International Criminal Court

Appeals Chamber

Situation: Republic of Uganda

In the case of The Prosecutor v. Dominic Ongwen - ICC-02/04-01/15

Presiding Judge Luz del Carmen Ibáñez Carranza, Judge Piotr Hofmański,

Judge Solomy Balungi Bossa, Judge Reine Alapini-Gansou and

Judge Gocha Lordkipanidze

Appeals Hearing - Courtroom 1

Thursday, 17 February 2022

(The hearing starts in open session at 10.46 a.m.)

THE COURT USHER: [10:46:00] All rise.

The International Criminal Court is now in session.

Please be seated.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:46:39] Good morning.

Court officer, could you please call the case.

THE COURT OFFICER: [10:46:46] Good morning, Madam President. Good morning, your Honours.

This is the situation in the Republic of Uganda, in the case of The Prosecutor versus Dominic Ongwen, case reference ICC-02/04-01/15.

And for the record, we are in open session.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:47:04] Thank you.

Before we take appearances, I would like to apologise for the small delay, which was due to the visit of a Head of State.

Now we will take appearances, beginning with the Defence team of Mr Dominic Ongwen.

Please introduce yourselves. The Defence.

MR AYENA ODONGO: [10:47:28] Good morning, Madam President and your Honours. I am Krispus Ayena Odongo, lead counsel leading this team, and today I am accompanied by Chief Charles Achaleke Taku, co-counsel; Beth Lyons, also co-counsel, who will be participating by link; we have Counsel Kifudde Gordon, assistant to counsel; Thomas Obhof, assistant to counsel, who will be participating by video link; and we have with us Morganne -- Morganne Ashley, case manager. Today, we shall also be joined as before, but I thought I should let you know that members of my team who are closely following this.

Number one, Professor Carter Linda -- I mean, Linda Carter. The other way around, I'm sorry. Sometimes I will confuse it back at home. And then we have Tibor Bajnovic, who was one of our assistant to counsel. We have Michael Rowse. Michael Rowse was also an assistant to counsel. We have Eniko, who was with us, one of the officers. And then Eunice Ainembabazi, who is one of the officers in our office. We have Abigail Bridgman, who is an assistant to counsel. That's about it, my Lord and your Honours.

Thank you.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:49:41] Thank you.

Now counsel for the Prosecution, please.

MS BRADY: [10:49:48] Good morning, your Honours. The appearances for the Prosecution today. Next to me is Ms Meritxell Regué, appeals counsel; behind us in the second row, Ms Nivedha Thiru, associate appeals counsel; Mr George Mugwanya, appeals counsel; and in the row behind them, Mr Reinhold Gallmetzer, appeals counsel; and Matthew Cross, appeals counsel.

On screen, watching -- well, remotely participating, not just watching, are Mr Matteo

Costi, appeals counsel; and Ms Priya Narayanan, appeals counsel. And I'm Helen Brady. I am the senior appeals counsel for the Prosecution. Thank you.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:50:29] Thank you.

Now, Legal Representatives of the two groups of victims.

Victims' Group 1, please.

MR COX: [10:50:41] Good morning, Madam President, your Honours. With me in court is Mr James Mawira. Also, on screen, Joseph Manoba, lead counsel, and legal assistant, Anushka Sehmi. Actually, Your Honor, she will be addressing the oral submission on sentencing, Anushka. Thank you.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:50:59] Thank you.

MR COX: [10:50:59] Sorry. Also, Priscilla Aling from Kampala.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:51:06] And you, yourself.

MR COX: [10:51:11] You're right. Myself, Francisco Cox. Thank you, your Honour.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:51:17] Thank you.

Victims' Group 2, please.

MS MASSIDDA: [10:51:22] Good morning, Madam President, your Honours. From the Common Legal Representative team appearing today, Mr Orchlon Narantsetseg, behind me, myself, Paolina Massidda.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:51:24] Thank you.

In case -- yes?

MR AYENA ODONGO: [10:51:31] Yes, sorry. Pardon my indulgence again, Madam President. I forgot to introduce our client. Mr Dominic Ongwen is in court.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:51:42] Thank you. Thank you.

