 of the Rules, (ii) Professor De Jong's report and diagnoses, (iii) Defence expert reports and diagnoses, (iv) information from the Registry, ICC-DC officials, and the ICC-DC medical officer, and (v) [REDACTED].[319] However, Ongwen fails to show that the Chamber improperly disregarded any of this evidence. Instead, he merely disagrees with the Chamber's conclusions.

160. First, this information and evidence was available to the Chamber, and there is no reason to conclude that the Chamber failed to consider it in its assessment of Ongwen's health. The ICTY Appeals Chamber has held that trial chambers are not required to articulate every step of their reasoning in reaching particular findings, and a failure to list in a judgement each and every circumstance placed before them and considered does not necessarily mean that they ignored or failed to evaluate the factor in question.[320]

161. Second, any reliance on Ongwen's requests for medical examination under rule 135 should be summarily dismissed. A party's own assertions about the existence of a mental condition cannot be considered as evidence of the same. Notably, as Ongwen accepts, his requests for a rule 135 examination were rejected.[321]

162. Third, there is no indication that the Chamber failed to consider Professor De Jong's findings about Ongwen's current mental health. The Chamber declined to rely on Professor De Jong's report for the purposes of determining Ongwen's mental state *during the charged period*, not his current condition.[322] Moreover, the Chamber's reference to "Ongwen's mental

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[317] Sentencing Judgment, para. 103.
[318] Sentencing Appeal, paras. 178-186.
[319] Sentencing Appeal, paras. 177-186.
[320] *Babić* SAJ, para. 43.
[321] Sentencing Appeal, paras. 178-180.
[322] Sentencing Judgment, para. 97; Judgment, paras. 2576-2579.

health at the time of the examination during the trial"[323] shows that it was cognisant of the report's scope and purpose. In addition, the Chamber in the Conviction Judgment made specific reference to the diagnoses made by Professor De Jong and recited by Ongwen in the appeal (post-traumatic stress disorder (severe), major depressive disorder (severe), and other specified dissociative disorder).[324] Significantly however, the Chamber also noted that Professor De Jong himself alerted the Chamber to the fact that his report had several shortcomings, including the fact that he was unable to complement his interviews with Ongwen with additional information from his family and the community.[325] In short, Ongwen fails to show that the Chamber disregarded De Jong's findings, nor that consideration of his report should have led the Chamber to a different conclusion about whether his current mental health qualified as an "exceptional circumstance" and thereby amount to a mitigating factor in sentencing.

163. Fourth, with regard to the Defence experts, as noted above, the Chamber clearly explained why it declined to rely on their evidence:[326] the Chamber deemed the Defence experts' evidence unreliable, and therefore, it correctly and reasonably decided not to rely on it.

164. Fifth, Ongwen's references to other information in the trial record emanating from the Detention Centre and the Registry about Ongwen's mental health are also inapposite.[327] The Chamber never stated that Ongwen did not suffer from *any symptoms* of a mental health condition. The Chamber simply considered that his mental health and any symptoms he may display were not of such severity that it would amount to exceptional circumstances and thereby warrant a reduction in sentence. The same considerations apply to the relevance of [REDACTED].[328]

165. In conclusion, the Chamber reasonably and correctly rejected Ongwen's current mental health as a mitigating factor in determining his sentence.

VIII.D. Ongwen fails to show how the purported errors would have materially affected the Sentencing Judgment

166. Ongwen fails make any arguments, let alone a showing, on how the alleged errors under

[323] Sentencing Judgment, para. 97.
[324] Judgment, para. 2576.
[325] Judgment, para. 2577.
[326] *See above* paras. 143, 146.
[327] Sentencing Appeal, para. 184.
[328] Sentencing Appeal, para. 185.

Ground 7 would have materially affected his sentence. In fact, none of the alleged errors in the Chamber's assessment of Ongwen's mental health would have materially affected his 25-year sentence.

167. Based on a careful assessment of all the evidence before it, the Chamber concluded that Ongwen's arguments regarding his significantly reduced mental capacity during the charged period and his mental health during the trial were not supported by the evidence. To the contrary, it found that "the evidence establishes clearly that at all relevant times for the charges, […] Ongwen did not suffer from a mental disease or defect", "was in full possession of his mental faculties", and consequently that "the mitigating circumstances of substantially diminished mental capacity [did] not apply".[329] It further considered that Ongwen's argument concerning his "current mental health" was "based on essentially the same evidence"[330] and concluded that none of the information available as to Ongwen's mental health at various times during his detention at the seat of the Court—or even the Defence submissions—"point[ed] to anything exceptional" about Ongwen's current mental health.[331]

168. Ongwen's challenges to the Chamber's assessment of the evidence ignore the Chamber's reasoning and are not supported by the record. Accordingly, his arguments which are premised on the Chamber's alleged failure to apply the balance of probabilities standard to this evidence, must likewise fail. In addition, irrespective of the arguments now advanced by Ongwen, he fails to show any realistic possibility that in light of the evidence before it, the Chamber would have mitigated his sentence based on his mental capacity during the charged period or his current mental health.

169. For all the above reasons, Ground 7 should be rejected.

IX. GROUND 8: THE CHAMBER CORRECTLY REJECTED DURESS AS A MITIGATING CIRCUMSTANCE UNDER RULE 145(2)(A)(I)

IX.A. Introduction

170. Ongwen argues that the Chamber erred in law and in fact by disregarding the expert

[329] Sentencing Judgment, para. 100. *See further* paras. 92-99; Judgment, paras. 2450-2580.
[330] Sentencing Judgment, para. 101. *See also* para. 103.
[331] Sentencing Judgment, para. 103.

evidence of D-0060, D-0114 and D-0133 in assessing whether the threshold for duress as a mitigating circumstance under rule 145(2)(a)(i) had been met in his case. Ongwen further submits that the Chamber ignored evidence indicating that there existed dire consequences for those who violated LRA rules, and challenges the Chamber's application of rule 145(2)(a)(i).[332]

171. These arguments should be rejected. Ongwen relies extensively on his previous submissions, and attempts to incorporate them by reference.[333] Such arguments should be dismissed *in limine*. In any event, the Chamber reasonably assessed, and decided not to rely on, the evidence of D-0060, D-0114 and D-0133 because it found it was either not suitable for use as evidence in relation to the issues at hand, or because it was unreliable.[334] Ongwen's additional arguments are also unfounded as they do not show that the Chamber failed to consider relevant evidence or misapplied rule 145(2)(a)(i).[335]

172. Ongwen further fails to show how any alleged error would have materially affected the Sentencing Judgment. For these reasons, Ground 8 should be rejected.

IX.B. The Chamber did not err in its findings on D-0060, D-0114 and D-0133

IX.B.1. The Appeals Chamber should summarily dismiss arguments that Ongwen has previously made in his sentencing brief

173. The Chamber made its findings in relation to Ongwen's defence of duress in its Conviction Judgement.[336] In its Sentencing Judgment, the Chamber confirmed that those findings remained undisturbed for the purposes of sentencing.[337]

174. Ongwen challenges these findings primarily by incorporating by reference his submissions from his Sentencing Brief before the Trial Chamber, which he appends as an annex to his Sentencing Appeal.[338] These submissions should be summarily dismissed.

175. First, Ongwen inappropriately challenges in his appeal against the Sentencing Judgment, the Chamber's findings on the applicability of the defence of duress in the Conviction

[332] Sentencing Appeal, para. 189-204.
[333] Sentencing Appeal, para. 192 and 193, and Annex A.
[334] Sentencing Judgment, paras. 114-116.
[335] Sentencing Appeal, paras. 202-203.
[336] Judgment, paras. 2668-2670.
[337] Sentencing Judgment, para. 112.
[338] Sentencing Appeal, para. 192 and 193, and Annex A.

Judgement. As held by the Appeals Chamber in *Bemba et al*., appeals against sentences and appeals against conviction are distinct: an appellant cannot challenge his conviction in a sentencing appeal and any arguments to that effect may be dismissed *in limine*.[339]

176. Second, the Appeals Chamber has held that "[t]he arguments of a participant to an appeal must be fully contained within that participant's filing in relation to that particular appeal. The filing must, in itself, enable the Appeals Chamber to understand the position of the participant on the appeal, without requiring reference to arguments made by that participant elsewhere."[340] Thus, arguments which incorporate by reference submissions made in other filings should be dismissed *in limine*[341] regardless of whether the incorporation of previous arguments by reference exceeds the overall page limit.[342] Moreover, including submissions in an annex violates regulation 36(2)(b) of the Regulations of the Court ("RoC"), according to which "[a]n appendix shall not contain submissions". The Appeals Chamber has previously considered that including submissions in an annex "amounts to an attempt to circumvent the requirements of regulations 36 and 37 of the RoC." Further, "[t]o the extent that the annexes […] may be construed to contain submissions or argumentative material, the Appeals Chamber considers it appropriate to disregard such submissions or arguments contained therein."[343]

177. Third, Ongwen's arguments concerning the evidence of D-0060, D-0114 and D-0133 merely repeat his arguments at sentencing. The ICTY Appeals Chamber has held that it "will, as a general rule, summarily dismiss submissions that merely repeat arguments that did not succeed at trial without any demonstration that the Trial Chamber's rejection of them constituted an error warranting the intervention of the Appeals Chamber."[344] This Appeals Chamber should do the same and summarily dismiss Ground 8 of the appeal.[345]

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[339] *Bemba et al.* SAJ, paras. 253-257, 311; *Bemba et al.* Decision on the Scope of the Appeal, paras. 9-11.
[340] *Lubanga* Redaction Decision AJ, para. 29.
[341] *Ntaganda* AJ, para. 901 ("To the extent Mr Ntaganda's arguments are developed in his closing brief, rather than within his appeal brief, the Appeals Chamber will not consider them as to do so would allow the page limit for the appeal to be circumvented").
[342] *Contra* Sentencing Appeal, fn. 355.
[343] *Kenya* Disqualification Decision, para. 5.
[344] *Krajišnik* AJ, para. 24; *Martić* AJ, para. 14; *Strugar* AJ, para. 16; *Halilović* AJ, para. 12; *Blagojević and Jokić* AJ, para. 10; *Brđanin* AJ, para. 16; *Galić* AJ, paras. 10 and 303; *Simić* AJ, para. 12; *Gacumbitsi* AJ, para. 9.
[345] *See e.g. Krajišnik* AJ, para. 16: "[The Appeals Chamber] has an inherent discretion to determine which of the parties' submissions merit a reasoned opinion in writing and […] may dismiss arguments which are evidently unfounded without providing detailed reasoning in writing. […] In order for the Appeals Chamber to assess a party's arguments on appeal, the party is expected to present its case clearly, logically and exhaustively. […] [T]he Appeals Chamber may dismiss submissions as unfounded without providing detailed reasoning if a party's submissions are obscure, contradictory, vague or suffer from other formal and obvious insufficiencies."

IX.B.2. The Chamber reasonably assessed the evidence of D-0060, D-0114 and D-0133

178. In any event, even if the Appeals Chamber does not dismiss Ongwen's arguments *in limine*, it should nevertheless reject them. Ongwen merely disagrees with the Chamber's assessment of the evidence that he submitted in the sentencing proceedings, when deciding that the threshold for duress as a mitigating circumstance under rule 145(2)(a)(i) had not been met. Ongwen fails to engage with the Chamber's reasoning. He does not show any error in the Chamber's assessment of the reports produced by D-0060, D-0114 and D-0133, or in its decisions not to rely on their evidence.[346]

179. D-0060 prepared a report on "the LRA's cosmological space", seeking to "explore the LRA's 'belief system' and in particular […] Ongwen's involvement in it". The report was based primarily on interviews with Ongwen.[347] The Chamber decided that D-0060's report was "not suitable for use as evidence in these proceedings", because the witness had uncritically adopted various statements, including Ongwen's.[348] Ongwen merely repeats his prior submissions and asserts that D-0060 properly and critically assessed Ongwen's statements, but without providing any basis for this assertion and without showing how the Chamber erred in finding that D-0060's report was not suitable for use as evidence.[349] This fails to show the Chamber improperly exercised its discretion by deciding not to rely on it.

180. D-0114 provided a report that included a narrative of various topics relating to the abduction and indoctrination of children, spiritualism and the coercive environment in the LRA. He expressly "plead[ed] for leniency and compassion for […] Ongwen".[350] The Chamber acknowledged the witness's background and personal experiences,[351] but declined to rely on his report since it found his evidence unreliable.[352] This was because his report related to issues already resolved in the Conviction Judgment based on reliable direct evidence of witnesses who, unlike D-0114, actually interacted with Ongwen during the relevant period.[353] The

[346] Sentencing Judgment, paras. 114-116.
[347] Sentencing Judgment, para. 114.
[348] Sentencing Judgment, para. 114.
[349] Sentencing Appeal, para. 200-201.
[350] Sentencing Judgment, para. 115.
[351] Sentencing Judgment, para. 115: "[…] explaining in terms of methodology that it is based on his work with children affected by war in Northern Uganda over a period of 20 years of 'actual work and development consultancy supporting interventions in the region, and designing post-conflict recovery programmes', and further stating that he 'relied on [his] own and other researches within northern Uganda, and consulted with both published and unpublished organisation reports'."
[352] Sentencing Judgment, para. 115.
[353] Sentencing Judgment, para. 115.

Chamber also considered D-0114's explicitly stated motivation to achieve a specific result—a more lenient sentence for Ongwen—as a reason not to rely on his report.[354] Ongwen does not challenge the Chamber's analysis or show an error in the Chamber's reasoning but rather merely disagrees with the Chamber's finding that D-0114's report was unreliable.[355] This fails to show that the Chamber improperly exercised its discretion by deciding that the evidence was unreliable and that it would therefore not rely on it.

181. D-0133's report addressed the issue of spiritualism in the LRA and related issues.[356] The Chamber decided that D-0133's report was not "suitable for use as evidence in the case in relation to the issue at hand",[357] as it was "based on [D-0133's] own experience and recollection of what happened to [him] and other abductees",[358] as opposed to providing an objective assessment of the conditions within the LRA on abductees and the influence on their free will as a grown up.[359] The Chamber's main reason for not relying on D-0133's report was the "stated basis for [his] report".[360] Ongwen does not address the Chamber's reasoning but rather merely recites D-0133's report,[361] without showing how the Chamber erred. Once again, this fails to show that the Chamber improperly exercised its discretion by deciding not to rely on this evidence.

182. For these reasons, Ongwen shows no error in the Chamber's assessment of the evidence of D-0060, D-0114 and D-0133 and this argument should be rejected.

IX.B.3. Ongwen's arguments relating to the consequences of violating LRA rules should be rejected

183. Ongwen further submits that the Chamber ignored evidence indicating that there existed dire consequences for those who violated LRA rules.[362] This argument should be summarily dismissed. First, Ongwen's assertions again relate to issues resolved in the Conviction Judgment, and he should not use his Sentencing Appeal to challenge the Trial Chamber's

[354] Sentencing Judgment, para. 115.
[355] Sentencing Appeal, para. 198-199.
[356] Sentencing Judgment, para. 116.
[357] Sentencing Judgment, para. 116.
[358] Sentencing Judgment, fn. 214.
[359] D-0133 gave evidence on this topic also during the trial (see Judgment, para. 612).
[360] Sentencing Judgment, para. 116.
[361] Sentencing Appeal, para. 195-197.
[362] Sentencing Appeal, para. 202-203.

findings on conviction.[363] Second, Ongwen once again merely incorporates by reference his earlier submissions, which as discussed above, should be disallowed.[364] Third, Ongwen fails to develop and substantiate his argument, which is a further reason to dismiss it *in limine*.

184. Ongwen's arguments with regard to the consequences for violating LRA rules are also unfounded. First, he does not clearly state what evidence the Chamber allegedly failed to consider, why that evidence was relevant to the Chamber's assessment of the applicably of duress as a mitigating circumstances, or how it affected the Chamber's decision rejecting duress as a mitigating circumstance under rule 145(2)(a)(i). The Chamber's assessment and conclusions on this issue were based on a large body of diverse evidence,[365] and Ongwen fails to demonstrate how any additional—and unspecified—evidence on the consequences of violating LRA rules would have disturbed the Chamber's findings.

185. Second, and most significantly, as the Chamber found in its Conviction Judgment, the consequences for violating LRA rules were completely different for senior members of the LRA (like Ongwen) and low-level fighters. And further, Ongwen's situation in the LRA was not analogous to that of any low-level member or recent abductee—he had some autonomy within the LRA, and he himself was often the source of threats to low-level member or recent abductees.[366]

186. For these reasons, Ongwen fails to show that the Chamber disregarded evidence relevant to the consequences for violating LRA rules, or that its conclusion to reject duress as a mitigating circumstance under rule 145(2)(a)(i) was unreasonable.

IX.B.4. The Chamber correctly interpreted and applied rule 145(2)(a)(i)

187. Ongwen's argues that because he was "under a constant state of duress while in the LRA", the Chamber should have found that duress was a mitigating factor for his sentence under rule 145(2)(a)(i).[367] His unclear arguments challenging the Chamber's application of rule 145(2)(a)(i) are both legally and factually incorrect and should be rejected.

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[363] Ongwen raised this this issue in his appeal against the Conviction Judgment (*see* Appeal, paras. 576-579; *see also* Response to Conviction Appeal, paras. 351-352.)
[364] *See above* para. 176.
[365] Judgment, paras. 2581-2670.
[366] Judgment, paras. 2590-2591.
[367] Sentencing Appeal, para. 189-191, 204.

188. The Chamber correctly recognised that duress, when falling short of constituting a ground for exclusion of criminal responsibility under article 31(1)(d), may still be a mitigating circumstance pursuant to rule 145(2)(a)(i), but that its application is not automatic.[368] It also correctly held that for duress to be considered in mitigation, it was first necessary that the Chamber find that (a) the person was in a situation of threat of imminent death or imminent or continuing serious bodily harm, and (b) that the conduct constituting the crime was "caused" by that threat.[369]

189. The jurisprudence of other international criminal tribunals supports the Chamber's approach that for duress to be a mitigating factor, there must have existed a threat of imminent death or serious bodily harm, and that this threat must have had a causal effect on the convicted person's criminal conduct. The ICTY Appeals Chamber in *Erdemović* carefully analysed the application of duress as a mitigating circumstance, finding that "an accused person is less blameworthy and less deserving of the full punishment when he performs a certain prohibited act under duress. *We would use the term 'duress' in this context to mean "imminent threats to the life of an accused if he refuses to commit a crime*"".[370] Following this, the *Erdemović* Trial Chamber went on to find that the evidence revealed "the extremity of the situation faced by the accused. [T]here was a real risk that the accused would have been killed had he disobeyed the order. He voiced his feelings, but realised that he had no choice in the matter: he had to kill or be killed."[371] Similarly, the ICTR Trial Chamber in *Rutaganira* accepted duress as a mitigating circumstance after noting that both parties in the case agreed on "the real danger faced by Vincent Rutaganira or a member of his immediate family of being killed if the Accused had objected to the killings that were taking place in his secteur."[372]

190. In this case, the Chamber in its Conviction Judgment concluded that "[t]here [was] no basis in evidence to hold that Dominic Ongwen was subjected to a threat of imminent death or imminent or continuing serious bodily harm to himself or another person at the time of his conduct underlying the charged crimes."[373] Consistent with this finding, the Chamber found in the Sentencing Judgment that because "the conduct constituting the crimes […] Ongwen was convicted of was not caused by a threat of death or serious bodily harm to [him] or another

[368] Sentencing Judgment, para. 108.
[369] Sentencing Judgment, para. 109.
[370] *Erdemović* AJ, Joint Sep. Op. Judge McDonald and Judge Vohrah, para. 66 (emphasis added).
[371] *Erdemović* TJ (1998), para. 17.
[372] *Rutaganira* Trial Judgment and Sentence (2005), para. 159.
[373] Judgment, para. 2668*; see also* paras. 2669-2670.

person […] duress is not applicable in the present case as a mitigating circumstance pursuant to Rule 145(2)(a)(i)."[374]

191. Accordingly, in the absence of any factual basis establishing that Ongwen was subjected to a threat of death or serious bodily harm during the charged period; and that Ongwen's criminal conduct was in any way influenced by such a threat, the Chamber reasonably concluded that the mitigating circumstance of duress under rule 145(2)(a)(i) was not applicable. If Ongwen's argument is that duress should be available as a mitigating factor even *without* showing these factual prerequisites have been met, his argument is legally incorrect and should be rejected.