I note that Mr Dominic Ongwen is present in the court.

Now, in case some of the amici are also participating, could you please introduce yourself for the record.

MS GERRY: [10:52:02] Yes, Madam President, good morning. And your Honours. It's Felicity Gerry, Queen's Counsel, here on behalf of the group who have made submissions on the non-punishment principle. I'm here to make the introductions together with Anna McNeil -- lawyers Anna McNeil and Jennifer Keene-McCann, and pupil barrister, Oliver Pateman. They will remain to watch. And we're not anticipating speaking today, but thank you for our attendance -- for allowing our attendance.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:52:38] Thank you.

Anyone else? Any other amici? Okay.

Well, now we are going to proceed with the responses to submissions on any other issues on the remaining grounds of appeal.

Counsel for Mr Ongwen, you may now respond to the submissions made by the Prosecutor and the participating victims on any other issues on the remaining grounds of appeal.

You have the floor for five minutes, starting now.

MR AYENA ODONGO: [10:53:12] Madam President and your Honours, we shall invite Madam Beth to respond.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:53:21] Thank you.

Madam Beth Lyons, are you with us?

MS LYONS: [10:53:28] Yes, I am, your Honour. Can you hear --

PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:53:30] Please, you have the floor now for five minutes.

MS LYONS: [10:53:35] Can you hear me, your Honour?

PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:53:36] Yes, yes, please. Go ahead.

MS LYONS: [10:53:39] Okay. Thank you. And thank you lead counsel.

I want to respond to the submission yesterday from the Prosecution - I believe Ms Thiru - on the issue of mental illness and mental disease.

First, I would like to make it very clear that the person sitting in this courtroom as a defendant, Mr Dominic Ongwen, is a mentally disabled defendant.

Since his voluntary surrender to the ICC in 2015, he has been under the care and treatment of medical professionals, psychologists, psychiatrists, medical doctors at the detention centre.

In this period for the last six or seven years, he has been treated for post-traumatic stress disorder, as well as other mental diseases. He's also received other treatments, including medications. In fact, in the December 2016 report from Dr de Jong, that was referred to yesterday, Dr de Jong notes that Mr Ongwen, as far back as at least December 2016 and perhaps earlier, was receiving two medications at the detention centre that are used for the treatment of mental illness. The physicians at the detention centre recognised the medical illness and treated him for that.

Now, when Mr Ongwen has come to court, he has come to court as a person who has -- who is on medication. The fact that he has been receiving medication for the last number of years, at least, as I said, since 2015 or 1016, we're now in 2022, means that he is able to come to court.

Now, does this mean that he can concentrate for the whole period of time? The answer is no.

Mr Ongwen still goes in and out in terms of his ability to concentrate.

As far back as 2015, in document 321 during the Article 56 hearings, the Defence

requested an adjustment of the schedule because it's -- it noticed that Mr Ongwen is having trouble concentrating and this causes him distress. So the issue of concentration and his ability to concentrate or his lack of ability to concentrate for a whole day consistently means -- has been going on at least since 2015, almost seven years ago.

Now, if a -- if I or if anyone were to observe Mr Ongwen, the fact that he is on medication, which makes him stable enough to function, the fact that he's on medication is not apparent. The fact that he's suffering from mental illnesses is not apparent. But this doesn't change the fact that he is suffering from mental diseases and that he is being treated even today so that when he addresses the Court tomorrow, he will be in the same situation. He will be a mentally disabled client suffering from mental disease who is under medication, which enables him to participate in this proceeding.

The Court has access to all of the medical records of the detention centre to -- to verify or to look further into this information.

As I said yesterday, mental illness is not a, quote, "visible disease".

A second point I want to make is that there were references yesterday to the de Jong report. What wasn't said was this: The de Jong report made a conclusion. Dr de Jong is a -- Professor de Jong is a psychiatrist. After his examination, he concluded that Mr Ongwen was suffering from three psychiatric illnesses: One, severe PTSD; two, severe major depressive disorder; and three, other specified dissociative disorders.