192. Finally, to the extent that Ongwen argues that his alleged "constant state of duress while in the LRA"[375] amounted to some "lesser" form of coercion, which should nevertheless be considered for mitigation under rule 145(2)(a)(i), this argument should also be rejected. First, the Chamber excluded that Ongwen was under any significant form of coercion during the charged period. In its Conviction Judgment, the Chamber expressly concluded that in spite of Ongwen's abduction and childhood experience,[376] during the charged period he was a "self-confident commander who took his own decisions on the basis of what he thought right or wrong".[377] Second, the Chamber already considered, to some extent, Ongwen's earlier experience within the LRA in mitigation of his sentence. The Chamber considered Ongwen's personal circumstances and in particular his abduction as a child and the consequences of that abduction.[378] It concluded that "Ongwen's abduction and early experience in the LRA constitute[d] specific circumstances bearing a significant relevance in the determination of the sentence".[379] Because of this experience,[380] it held that the appropriate joint sentence would not be life imprisonment, but rather imprisonment for a total of 25 years.[381]

193. In sum, Ongwen fails to show that the Chamber legally or factually erred in its application of rule 145(2)(a)(i) to the circumstances of his case. Nor does he show that it erred by not

[374] Sentencing Judgment, para. 111.
[375] Sentencing Appeal, para. 204.
[376] Judgment, 2592, 2672.
[377] Judgment, paras. 2602, 2668.
[378] Sentencing Judgment, paras. 83-84.
[379] Sentencing Judgment, para. 88; *see also* para. 87.
[380] Sentencing Judgment, para. 388.
[381] Sentencing Judgment, para. 392.

considering duress as a mitigating factor in sentencing him.

IX.C. The alleged errors do not materially affect the Sentencing Judgment

194. Ongwen argues that the Chamber's alleged failure to consider duress as a mitigating circumstance under rule 145(2)(a)(i) resulted in a disproportionately high sentence.[382] This argument should be rejected.

195. As shown above, the Chamber did not err by not relying on the evidence of D-0060, D-0114 and D-0133 or by failing to consider other relevant evidence. But even if it had, Ongwen fails to show how reliance on their evidence or on other evidence would have affected the Chamber's finding to exclude duress as a mitigating circumstance in this case. He makes no arguments on how the other alleged errors under Ground 8 materially affected the Sentencing Judgment.

196. The Chamber's finding in the Sentencing Judgment that Ongwen was not under duress at the time of the conduct underlying his crimes was based on its reasoning and findings in the Conviction Judgment. In that Judgment the Chamber relied on a large body of diverse evidence to find that Ongwen was not under threat of death or serious bodily harm when engaging in the conduct underlying the charges[383] and that instead he was a "self-confident commander who took his own decisions on the basis of what he thought right or wrong".[384] Ongwen fails to show how this conclusion would be affected by any of the errors alleged under Ground 8. Accordingly, Ongwen fails to demonstrate that the "Chamber would have rendered a decision that is substantially different from the decision that was affected by the error, if it had not made the error'."[385]

197. In conclusion, Ground 8 of his appeal should be rejected.

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[382] Sentencing Appeal, para. 204.
[383] Sentencing Appeal, para. 111; Judgment, paras. 2568-2670.
[384] Judgment, paras. 2602, 2668.
[385] *Gbagbo* Judgment on jurisdiction and stay of the proceedings, para. 44 (citing *Ntaganda* DRC Arrest Warrant AD, para. 84); *Lubanga* AJ, paras. 19-20; *Ngudjolo* AJ, paras. 20-21.

X. GROUND 10: THE CHAMBER DID NOT ERR BY REFERRING TO ONGWEN'S UNSWORN STATEMENT

X.A. Introduction

198. Under Ground 10, Ongwen argues that the Chamber erred by relying on the unsworn statement that he gave during the sentencing hearing on 15 April 2021 ("Unsworn Statement"), to reject the mitigating factor of substantially diminished mental capacity under rule 145(2)(a)(i) and to reject Ongwen's current mental health as a circumstance warranting mitigation. He claims this violated his fundamental rights under articles 67(1)(g) and (h), in particular his right to silence, and that in any event this statement was not representative of his current mental health and reflected nothing more than "a moment of clarity". However, these arguments must be rejected, because they misstate the reasoning in the Judgment, and misunderstand the applicable law.[386]

199. The Chamber did not rely solely on the Unsworn Statement to determine Ongwen's current mental health and it did not give any weight to the Unsworn Statement in determining Ongwen's joint sentence. Nor did the Chamber err in relying on the Unsworn Statement to the extent that it did. Ongwen's free and voluntary choice to make an unsworn statement waived his right to silence in that respect.

200. Ongwen's further claim that the Chamber failed to apply the proper standard of proof for mitigating factors, essentially repeating his submissions under Ground 7, should be dismissed *in limine*.[387] This is not only for the reasons already stated,[388] but for Ongwen's failure to provide any references to the Sentencing Judgment even potentially suggesting such an error.[389]

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[386] *Contra* Sentencing Appeal, paras. 205-214.
[387] *Contra* Sentencing Appeal, para. 209. Under Ground 10, Ongwen argues that the Chamber used the improper standard "for mitigating factors and personal circumstances": para. 209. However, under Ground 7—on which Ongwen's arguments of Ground 10 rely—he only refers to the Chamber's alleged error in assessing the "substantially diminished mental capacity […] as a mitigating factor": para. 155.
[388] *See above* paras. 137-169 (responding to Ground 7). *See further* Sentencing Judgment, para. 54 (correctly articulating the "balance of probabilities" as the standard applicable to assessing mitigating circumstances); *Ntaganda* AJ, para. 594 (confirming that, when a chamber correctly articulates the burden and standard of proof, it should assumed that it proceeded on the basis of a correct understanding of those concepts).
[389] *See e.g. Ntaganda* AJ, para. 48 (noting the potential for dismissal *in limine* where an appellant fails to present "cogent arguments" setting out or explaining the alleged error); *Krajišnik* AJ, para. 26 ("Submissions will be dismissed without detailed reasoning where an appellant makes factual claims or presents arguments that the Trial Chamber should have reached a particular conclusion without advancing any evidence in support. Indeed, an appellant is expected to provide the Appeals Chamber with an exact reference to the parts of the trial record invoked in support of its arguments. As a general rule, in instances where this is not done, the Appeals Chamber will summarily dismiss the alleged error or argument. Similarly, the Appeals Chamber will, as a general rule,

In any event, Ongwen fails to show how any alleged error would have materially affected the Sentencing Judgment.

X.B. The Chamber did not rely solely on the content of the Unsworn Statement to determine Ongwen's mental health, but on all the evidence

201. Ongwen is incorrect to assert that the Chamber relied on the content of the Unsworn Statement "to determine [his] overall mental state"[390] and that it supplanted "all the medical evidence given to the Chamber".[391] Ongwen's claim that he "suffers from diagnosed mental disabilities" ignores the Chamber's findings and is unsupported by the evidence.[392]

202. To the contrary, the Chamber found that "the evidence establishes clearly that at all relevant times for the charges, […] Ongwen did not suffer from a mental disease or defect", "was in full possession of his mental faculties", and consequently that "the mitigating circumstances of substantially diminished mental capacity [did] not apply".[393] This finding was based not only on the eyewitness testimony of persons who interacted with Ongwen at the time, but also extensive expert testimony from mental health professionals.

203. The Chamber then considered that Ongwen's argument concerning his "current mental health" was "based on essentially the same evidence"[394] and further noted that "none of the information available to the Chamber as to […] Ongwen's mental health at various times during his detention at the seat of the Court, or even the Defence submissions, point to anything exceptional".[395] It is clear, therefore, that the finding on Ongwen's mental health was based on a broad range of evidence—and that, even without the Unsworn Statement, this evidence considered as a whole did not support Ongwen's claim that his current mental health should be taken into account in mitigation of the sentence.

204. To support its analysis of the current state of Ongwen's mental health,[396] the Chamber

summarily dismiss undeveloped arguments and alleged errors, as well as submissions where the appellant fails to articulate the precise error committed by the Trial Chamber").
[390] *Contra* Sentencing Appeal, para. 208.
[391] *Contra* Sentencing Appeal, para. 208.
[392] *Contra* Sentencing Appeal, para. 206.
[393] Sentencing Judgment, para. 100. *See further* paras. 92-99; Judgment, paras. 2450-2580. *Contra* Sentencing Appeal, para. 214.
[394] Sentencing Judgment, para. 101. *See also* para. 103.
[395] Sentencing Judgment, para. 103.
[396] Sentencing Judgment, paras. 101-105.

referred to Ongwen's Unsworn Statement, noting that Ongwen "spoke lucidly" for a lengthy period of time; that he "sustained a structured and coherent declaration"; that he "demonstrated a great and detailed understanding of the trial"; that he avoided referring to confidential information; and that by his own admission his "treatment in the detention centre helped him".[397] It was reasonable for the Chamber to note that the manner in which Ongwen provided his Unsworn Statement, and his admission as to the beneficial effect of the treatment in the detention centre, was consistent with its finding that none of the information available to the Chamber as to Ongwen's current mental health pointed to anything exceptional.[398]

205. The Chamber's only other reference to the Unsworn Statement arose in the context of its determination of the joint sentence.[399] It noted that it could not "overlook the absence, in […] Ongwen's submissions during the hearing on sentence, of any expression of empathy for the numerous victims of the crimes—and even less of any genuine remorse—supplanted by a lucid, constant focus on himself and his own suffering eclipsing that of anyone else."[400] However, it expressly clarified that the content of the Unsworn Statement did not constitute "an aggravating factor in and of itself or an element otherwise impinging as such on the length of the prison sentence to be imposed in the present case".[401] As such, while noting the disapprobation that may attach to Ongwen's words, the Chamber did not give any weight to the Unsworn Statement in determining his joint sentence.

X.C. The Chamber was entitled to rely on the content of the Unsworn Statement

206. The Chamber's reference to the Unsworn Statement did not violate Ongwen's fair trial rights under articles 67(1)(g) and (h) of the Statute.[402]

207. First, the Chamber's limited reliance on the Unsworn Statement did not violate Ongwen's right to remain silent under article 67(1)(g). As part of the sentencing proceedings, Ongwen indicated that he "may make an unsworn statement to the Chamber" pursuant to article 67(1)(h).[403] Accordingly, the Chamber in its scheduling order for the sentencing hearing

[397] Sentencing Judgment, para. 104.
[398] Sentencing Judgment, para. 103.
[399] Sentencing Judgment, paras. 374-397.
[400] Sentencing Judgment, para. 394.
[401] Sentencing Judgment, para. 394.
[402] *Contra* Sentencing Appeal, paras. 210, 214.
[403] First Defence Evidence Request, para. 54.

allotted time for the Defence to make its submissions, "including Dominic Ongwen himself".[404] By asking to make an Unsworn Statement, Ongwen explicitly waived his right to remain silent under article 67(1)(g). For example, in *Bemba et al*., the Single Judge specifically cautioned the convicted persons who had asked to make unsworn statements that their unsworn statements constituted a waiver of their rights under article 67(1)(g), including the right to remain silent.[405]

208. Second, the Chamber's reliance on the Unsworn Statement did not violate Ongwen's right under article 67(1)(h), but rather was consistent with it. Article 67(1)(h) allows an accused to make an unsworn statement, that is, a statement made without solemn undertaking under article 69 (and thus not subject to the penalty for false testimony under article 70) and not subject to cross-examination. This follows the civil law model, which generally does not foresee the accused taking the oath as a witness.[406] Yet nothing in article 67(1)(h) prevents a chamber from relying on the content of an unsworn statement to inform its decision on the merits of a case, or from taking it into account in determining a sentence[407]—whether in the context of articles 74(2)[408] or 76(1)[409] —even if it may be afforded lesser weight than sworn testimony.[410] To the contrary, article 67(1)(h) expressly provides that an accused may make such an unsworn statement "in his or her defence". It would run counter to the accused's right under article 67(1)(h)—and indeed the purpose of such a statement—if a chamber were required, as a matter of law, to disregard its content.

209. This interpretation of article 67(1)(h) is also consistent with ICTY rule 84*bis* (Statement

[404] Sentencing Scheduling Order, p. 5.
[405] *Bemba et al*. Decision on Unsworn Statements, para. 9 ("[t]o the extent that these statements can be considered in the judgment, the [convicted persons] are reminded that such statements constitute a waiver of their Article 67(1)(g) right to not to be compelled to 'confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence'").
[406] CLICC Commentary, Article 67(1)(h), Juan Pablo Pérez-León-Acevedo and Björn Elberling; Schabas and McDermott, p. 1268, mn. 48. In some common law systems, unsworn statements are also allowed, including for the purpose of sentencing (*see e.g.* Clayton Rice, Q.C., Statements from the Dock, 18 June 2016; Zamzam Ismail, 'An Accused's Tale of Woe beneath the Glass Ceiling': A Legal Dissection, ISSN 1800-055X Vol. Iv).
[407] *See e.g. Bemba et al*. Decision on Unsworn Statements, para. 9 ("[t]o the extent that these statements can be considered in the judgment […]"); *Abu Garda* CD, paras. 55, 214 (referring to the content of Abu Garda's unsworn statement in its decision on the confirmation of charges).
[408] Article 74(2) provides that a chamber's decision on the guilt or innocence of an accused "shall be based on its evaluation of the evidence *and the entire proceedings*" (emphasis added).
[409] Article 76(1) mandates a chamber to consider for its sentencing decision "evidence presented and *submissions made* during the trial that are relevant to the sentence" (emphasis added).
[410] *Bemba* Decision on Unsworn Statement, para. 8; *Abu Garda* CD, para. 54. *Ntaganda* Conduct of Proceedings Decision, para. 19. *See als*o Schabas and McDermott, p. 1269, mn. 49; Orie, p. 1482; *contra* Zappalà (2003), p. 79.

of the Accused),[411] whose adoption was influenced by article 67(1)(h) of the Rome Statute.[412] Like an unsworn statement under article 67(1)(h), the accused's statement under ICTY Rule 84*bis* is not given under oath and is not subject to cross examination by the Prosecution. ICTY Rule 84*bis*(B) expressly states that the trial chamber shall decide on the probative value, if any, to be given to such statements. This confirms that a chamber is entitled to consider such a statement and to give it due weight. Thus, the ICTY Appeals Chamber has held that "statements made under Rule 84*bis* are a type of evidence – the probative value of which is decided by the Trial Chamber".[413] Similarly, when ICTY or ICTR trial chambers allowed accused persons to address the chamber during sentencing hearings, the content of their statements—for instance, the accused expressing remorse—was considered for the purposes of sentencing.[414]

210. In sum, Ongwen fails to show that his fair trial rights under articles 67(1)(g) and (h) were violated by the Chamber's limited references to his Unsworn Statement. Even if the Chamber had considered the contents of the Unsworn Statement more extensively or in a more substantive way, his fair trial rights would not have been violated.

X.D. The alleged errors do not materially affect the Sentencing Judgment

211. In any event, Ongwen fails to show how the alleged errors under Ground 10 would have materially affected the Sentencing Judgment.[415] This is an additional reason why this ground of appeal must be rejected.[416]

212. In particular, Ongwen's claim that the Chamber used his Unsworn Statement to increase his sentence from 20 to 25 years simply has no basis in the Sentencing Judgment.[417] Rather, the Chamber held that—because of the "extreme gravity of the numerous crimes of which Dominic Ongwen was convicted" and the existence of several aggravating circumstances[418]—

[411] Rule 84*bis* of the ICTY Rules provides: "(A) after the opening statements of the parties or, if the defence elects to defer its opening statement pursuant to Rule 84, after the opening statement of the Prosecutor, if any, the accused may, if he or she so wishes, and the Trial Chamber so decides, make a statement under the control of the Trial Chamber. The accused shall not be compelled to make a solemn declaration and shall not be examined about the content of the statement. (B) The Trial Chamber shall decide on the probative value, if any, of the statement."
[412] Zappalá (2002), p. 1352.
[413] *Prlić et al.* Rule 84*bis* Decision, para. 28. *See also* *Martić* TJ, para. 23, where the Trial Chamber considered whether the accused's Rule 84*bis* statement had any probative value, and concluded that it did not.
[414] *See e.g.* *Nikolić* SJ, paras. 45, 146, 241-242, 274; *Todorović* SJ, paras. 89-92; *Serushago* SJ, paras. 40-42.
[415] *Contra* Sentencing Appeal, paras. 205, 213.
[416] *Gbagbo* Judgment on jurisdiction and stay of the proceedings, para. 44 (citing, *Ntaganda* DRC Arrest Warrant AD, para. 84); *Lubanga* AJ, paras. 19-20; *Ngudjolo* AJ, paras. 20-21.
[417] *Contra* Sentencing Appeal, paras. 205, 213.
[418] Sentencing Judgment, para. 384.

life imprisonment "would surely [have been] in order in the present case".[419] However, the Chamber —by Majority[420]—concluded that because Ongwen was abducted and integrated into the extremely violent environment of the LRA when he was a child,[421] the appropriate joint sentence would be imprisonment for 25 years.[422]

213. Moreover, since the Unsworn Statement was made more than a decade later, it could not—and did not—have any bearing on the Chamber's assessment of Ongwen's mental health at the times material to the charged crimes, and consequently the Chamber's rejection of substantially diminished mental capacity as a mitigating factor under rule 145(2)(a)(i).[423] Nor does Ongwen show any realistic possibility that, had the Chamber not referred to the Unsworn Statement, it would have mitigated his sentence on the basis of his current mental health. To the contrary, since Ongwen relied on "essentially the same evidence" as that pertaining to his mental health at the times material to the charges,[424] the Chamber's conclusion would have been no different. Furthermore, as the Chamber observed, none of the information available as to Ongwen's mental health at various times during his detention at the seat of the Court—or even the Defence submissions—"point[ed] to anything exceptional" about Ongwen's current mental health.[425] This did not rise to the level required for mitigation of sentence.[426] Accordingly, Ongwen fails to show the Chamber's references to the Unsworn Statement materially affected its conclusions regarding Ongwen's mental health at the time material to the charged crimes or during the proceedings.

[419] Sentencing Judgment, paras. 383-386.
[420] Judge Pangalangan partly dissented from this conclusion. While he agreed with the majority's finding on the individual sentences, he would have imposed a joint sentence of 30 years' imprisonment: Partly Dis. Op. Judge Pangalangan, paras. 1, 8.
[421] Sentencing Judgment, para. 388.
[422] Sentencing Judgment, para. 392.
[423] Sentencing Judgment, para. 100; Judgment, paras. 2450-2580. The Chamber correctly held that substantially diminished mental capacity as a mitigating circumstance under rule 145(2)(a)(i) "must be determined by reference to the time of the relevant conduct" (Sentencing Judgment, para. 92).
[424] Sentencing Judgment, para. 101.
[425] Sentencing Judgment, para. 103.
[426] Sentencing Judgment, para. 103 (noting that the poor health of a convicted person at the time of sentencing is generally a matter for the enforcement of the imposed sentence rather than a factor relevant to mitigate the sentence, and that it may only be taken into account as such "in extreme and exceptional cases" such as "a very serious health condition or perhaps terminal disease").