These three diagnoses were also the same as our Defence experts found, and they added particularly suicide ideation and the possibility or high risk of suicide. The issue of suicide is discussed in the confidential report and you can read it. But this is

important.
While Dr de Jong may have found --
THE COURT OFFICER: [10:59:12] Counsel -- counsel's time is up.
PRESIDING JUDGE IBÁÑEZ CARRANZA: Counsel, I will give you 30 seconds to conclude, please.
MS LYONS: [10:59:20] Thank you.
While Dr de Jong found that Mr Ongwen was conscious or articulate, he also found that Mr Ongwen, in 2016, when he examined him, was suffering from mental illness. And our position is he is still suffering from those mental illnesses today. Thank you.
PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:59:42] Thank you.
Now, counsel for the Prosecution, please. You have the floor for five minutes starting now.
MS THIRU: [10:59:51] Thank you, Madam President.
I wish to make some points in response to what Ms Lyons has just said. Repeatedly, your Honours, the Defence misses the point on what we say about Ongwen and his mental illness.
Yes, he may have been diagnosed with mental illness by Professor de Jong, but the question is not whether he has an illness. The question is what is his capacity to participate in the hearing despite it.
The Defence do not actually challenge meaningfully the Trial Chamber's finding on that question. Instead, they just keep repeating the fact that he has mental illness.
Secondly, even with mental illness, the Trial Chamber can accommodate Mr Ongwen's participation in the hearing, and it did so in this case and it did so based on the advice of the detention centre's medical officer. It accommodated his

need to have a break in the hearing schedule. Again, we just hear repeated arguments from the Defence disagreeing with those findings.

And thirdly, your Honours, there is ample jurisprudence from other jurisdictions showing that fitness to participate in trial is not necessarily affected simply by the fact that an accused has a mental illness. I refer you, for example, to the Strugar appeal judgment in the ICTY. There, the Appeals Chamber surveyed a whole range of domestic and international jurisdictions to identify factors that they found relevant to assessing an accused's fitness to stand trial.

And this included an assessment of whether the accused had the mental capacity to communicate with his counsel in a comprehensible manner, whether he could instruct counsel, whether he could challenge a witness on the evidence and understand the details of the evidence, that they understood the general thrust of what was being said in court, but not necessarily needing to understand every point of law, that they did not require the individual to be operating at the highest level of functioning but, rather, that they satisfied certain minimum requirements to be fit for trial. And indeed, in that judgment, they found that in certain domestic jurisdictions, even insanity or amnesia did not necessarily mean that a person was unfit to stand trial.

And so in this context, it is highly relevant that the Trial Chamber was acting on information it had received from the people treating him and that it was acting, also, on its own observations of him and on the conduct of the Defence throughout the trial. It observed, as I said yesterday, Mr Ongwen participating in his hearing, instructing counsel during testimony, and it is relevant that his Defence were able to file lists of evidence, disclose material, make submissions on the charges during the trial, all steps that they could have only done with Mr Ongwen's instructions. And the

Defence did so without raising any specific difficulties about his ability to provide them with instructions on certain matters.

So I think we've already canvassed this in much more detail in our response. I won't say anything more on it, your Honours. But that's all I have to say. Thank you.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [11:03:27] Thank you very much.

Counsel for Victims' Group 1, please. You have the floor for five minutes.

MR COX: [11:03:37] Thank you, your Honour.

Once again, I am surprised. It seems like the threshold, both for 31(a) and for the capacity to understand the trial for the Defence is very, very low.

When asked, I remember that Ms Beth Lyons the other day said that there were -- there was evidence at the time that Mr Ongwen had mental problem. And what was her reference to this evidence? That the person that -- with whom Mr Dominic Ongwen was abducted said that he was depressed, then to try to explain the importance of culture and the lack of a word for blue, having the blues.

Your Honour, if that's the standard - and I mean no disrespect with this - the jails of the world are going to be open forever. Most people in jail are depressed. Most people in countries take medicine and have depression. That does not meet 31(a).

And as judge -- and I'm sorry, your Honour, if I completely kill your last name -- Lordkipanidze, and I know I did. As he said, it's a binary concept. It's destroyed or not destroyed. And Mr Braakman -- or Dr Braakman said he was proposing grey. It's the wrong place to propose grey. They have to go to the Assembly of State Parties to propose grey, not this Appellate Chamber.