XI. GROUND 11: THE CHAMBER DID NOT RELY ON IMPERMISSIBLE AGGRAVATING CIRCUMSTANCES WHEN DETERMINING THE JOINT SENTENCE

XI.A. Introduction

214. Under Ground 11, Ongwen argues that the Chamber erroneously double-counted impermissible aggravating factors to increase his sentence from 20 to 25 years.[427] In particular, Ongwen alleges that the Chamber considered: (i) the "accumulation of aggravating factors" of all the individual sentences, meaning it double-counted aggravating factors that overlapped between the individual sentences;[428] (ii) aggravating factors regarding modes of liability and acts or conduct not attributable to Ongwen;[429] and (iii) other aggravating factors relating to findings relied upon in the Conviction Judgment.[430] Ongwen claims that the Chamber should have identified *new* aggravating circumstances to justify the sentence of 25 years, and that it failed to provide a reasoned statement to support its assessment.[431] As a result, Ongwen claims the Chamber abused its discretion.[432]

215. Ongwen's arguments should be rejected as they are premised on a mischaracterisation of the Chamber's reasoning and a misunderstanding of the factors relevant to determining a joint sentence under the Court's two-step sentencing regime.[433] Moreover, Ongwen ignores a large part of the Chamber's reasoning in which it carefully avoided any overlap between the factors underlying the individual sentences. The Chamber did not "accumulate" all aggravating factors in the individual sentences. Rather, it appropriately considered the distinct conduct underlying the crimes to arrive at a joint sentence that was proportionate to the gravity of the crimes and that reflected his culpability for the crimes for which he was convicted.[434]

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[427] Sentencing Appeal, paras. 215-235.
[428] Sentencing Appeal, paras. 219, 222-223, 229-230, 233.
[429] Sentencing Appeal, paras. 225-226.
[430] Sentencing Appeal, para. 231.
[431] Sentencing Appeal, paras. 219, 224, 229, 232.
[432] Sentencing Appeal, para. 222.
[433] According to the process prescribed under article 78(3) of the Statute, when a person is convicted of more than one crime, the trial chamber is required by law to first impose an individual sentence for each crime that fully reflects the convicted person's culpability for that crime, which necessarily entails an assessment of all the circumstances relevant to the particular crime; these individual sentences then serve to inform the trial chambers calculation of the joint sentence, which is the *actual* penalty imposed on the convicted person: *Ntaganda* SAJ, paras. 129, 133.
[434] *Bemba et al.* SAJ, para. 113 ("[…] the sentence imposed on a convicted person for crimes and offences under the jurisdiction of the court must be proportionate to the crime or offence and reflect the culpability of the convicted person").

216. Ongwen also fails to show how the alleged errors under Ground 11 materially affected the Sentencing Judgment. Ground 11 should therefore be rejected.

XI.B. The Chamber did not err in its consideration of aggravating circumstances in determining the joint sentence

XI.B.1. The Chamber took into account reasonable and appropriate factors in determining the joint sentence

217. Ongwen incorrectly claims that the Chamber failed to identify, consider and balance the relevant factors when determining the joint sentence.[435] He claims that the Chamber relied upon the "*extent of accumulation of aggravating circumstances*" and double-counted factors from the individual sentences in determining the joint sentence.[436] Yet Ongwen ignores a large part of the Chamber's reasoning and mischaracterises aspects of it.

218. First, the Chamber comprehensively set out the factors it reasonably and appropriately relied upon in arriving at the joint sentence of 25 years' imprisonment. As the Chamber correctly observed, it was required to determine an individual sentence that fully reflected Ongwen's culpability for the particular crime, entailing an assessment of *all* the circumstances relevant to a particular crime.[437] This was merely the first step in the Chamber's reasoning establishing some of the factors relevant to the calculation of the joint sentence.[438] The Chamber set out its analysis in accordance with this first step to arrive at the individual sentence for each crime[439] before undertaking the second step of determining the joint sentence—the *actual* penalty to be imposed on Ongwen.

219. The Chamber's assessment of the joint sentence took into account all relevant circumstances underlying the crimes and Ongwen's individual circumstances, adjusting for the factual overlap between two or more crimes to ensure that Ongwen was not actually punished

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[435] Sentencing Appeal, paras. 228-230, 233.
[436] Sentencing Appeal, para. 233.
[437] Sentencing Judgment, para. 59; *see* *Ntaganda* SAJ, para. 129; *Bemba et al.* SAJ, para. 238.
[438] Article 78(3) of the Statute.
[439] Sentencing Judgment, paras. 61-88 (examining factors and circumstances generally applicable to all crimes), 135-137 (setting out the statutory framework for its analysis), 138-177 (re crimes committed in the context of the attack on Pajule IDP camp), 178-215 (re crimes committed in the context of the attack on Odek IDP camp), 216-250 (re crimes committed in the context of the attack on Lukodi IDP camp), 251-283 (re crimes committed in the context of the attack on Abok IDP camp), 284-324 (re SGBC directly perpetrated by Ongwen), 325-355 (re SGBC not directly perpetrated by Ongwen), 356-373 (re the crime of conscription of children under the age of 15 and their use to participate actively in hostilities).

beyond his real culpability.[440] Thus, it took into account, *inter alia*:

- the extreme gravity of the numerous crimes of which Ongwen was convicted "especially when considered jointly", and their tremendous impact on the victims;[441]

- the degree of Ongwen's culpable conduct for these crimes, noting that he fully intended the crimes and played a key role in their commission; that he personally took part in certain crimes; that his involvement in SGBC and the abduction and integration of children under the age of 15 was "striking"; and that the crimes he committed were all part of an even larger pattern of violence of which he was, wilfully, an essential part and which he significantly sustained and contributed to perpetuating;[442]

- the aggravating circumstances, namely, the very large extent of cumulative victimisation of the crimes; that many victims were targeted for motives including discrimination; that many were particularly defenceless; and that these crimes offended distinct protected interests of great importance;[443]

- Ongwen's unique personal history,[444] determining that this militated *against* imposing a life sentence;[445] and

- that some of the 61 crimes were based on the same underlying conduct and/or consequences.[446]

220. In this context, Ongwen's claim that the Chamber determined the joint sentence solely on the basis of accumulated aggravating circumstances is incorrect.[447] Ongwen simply fails to acknowledge or engage with the Chamber's comprehensive assessment of factors.

221. Second, Ongwen's allegation that the Chamber impermissibly relied upon the "*extent of accumulation of aggravating circumstances*" to double-count factors from the individual

[440] Sentencing Judgment, paras. 59, 374-397.
[441] Sentencing Judgment, para. 388.
[442] Sentencing Judgment, paras. 385, 393.
[443] Sentencing Judgment, paras. 380, 384, 393.
[444] *Contra* Sentencing Appeal, para. 225.
[445] Sentencing Judgment, paras. 386-391. *See also* para. 88 (where the Chamber accepted the Prosecution's proposal that, owing to Ongwen's individual circumstances, a one-third reduction to the individual sentences was generally warranted).
[446] Sentencing Judgment, paras. 375-382, 393. *See below* paras. 221-224.
[447] *Contra* Sentencing Appeal, para. 233.

sentences in determining the joint sentence also mischaracterises the Chamber's reasoning.[448] The Chamber never made any such statement, nor did it apply such a formula. To the contrary, precisely to avoid the overlap of factors relevant to the joint sentence, the Chamber stated that it would "consider to what extent the criminal conduct underlying each of the crimes—and corresponding blameworthiness as expressed in the related individual sentences—overlap in the concrete circumstances, or must be (separately) reflected in the joint sentence".[449]

222. That the Chamber was alert to the need to avoid the possible overlap in the underlying conduct between different crimes is evident throughout its analysis.[450] Indeed, it identified five particular aspects of overlap between the individual sentences: (i) the acts and conduct underlying concurrent war crimes and crimes against humanity;[451] (ii) the acts and conduct underlying the crimes of attacks against the civilian population and the separate crimes committed in the context of those attacks;[452] (iii) the acts, conduct and discriminatory dimension underlying the crimes of persecution and the specific crimes through which the persecution was committed (where the discriminatory dimension was found to be an aggravating circumstance);[453] (iv) the conduct underlying the crimes of torture and enslavement committed in the four attacks;[454] and (v) certain criminal conduct and elements underlying the rapes and sexual slavery, and sexual slavery and torture.[455]

223. Ultimately, the Chamber found that these instances of overlap did not weigh noticeably or have a significant bearing in its determination of the joint sentence, given: (i) the "strikingly large number of convictions, holding entirely different factual basis";[456] (ii) the large number of crimes which were each designed to safeguard wholly distinct protected interests that did not overlap with, absorb or consume any other crimes (naming as examples, murder, sexual slavery, the conscription of children under the age of 15 years and their use to participate actively in hostilities, destruction of property and pillaging);[457] and (iii) that, ultimately, Ongwen was convicted for a large number of crimes which he committed by way of a "number

[448] Sentencing Appeal, para. 233.
[449] Sentencing Judgment, paras. 374-397, *especially* 375.
[450] *Contra* Sentencing Appeal, para. 223.
[451] Sentencing Judgment, para. 376.
[452] Sentencing Judgment, para. 377.
[453] Sentencing Judgment, para. 377.
[454] Sentencing Judgment, para. 377.
[455] Sentencing Judgment, para. 378.
[456] Sentencing Judgment, para. 379.
[457] Sentencing Judgment, para. 380.

of *distinguishable criminal conducts* […], each carrying its own distinct blameworthiness not otherwise absorbed within any other crime and corresponding individual sentence(s)".[458]

224. Thus, contrary to Ongwen's claim, the Chamber did not base its assessment of the joint sentence by looking at the "accumulation of aggravating factors" and double-counting aggravating factors. Rather, it assessed the factors underlying the individual sentences in their totality to *avoid* double-counting the same factors. And in any case, it found the extent of overlap between the factors to be negligible.

225. Finally, in light of the Chamber's comprehensive reasoning described above, Ongwen's claim that the Chamber imposed a joint sentence without a reasonably logical basis or without articulating a reasoned opinion or statement on the criteria it relied upon[459] is unfounded and should be rejected.

XI.B.2. Ongwen's interpretation of the two-step sentencing process is incorrect and unworkable

226. Ongwen asserts that the Chamber should have identified *new* aggravating circumstances to justify arriving at a joint sentence of 25 years instead of relying on an accumulation of those it had already determined for the individual sentences.[460] Aside from mischaracterising the Chamber's assessment as demonstrated above, Ongwen provides no authority to support his suggested approach to determining the joint sentence. Nor could he, as it would be untenable under the Court's sentencing framework.

227. First, under the Court's sentencing framework, aggravating circumstances must relate to the crime for which a person is convicted and are limited to the circumstances enumerated in rule 145(2)(c) of the Rules. Accordingly, there must be a sufficiently proximate link between the factor being considered as aggravating and the offences that formed the basis of the conviction.[461] Moreover, and as Ongwen acknowledges,[462] a trial chamber has no discretion to exclude relevant factors from its assessment of an individual sentence. Indeed, as the Appeals Chamber held, "if the circumstances relevant to more than one individual sentence were to be

[458] Sentencing Judgment, para. 381.
[459] Sentencing Appeal, paras. 219, 224, 229.
[460] Sentencing Appeal, para. 232.
[461] *Ntaganda* SAJ, para. 101; *Bemba et al.* SAJ, para. 115.
[462] Sentencing Appeal, para. 228.

excluded from the calculation of any of those individual sentences, the true culpability of a convicted person for a particular crime would be unclear".[463] Thus the Chamber was required to take into account *all* relevant aggravating circumstances when determining the individual sentence for each crime. There could be no *new* aggravating circumstances arising that would be relevant to the joint sentence that were distinct from or not already considered with the factors relevant to the individual sentences.

228. Second, the possibility of a joint sentence being higher than the highest individual sentence is explicitly foreseen in article 78(3) of the Statute, thus recognising that a person who is convicted of many crimes may be more culpable, and therefore penalised more severely, than a person who is convicted of just one crime.[464] In this context, the factors relevant to a chamber's assessment of the joint sentence, may include—where relevant—factors such as the number and character of the individual sentences,[465] the number of distinct protected interests that were violated,[466] the total extent of victimisation,[467] the number of aggravating circumstances,[468] the degree of relation or overlap between the underlying factors and the different blameworthiness of the distinct criminal conducts,[469] the period of time over which all the crimes were committed,[470] and the scale of the crimes in their totality,[471] and the convicted person's overall culpability.[472] The Chamber reasonably and correctly took these factors into account in this case. In light of these factors, the Chamber was therefore not required—nor would it have been appropriate—to identify any new aggravating factors to warrant the joint sentence of 25 years' imprisonment.[473]

XI.B.3. The Chamber did not err in considering findings from the Conviction Judgment to assess the gravity of the crimes or to find aggravating circumstances

229. Ongwen's claim that the Chamber failed to exclude impermissible aggravating factors

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[463] *Ntaganda* SAJ, para. 130.
[464] *See* *Čelebići* AJ, para. 771 ("[…] a person who is convicted of many crimes should generally receive a higher sentence than a person convicted of only one of those crimes"); *Sesay et al.* TJ, para. 18 ("[…] it is universally recognised and accepted that a person who has been convicted of many crimes should generally receive a higher sentence than a person convicted of only one of those crimes").
[465] *See e.g.* Sentencing Judgment, para. 381; *Ntaganda* SJ, para. 249.
[466] *See e.g.* Sentencing Judgment, para. 393.
[467] *See e.g.* Sentencing Judgment, para. 384.
[468] *See e.g.* Sentencing Judgment, para. 384; *Bemba et al.* SJ, para. 193.
[469] *See e.g.* Sentencing Judgment, paras. 376-379, 393; *Bemba et al.* SJ, para. 146.
[470] *See e.g.* Sentencing Judgment, para. 393.
[471] *See e.g.* Sentencing Judgment, para. 393.
[472] *See e.g.* Sentencing Judgment, paras. 385, 393; *Ntaganda* SJ, para. 249.
[473] *Contra* Sentencing Appeal, paras. 219, 228-230, 233.

such as modes of liability and acts and conduct not committed or attributable to Ongwen—in particular the fact that Ongwen was found to have ordered crimes to be committed[474]—is legally incorrect.

230. First, the Conviction Judgment findings that Ongwen personally ordered certain acts/crimes, which Ongwen refers to in this ground of appeal,[475] were factors that the Chamber took into account as enhancing Ongwen's degree of participation and intent for the crimes,[476] and not specifically as 'aggravating circumstances'.[477] However, regardless of how they enhanced the Chamber's assessment of gravity, the Chamber did not err in taking these factors into account. *All* circumstances of Ongwen's culpable conduct were relevant to assessing the gravity of the crimes he committed.[478] Moreover, while, as the Chamber correctly recalled, "a legal element of the crime or mode of liability cannot be considered as an aggravating circumstance,"[479] it also properly observed that this limitation "applies only to such legal elements—or the material factual findings underpinning them—and does not extend to those non-essential factual findings which only served to prove the legal elements of the crimes of which the person was convicted, or the relevant mode of liability, and may thus be considered aggravating factors".[480]

231. In this context, Ongwen's orders to commit certain acts were "non-essential factual finding[s] which only served to prove the […] relevant mode of liability" for which Ongwen was convicted (*i.e.* liability under article 25(3)(a)), and therefore could be counted as factors enhancing the gravity of his sentence.[481] Moreover, as the Chamber correctly recalled, it is possible to take into account in sentencing factors relating to facts that have been established,

[474] Sentencing Appeal, paras. 225-226, 231.
[475] Sentencing Appeal, paras. 226 (fn. 400), 231 (fn. 406).
[476] *See e.g.* Sentencing Judgment, paras. 167 (count 8), 171 (count 9), 181 (regarding the crimes committed in the attack on Odek IDP camp generally), 185 (count 11), 188 (counts 12 & 13), 203 (count 21), 240 (count 34), 253 (regarding the crimes committed in the attack on Abok IDP camp generally), 275 (count 47), 296 (counts 51 & 52), 328 (regarding the SGBC not directly perpetrated by Ongwen), 372 (counts 69 & 70).
[477] *Contra* Sentencing Appeal, paras. 225-226, 231.
[478] Rule 145(1)(c) of the RPE; *Al Mahdi* SJ, para. 76.
[479] Sentencing Judgment, para. 53.
[480] Sentencing Judgment, para. 53. *See also Ntaganda* SAJ, para. 123; *Bemba et al.* SAJ, para. 129. *See further Nzabonimana* AJ, paras. 462, 465 (where the Appeals Chamber rejected the convicted person's argument that the Trial Chamber erred in taking into account the number of victims for one offence as an aggravating circumstance while also relying upon that fact in satisfaction of one of the elements of the crime of extermination as a crime against humanity. As the number of victims exceeded that required for extermination, it did not err in taking the number of victims into consideration as an aggravating circumstance).
[481] Sentencing Judgment, para. 53.

but for which no conviction was entered (*i.e.* ordering, in this particular instance).[482] What matters is that the facts were proved beyond reasonable doubt, that they were foreseeable to Ongwen, and that Ongwen was on notice of them; in this case, Ongwen received sufficient notice through the findings established in the Trial Judgment.[483]

232. Second, other trial chambers of this court have taken into account such findings when assessing the gravity of crimes. In *Ntaganda*, the Trial Chamber found it relevant to the gravity of the crime of murder that Ntaganda—who was convicted of the crime as an indirect co-perpetrator—had ordered attacks on certain occasions in which heavy weaponry was used against civilians.[484] Similarly in *Al Mahdi*, Trial Chamber VIII took into account that, in addition to committing the crime of intentionally attacking protected objects jointly with others, Al Mahdi organised the logistics of the attack, oversaw the operation, supervised its execution, decided the order in which sites should be destroyed, collected and distributed the necessary tools, provided logistical and moral support, personally participated in the destruction of some sites and wrote a sermon that was read before the attack—all notwithstanding that he was not convicted for ordering, soliciting or inducing the crime.[485]

XI.B.4. The Chamber did not err in its balancing of the relevant factors according to the requisite standard of proof

233. Ongwen's claim that the Chamber erred in failing to "balance relevant factors, individual circumstances and mitigating factors pursuant to the applicable evidentiary standard of "balance of probabilities""[486] is undeveloped and does not identify any finding to illustrate the alleged error. It should therefore be dismissed *in limine*. In any event, as demonstrated above, the Chamber reasonably identified and balanced all relevant factors.[487] Moreover it relied on findings that were established to the requisite standard of proof.[488]

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[482] *Contra* Sentencing Appeal, para. 226. *See* Sentencing Judgment, para. 58, citing *Bemba et al.* SAJ, paras. 5, 114-116; *Ntaganda* SAJ, paras. 100, 104.
[483] *Bemba et al.* SAJ, para. 116 ("If a trial chamber relies upon facts in aggravation that were established in its decision on conviction under article 74 of the Statute, there is, barring exceptional circumstances, also no further notice required to the convicted person as these facts clearly form part of the context of the conviction"); *Ntaganda* SAJ, para. 105.
[484] *Ntaganda* SJ, paras. 54-55, 61, 64. This finding was not disturbed on appeal.
[485] *Al Mahdi* SJ, paras. 83-85.
[486] Sentencing Appeal, para. 220.
[487] *See above* paras. 217-225.
[488] Sentencing Judgment, paras. 53 (stating that it would assess whether aggravating circumstances were established beyond reasonable doubt), 54 (stating that it would assess whether mitigating circumstances were established on the balance of probabilities).

234. In sum, Ongwen fails to show any error in the Sentencing Judgment. Ground 11 should therefore be rejected.

XI.C. The alleged errors do not materially affect the Sentencing Judgment

235. Ongwen fails to show how the alleged errors materially affected the Sentencing Judgment.[489] As demonstrated above, the Chamber correctly applied the two-step process to determining the joint sentence, taking into account all relevant factors and being attentive to avoiding any overlap between factors. In any case, the Chamber found that the overlapping factors between the individual sentences "did not weigh noticeably" on the determination of the joint sentence, and that Ongwen was instead "convicted for a large number of crimes which he committed by way of a number of distinguishable criminal conducts […] each carrying its own distinct blameworthiness not otherwise absorbed within any other crime and corresponding individual sentence[s]".[490] It further clarified that "even if, *ad absurdum*, the Chamber, in its consideration of the joint sentence, were to exclude altogether the individual sentences for any crime having a factual basis even partially overlapping with that of any other crime […] this would have [had] no practical impact given the circumstances of the present case".[491]

236. In this context, even if the Chamber is found *arguendo* to have erroneously double-counted the same underlying factors or aggravating circumstances in its determination of the joint sentence—a claim which should be rejected for the reasons set out above—such double-counting would not have impacted on the overall final sentence.

XII. GROUND 12: THE CHAMBER DID NOT ERR IN ITS ASSESSMENT OF AGGRAVATING CIRCUMSTANCES IN THE INDIVIDUAL SENTENCES

XII.A. Introduction

237. Under his final ground of appeal, Ongwen alleges that the Chamber violated the prohibition on double-counting by considering factors which were necessary to prove convictions, and/or by considering factors it had already taken into account in its gravity

[489] *Contra* Sentencing Appeal, paras. 234-235.
[490] Sentencing Judgment, para. 381.
[491] Sentencing Judgment, para. 382 (fn. 691).

assessment of the crimes as aggravating circumstances. Ongwen alleges that the error specifically concerns: discriminatory motives, the multiplicity of victims, the vulnerability of children conscripted by the LRA, and elements essential to the mode of liability for which Ongwen was convicted.[492] These arguments should be rejected. Ongwen misunderstands the Chamber's reasoning in determining the individual sentences and takes the Chamber's findings out of context. To the extent Ongwen claims that the Chamber relied on elements essential to the mode of liability for which Ongwen was convicted to aggravate his sentence, his arguments are legally and factually incorrect.