And now, now, Mr -- Beth Lyons says that Mr Ongwen doesn't concentrate. As OTP has said, they gave Wednesdays off. And you know what's interesting? Because once again, you have elements to see if Mr Ongwen understands or not. And if you

can't take into evidence what he said at the end of the trial, it shows that he completely understood. And in that context, he never asked for forgiveness, of course. He never had one word for the victim, of course. But he defended himself and his role. He understood everything.

Another time, when he -- once again, I would submit that when he made his plea, he used the same strategy that the Defence is using now. He is not the LRA.

That's -- that's his phrase.

And finally, your Honour, yesterday, my learned friend, Mr Ayena, gave us more insight. Who but General Salim and Mr Ongwen know what that conversation was about. And he explained to you what allegedly that conversation was about. It was about running away. Who told them that? I guess Dominic Ongwen.

So was Mr Dominic Ongwen following the trial? Yes. And he's helping with alternative discourses and alternative issues, specifically in this case for escape.

So I think you can rest assure that he might be suffering of depression, I'm sure he is, but that he's more than fit to stand trial and that at the time he was competent mentally for the acts that he committed. His capacity to understand the unlawfulness and the reach of his conduct was more than able.

Thank you, your Honour.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [11:07:38] Thank you.

Ms Paolina Massidda for Victims' Group 2, please. You have the floor for five minutes.

MS MASSIDDA: [11:07:48] Thank you, Madam President.

Very, very briefly. I don't think that the -- the Defence is missing the point here. The Defence is deliberately continuing with arguments which are supported by no evidence in relation to both the defences and the actual current state of Mr Ongwen.

I would like to read, also for the benefit of the public who is following these proceedings, paragraph 104 of the sentencing decision. And I would like to read it because I think that the use of the objectives by the Trial Chamber is particularly important. I quote:

"In fact, the Chamber finds itself greatly impressed by Dominic Ongwen's personal statement in court during the sentencing hearing. Dominic Ongwen spoke lucidly for one hour and 45 minutes, without a break, sustaining a structured and coherent declaration, while speaking largely freely (as opposed to reading out a prepared speech). The Chamber notes that Dominic Ongwen demonstrated a great and detailed understanding of the trial, including of legal and procedural matters. His arguments, while on occasion at odds with the Trial Judgment and of no consequence to the sentencing proceedings, related to topics the relevance of which for the case was clear. Also remarkably, Dominic Ongwen made sure, without mistakes, not to refer to confidential information when discussing sensitive topics." And finally, "Not at all unimportantly, Dominic Ongwen himself stated that [the] treatment in the detention centre helped him and that his life in detention was better than in the bush with the LRA." End of quote.

Now, your Honours, how this clear statement from the Chamber, supported by evidence and supported by the way in which the Chamber could observe the behaviour of a person accused in a courtroom each day for years, can be reconciled with the fiction - and I restate this word that was also retained by my colleague Ms Lyons - that Mr Ongwen is suffering from any kind of mental disease or defect. Thank you.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [11:10:33] Thank you, Counsel.

Now, I will give the floor to my learned colleagues in case they have questions. I

remind the parties and participants that you have two minutes to respond to each question posed by the Chamber.

Judge Hofmánski, you have questions?

JUDGE HOFMÁNSKI: [11:10:57] Thank you very much. I have no question, no.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [11:10:59] Thank you.

Judge Bossa, do you have questions?

JUDGE BOSSA: [11:11:04] Thank you, Madam President. I have no questions.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [11:11:07] Thank you.

Judge Alapini-Gansou, do you have questions?

JUDGE ALAPINI-GANSOU: [11:11:16](Interpretation) No, Madam President.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [11:11:16] Judge Lordkipanidze, do you have questions?

JUDGE LORDKIPANIDZE: [11:11:20] I have no questions, Madam President.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [11:11:22] Thank you.

(Appeals Chamber confers)

PRESIDING JUDGE IBÁÑEZ CARRANZA: [11:11:42] Thank you.