238. Ongwen also fails to show how any alleged error would have materially affected the Sentencing Judgment. Ground 12 should be rejected.

XII.B. The Chamber did not err in its determination of aggravating circumstances in the individual sentences

XII.B.1. The Chamber did not double-count discriminatory intent

239. First, Ongwen alleges that the Chamber erroneously double-counted his discriminatory intent for crimes committed in the attacks on the four IDP camps as an aggravating factor in relation to 37 individual counts *and* as a factor informing the gravity of the crimes.[493] Ongwen misreads the Sentencing Judgment and fails to show any error in the Chamber's reasoning.

240. At the outset, the Chamber correctly held that it is not determinative whether it found a particular factor relevant to enhancing the gravity of a crime, or as being an aggravating circumstance, provided that it did not consider the same factor more than once for the purpose of determining the individual sentences for each crime.[494] As the Chamber stated, logically, instances of factual overlap in underlying conduct and/or consequence between different crimes would result in corresponding overlap in the related factors relevant to the gravity of the individual crimes and their aggravating circumstances.[495] Given this potential overlap, what is important, as the Appeals Chamber has held, 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

[492] Sentencing Appeal, para. 238.
[493] Sentencing Appeal, para. 242 (citing counts 1-5, 8-9, 11-17, 20-22, 24-30, 33-35, 27-43, 46-48).
[494] Sentencing Judgment, para. 56.
[495] Sentencing Judgment, para. 377.

relied upon more than once".[496]

241. In this context, the instances of overlap that Ongwen highlights regarding discriminatory motive do not demonstrate any double-counting by the Chamber.[497] While the Chamber stated that the discriminatory motive was a common feature of the crimes committed in the attacks on the four IDP camps which "inform[ed] the Chamber's consideration of the gravity of the crimes",[498] the Chamber did not actually attribute any weight to this factor in terms of gravity. It merely introduced this factor in its general introductory description of each attack—indeed, the Chamber made no actual findings on gravity in any of these introductory descriptions.[499] Rather, it was only later when analysing each crime under each attack that the Chamber explicitly conducted its *concrete* gravity analysis.[500] In those analyses, the Chamber cited back to the discriminatory motive that it identified in the introductory description and attributed it as an aggravating circumstance for each crime.[501] Thus, the Chamber only took into account the concrete gravity of the discriminatory motive once for each sentence.

242. Second, Ongwen alleges that the Chamber also impermissibly double-counted discriminatory intent because it had already been found to be an essential element of the common plan for the attacks on the Pajule and Odek IDP camps.[502] Ongwen's characterisation is factually and legally incorrect. While the discriminatory element of the common plan was a factual finding relevant to the Chamber's finding in the Conviction Judgment that the attacks on the Pajule and Odek IDP camps took place pursuant to an agreement involving Ongwen and

[496] Sentencing Judgment, para. 55, citing *Bemba et al.* SAJ, para. 4; *Lubanga* SAJ, paras. 61-65.
[497] *Contra* Sentencing Appeal, paras. 241-242.
[498] Sentencing Judgment, paras. 145, 182, 220, 255.
[499] *See generally* Sentencing Judgment, paras. 139-146 (common features of the crimes committed in the attack on Pajule IDP camp); 179-183 (common features of the crimes committed in the attack on Odek IDP camp); 217-221 (common features of the crimes committed in the attack on Lukodi IDP camp); 252-256 (common features of the crimes committed in the attack on Abok IDP camp).
[500] *See e.g.* Sentencing Judgment, paras. 150-152 (concrete gravity analysis for count 1), 153-156 (concrete gravity analysis for counts 2 and 3), 157-161 (concrete gravity analysis for counts 4 and 5).
[501] Sentencing Judgment, paras. 152 (fn. 276), 156 (fn. 283), 161 (fn. 294), 168 (fn. 319), 173 (fn. 328) (each citing back to paragraph 145 of the Sentencing Judgment where the Chamber stated that discriminatory motive was a feature common to all crimes committed in the attack on the Pajule IDP camp); 186 (fn. 347), 191 (fn. 365), 194 (fn. 369), 196 (fn. 374), 200 (fn. 384), 205 (fn. 394), 211 (fn. 400) (each citing back to paragraph 182 of the Sentencing Judgment where the Chamber stated that discriminatory motive was a feature common to all crimes committed in the attack on the Odek IDP camp); 224 (fn. 417), 229 (fn. 430), 232 (fn. 435), 234 (fn. 445), 237 (fn. 452), 241 (fn. 461), 246 (fn. 470) (each citing back to paragraph 220 of the Sentencing Judgment where the Chamber stated that discriminatory motive was a feature common to all crimes committed in the attack on the Lukodi IDP camp); 260 (fn. 488), 265 (fn. 497), 267 (fn. 501), 269 (506), 272 (fn. 514), 276 (fn. 522), 279 (fn. 528) (each citing back to paragraph 255 of the Sentencing Judgment where the Chamber stated that discriminatory motive was a feature common to all crimes committed in the attack on the Abok IDP camp).
[502] Sentencing Appeal, paras. 243-244, citing Judgment, paras. 2852, 2910.

his co-perpetrators, it was not an *essential* factual finding that served to prove the legal elements of article 25(3)(a) liability.[503] Accordingly, for the same reasons set out in response to Ground 11 of the Sentencing Appeal,[504] the Chamber was not precluded from considering the discriminatory motive as a factor relevant either to gravity or as an aggravating circumstance.[505]

243. Ongwen therefore fails to demonstrate that the discriminatory motive was double-counted, let alone counted three times.[506]

XII.B.2. The Chamber did not double-count the high number of victims as a factor relevant to the gravity of the crimes and as an aggravating circumstance

244. Unlike previous trial chambers which have factored in the number of victims in their gravity assessment of the crimes,[507] the Chamber in this case qualified this factor as an aggravating circumstance pursuant to rule 145(2)(b)(iv). The Chamber did not err in doing so; it was a matter for its discretion as to whether to take the number of victims into account under its gravity assessment or as an aggravating circumstance,[508] provided that it did not consider the same factor more than once. However, Ongwen argues that the Chamber erroneously counted the high number of victims as a factor relevant to the gravity of the crimes of murder, attempted murder, torture and enslavement, while *also* counting the 'multiplicity of victims' as an aggravating factor for those crimes, resulting in heavier sentences for 24 counts.[509] Ongwen again takes the relevant findings out of context and mischaracterises the Chamber's analysis.

XII.B.2.a. The Chamber did not double-count the number of victims of murder

245. The Chamber correctly avoided double-counting the number of victims when determining the individual sentences for the counts of murder.[510] Specifically, after the Chamber first stated

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[503] Sentencing Judgment, para. 53, *citing* *Bemba et al.* SAJ, para. 128.
[504] *See above* paras. 229-232.
[505] *Contra* Sentencing Appeal, para. 244.
[506] Sentencing Appeal, paras. 243-244.
[507] *See e.g.* *Lubanga* SJ, paras. 45-50 (finding in its gravity assessment that the scale of the use of children to actively participate in hostilities was "widespread"); *Katanga* SJ, para. 47 (estimating as part of its gravity assessment that the number of victims killed was at least 30); *Al Mahdi* SJ, para. 78 (finding as part of its gravity analysis that 10 sites were destroyed); *Ntaganda* SJ, para. 40 (setting out the number of victims of murder as part of its gravity analysis for that crime).
[508] *See above* para. 240.
[509] Sentencing Appeal, paras. 245, 250. While Ongwen cites in footnote 425 to paragraphs 145, 182, 220, 255 and 377 of the Sentencing Judgment, these paragraphs refer only to discriminatory motives, as discussed in the previous topic, and do not refer to the multiplicity of victims.
[510] *Contra* Sentencing Appeal, para. 246, *citing* Sentencing Judgment, paras. 154, 188, 192, 226, 230, 262, 266.

that the concrete gravity of murder was very high, it listed a number of factors relevant to the crime, including the specific number of victims for each count. It then found that the criteria under rule 145(2)(b)(iv) were met whenever there was a multiplicity of victims constituting an aggravating circumstance.[511] While it would have been clearer, and preferable, for the Chamber to have avoided referring to victim numbers both in its assessment of concrete gravity and in its decision to characterise it as an aggravating circumstance, the Chamber's approach had no actual effect on the individual sentence. This is because when it finally weighed and balanced the factors relevant to each crime, it specifically referred to the number of victims *once, i.e.* as an aggravating circumstance.[512]

XII.B.2.b. The Chamber did not double-count the number of victims of torture

246. The Chamber similarly avoided double-counting in its determination of the individual sentences for the counts of torture committed in the attacks on the Pajule and Odek IDP camps.[513] The Chamber noted that in the concrete circumstances of the case, the gravity of the crime was very high, and recalled, *inter alia*, the large number of victims.[514] The Chamber then went on to "qualify", or label, the number of victims as an aggravating circumstance. In its final weighing and balancing of the factors in determining the individual sentence, it correctly only referred to the number of victims once.[515]

XII.B.2.c. The Chamber did not double-count the number of victims of enslavement, or if it did, this had no impact on the individual sentence

247. Ongwen alleges the Chamber double-counted the number of victims in its individual sentences for the counts of enslavement.[516] While the Chamber clearly distinguished the number of victims as an aggravating factor (and therefore only counted the number of victims

[511] Sentencing Judgment, paras. 154 (counts 2 & 3, stating, [I]n the concrete circumstances of the case, the Chamber considers the gravity of the crimes of murder under Counts 2 and 3 to be very high. As concerns the extent of victimization, the Chamber found that in the course of the attack on Pajule IDP camp, LRA fighters killed at least four civilians […]. The aggravating circumstance of multiplicity of victims is therefore established). Similarly, *see* paras. 188 (counts 12 & 13), 192-193 (counts 14 & 15), 226 (counts 25 & 26), 230 (counts 27 & 28), 262 (counts 38 & 39), 266 (counts 40 & 41).
[512] Sentencing Judgment, paras. 156 (counts 2 & 3), 191 (counts 12 & 13), 194 (counts 14 & 15), 226 (counts 25 & 26), 229 (counts 27 & 28), 265 (counts 38 & 39), 267 (counts 40 & 41).
[513] *Contra* Sentencing Appeal, para. 248, citing Sentencing Judgment, paras. 158-159, 161 (counts 4 & 5), 195-196 (counts 16 & 17).
[514] Sentencing Judgment, paras. 161 (counts 4 & 5), 196 (counts 16 & 17).
[515] Sentencing Judgment, paras. 161 (counts 4 & 5), 196 (counts 16 & 17).
[516] Sentencing Appeal, para. 249, citing Sentencing Judgment, paras. 163-164, 168 (count 8), 197, 199-200 (count 20), 235-237 (count 33), 270-272 (count 46).

once in its weighing and balancing of the factors) in relation to counts 8[517] and 20,[518] its findings in relation to counts 33 and 46 are more ambiguous. In those counts, the Chamber stated that the concrete gravity of the crime was high "because" of, *inter alia*, the number of victims involved—indicating that the number of victims was already factored into the Chamber's "high" gravity assessment of the crime.[519] It then went on to qualify the multiplicity of victims as an aggravating circumstance,[520] and took into account the gravity of the crime as well as the multiplicity of victims as an aggravating circumstance when weighing and balancing the relevant factors.[521]

248. However, that the Chamber did not double-count is shown by the fact that the Chamber demonstrated repeatedly in the Sentencing Judgment that it understood the legal prohibition on double counting by correctly outlining the prohibition in its reasoning, reiterating that some factors relevant to gravity and to aggravating circumstances are not neatly distinguishable and may reasonably be considered under more than one category, provided the same factor is not relied upon more than once.[522]

249. Moreover, as explained below, even if *arguendo* the Chamber did impermissibly double-count the number of victims in this instance, Ongwen has not demonstrated that this had a material impact on the calculation of the individual sentences for these counts.[523]

250. Ongwen's claims that the Chamber double-counted the number of victims to impose a heavier sentence on him should therefore be rejected.[524]

[517] Sentencing Judgment, paras. 163-164 (stating that in the concrete circumstances, the concrete gravity of the crime of enslavement was high; hundreds of civilians were abducted and enslaved; the large number of victims was particularly striking and must thus be qualified as an aggravating circumstance), 168 (weighing and balancing all the relevant factors, expressly taking into account the multiplicity of victims only once).
[518] Sentencing Judgment, paras. 197 (stating that in the concrete circumstances of the case, the concrete gravity of the crime was high; the LRA abducted at least 40 civilians), 199-200 (finding the multiplicity of victims established as an aggravating circumstance; and weighing and balancing all relevant factors, referring only once to the multiplicity of victims).
[519] Sentencing Judgment, paras. 235 (count 33), 270 (count 46).
[520] Sentencing Judgment, paras. 236 (count 33), 271 (count 46).
[521] Sentencing Judgment, paras. 237 (count 33), 272 (count 46).
[522] Sentencing Judgment, para. 135; *see also* paras. 59, 379, 382, 393 (in the context of determining the joint sentence).
[523] *See below* para. 259.
[524] Sentencing Appeal, para. 247-249.

XII.B.3. The Chamber reasonably took into account the particular defencelessness of very young children recruited into the LRA as an aggravating factor

251. Ongwen alleges that the vulnerability of victims of the crime of the conscription of children under the age of 15 and their use to participate in hostilities (counts 69 and 70) was an inherent part of the gravity of the crime, and thus should not have been considered as an aggravating factor.[525] Specifically, Ongwen argues that the Chamber erred in considering that the very young age of the conscripted children made them additionally or particularly vulnerable and finding that it thus constituting an aggravating factor.[526] Ongwen fails to show any error and his argument should be rejected.

252. First, the Chamber's approach was consistent with that taken by other trial chambers that have sentenced convicted persons for the crimes of conscripting children under the age of 15 years and actively using them to participate in hostilities. In *Ntaganda*, the Trial Chamber correctly held that while age was indeed an element of the crime, the fact that some children were very young was an aggravating circumstance.[527] This finding was not disturbed on appeal. In *Lubanga*, while the Trial Chamber declined to qualify the very young age of some of the children as an aggravating circumstance, this was because their age had already formed part of the gravity assessment for the crime.[528] The SCSL Trial Chamber also took into account the particular vulnerability of children aged 8, 9 and 11 as enhancing (and thus not merely inherent to) the gravity of the crimes.[529]

253. Second, the Chamber did not impose an arbitrary and undefined threshold to quantify the vulnerability of children.[530] It was a reasonable—and appropriate—exercise of the Chamber's discretion to find that children under age of 10 who were abducted and integrated into the Sinia brigade were particularly vulnerable, just as a chamber might find that elderly, disabled or

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[525] Sentencing Appeal, para. 251.
[526] Sentencing Appeal, para. 252 (citing Sentencing Judgment, paras. 369, 373).
[527] *Ntaganda* SJ, para. 195.
[528] *Lubanga* SJ, para. 78 ("[T]he factors that are relevant for determining gravity of the crime cannot additionally be taken into account as aggravating circumstances. Therefore, the age of the children does not both define the gravity of the crime and act as an aggravating factor").
[529] *Sesay et al.* SJ, para. 182 (taking into account the "exceptionally young age" of the children who were abducted, being as young as 8 or 9 years old as being relevant to the gravity assessment for the crime); *Fofana et al.* SJ, para. 55 (taking into account the "particular vulnerability" of a boy of 11 years of age who was captured and forcibly trained to kill and to commit crimes as being relevant to its gravity assessment).
[530] *Contra* Sentencing Appeal, paras. 253-254.

pregnant victims of crimes are also. Moreover, the Chamber already had a statutory basis to differentiate the victims by age:[531] it was incumbent on the Chamber pursuant to Rule 145(1) and (2) of the Rules to determine a sentence that reflected, *inter alia*, the extent of the damage caused, in particular the harm to the victims and their families, and to count as an aggravating circumstance crimes where the victims were *particularly* defenceless.[532] In this context, the differentiations in age of the victims and the very young age of some of the children was a relevant factor for the Chamber to consider.

254. Finally, as stated above, a trial chamber may consider in aggravation any factor that was not an essential element of the crime.[533] In this instance, while it was essential that the victims were younger than 15 years of age, every year younger than that age was a potentially relevant additional and non-essential factor in determining the defencelessness of a child that could reasonably be considered. Ongwen fails to show any error.

XII.B.4. The Chamber did not double-count the essential elements of modes of liability as aggravating factors

255. Ongwen argues that the Chamber erroneously took into consideration Ongwen's role and the nature of the common purpose in assessing gravity and the aggravating factors for the crime of enslavement committed at Pajule IDP camp (count 8), thus impermissibly double-counting an essential element of the mode of liability as an aggravating factor.[534] Specifically, Ongwen cites to the Chamber's finding that the enslavement of civilians was one of the main purposes of the attack on Pajule IDP camp, as designed by Ongwen and other LRA members, and that Ongwen personally ordered the commission of the crime and led a group of abductees.[535] Ongwen claims that the Chamber's intent in referring to these factors was to take them into account "as the confluence of gravity and aggravating factors", as evidenced by its placement in the analysis of count 9.[536]

256. Ongwen does not demonstrate any error. As stated above in response to Ground 11, factual findings may be considered in aggravating a sentence provided they were not essential

[531] *Contra* Sentencing Appeal, para. 255.
[532] Rule 145(1)(c), 145(2)(b)(iii) of the RPE.
[533] *See above* para. 230.
[534] Sentencing Appeal, para. 257.
[535] Sentencing Appeal, para. 258, citing Sentencing Judgment, para. 167; Judgment, para. 2853.
[536] Sentencing Appeal, para. 259.

factual findings underpinning the legal elements of the crime or mode of liability.[537] In this case, the co-perpetrator's purpose of enslaving civilians was a factual characteristic of the common plan, and Ongwen's personal ordering of the crime and leading a group of abductees one factual aspect of his culpable conduct. Neither findings were *essential* to demonstrate (i) the existence of an agreement or common plan between the co-perpetrators to commit crimes—indeed the Chamber did not refer to the purpose of enslaving civilians when making its legal findings on the existence of the agreement or common plan;[538] or (ii) Ongwen's control over the crime by virtue of his essential contribution to it—as this was already established by a wide range of factors.[539]

257. In sum, Ongwen fails to show any error in the Sentencing Judgment. Ground 12 should therefore be rejected.

XII.C. The alleged errors do not materially affect the Sentencing Judgment

258. Ongwen fails to show how the alleged errors materially affected the Sentencing Judgment.[540] As shown above, Ongwen takes the Chamber's findings on gravity out of context and fails to demonstrate clear instances of double-counting. He also incorrectly characterises certain findings in the Trial Judgment as being *essential* factual findings underpinning the elements of the crimes/modes of liability and thus precluded from being considered in the gravity assessment.

259. Moreover, Ongwen ignores that, apart from the victim numbers in each crime, the Chamber relied upon a range of factors to assess the gravity of the crimes and determine the individual sentences. Thus, even if *arguendo* the Chamber was found to have erred by double-counting any factor in an individual sentence, Ongwen has not established that this would have led in a reduction in the individual sentence imposed. In particular, regarding the alleged double-counting of victims of enslavement under counts 33 and 46, Ongwen has not demonstrated that this had a material impact on the calculation of the individual sentences of 14 years for these counts, particularly in light of the other factors relevant to its assessment, namely, the abstract gravity of the crime of enslavement, the manner in which the victims were

[537] *See above* paras. 229-232.
[538] Judgment, paras. 2851-2854.
[539] Judgment, paras. 2859-2864.
[540] *Contra* Sentencing Appeal, paras. 239, 245, 256, 257.

treated, Ongwen's involvement in the crime and the presence of a discriminatory motive.[541]

260. Finally, and even more importantly, Ongwen does not show that any variation in an individual sentence would have materially affected the overall joint sentence of 25 years.

261. For all these reasons, the Appeals Chamber should dismiss Ground 12 and affirm the individual sentences imposed by the Chamber. Furthermore, even if it were to reduce any individual sentence, it should maintain the joint sentence imposed, which was proportionate to the gravity of the crimes and Ongwen's criminal conduct as a whole.

CONCLUSION

262. For all the reasons above, the Prosecution respectfully requests the Appeals Chamber to dismiss Ongwen's Sentencing Appeal.

Karim A.A. Khan QC, Prosecutor

Dated this 27th day of October 2021
At The Hague, The Netherlands

[541] Sentencing Judgment, paras. 235-237 (count 33), 270-272 (count 46).