In light that there is no questions, we have gained some time. So we are going to move a little bit the agenda. We will now start with the submissions on the sentencing appeal. And we will start, of course, with the Defence.

I understand that in its submissions the Defence may request to briefly go into a private session. We thank you for informing this to the Chamber in advance. We have made the necessary arrangements for this to happen without any unnecessary interruptions to the hearing.

Counsel for Mr Ongwen, you have now the floor for 30 minutes for your submissions on the sentencing appeal.

MR AYENA ODONGO: [11:12:38] I shall invite Thomas Obhof to present.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [11:12:42] Thank you.

Counsel Obhof, you have the floor for 30 minutes, starting now.

MR OBHOF: [11:12:52] Thank you very much, Madam President.

Firstly, the Defence takes note that the Prosecution took issue with its substantive annex A of the Defence appellate brief against the sentence at paragraph 176 of the Prosecution response.

Unlike, as the Prosecution has challenged, substantive annex A does not circumvent Regulation 36 of the Regulations of the Court. The Prosecution cites to the Kenyan disqualification decision of 11 July 2012. And that's ICC-01/09-96-Red, at paragraph 5.

What the Prosecution failed to state --

PRESIDING JUDGE IBÁÑEZ CARRANZA: [11:13:42] Sorry, Counsellor, please give me some moment.

The Defence, if you would like to go into private session for the record, you can request it now, for the record.

Then you will continue, Counsellor.

MR OBHOF: [11:14:02] Madam President, do you mean that we would go in now or at a later time after requesting?

PRESIDING JUDGE IBÁÑEZ CARRANZA: [11:14:07] No. At the beginning of your submission, you need to make the request so we can put in place the arrangements. If you would like --

MR OBHOF: [11:14:15] Yes, I will be doing it. It will be around (Overlapping speakers)

PRESIDING JUDGE IBÁÑEZ CARRANZA: [11:14:17] Yes, yes. Please, please go

ahead.

MR OBHOF: [11:14:21] Okay. It will be around minute 20 or so where I would need to go into private session and I will announce it clearly at that time.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [11:14:28] Thank you. Thank you very much. You can continue. Thank you.

MR OBHOF: [11:14:32] Thank you.

What the Prosecution failed to state is that the substantive annex submitted in the Kenyan disqualification decision increased the substantive filing from 13 pages to approximately 351 pages. And this can be found in footnote 6 of the Kenyan disqualification decision.

In that case, this Appeals Chamber stated the 339-page annex "[did] not assist in assessing the submissions expeditiously." And that is at paragraph 5 of that decision.

Your Honours, the Defence poses that the spirit of Regulation 36(2)(b) is to stop parties and participants from including arguments beyond that of the stipulated page limit, which the Defence clearly did not surpass the 100-page limitation when substantive annex A is included in the page count.

Furthermore, substantive annex A clearly assists the Appeals Chamber in assessing the submissions expeditiously and, as noted in this Kenyan disqualification decision, clearly specifies what relevant arguments the annex supports.

The Defence asks the Chamber to dismiss this argument of the Prosecution, as it fails when one considers the purpose of Regulation 36(2)(b).

Now, your Honours, moving on to the Acholi traditional justice system and complementarity.

As the Prosecution noted, the Defence argued that the existence of the Acholi

traditional justice system should be considered as a personal circumstance of Mr Ongwen. The Prosecution incorrectly stated that the issue of complementarity was never before the Trial Chamber. The Defence points to paragraph 733 of its closing brief stating, and I quote:

"In the event that the Court finds Mr Ongwen guilty, that punishment [should] be suspended and that the Court should: Order Mr Ongwen to be placed under the authority of the Acholi justice system to undergo the *Mato Oput* process of accountability and reconciliation as the final sentence for the crimes for which he is convicted." End quote.

Moreover, Madam President and your Honours, a significant amount of the Defence's evidence for sentencing, its brief on sentencing and its appellate brief against sentence related to the Acholi traditional justice system. Merely because the magic word "complementarity" was not written down does not mean that it was not expressed. Your Honours, if I told you that I saw hundreds of animals roaming the Rift Valley that looked like slightly smaller horses, but they had black and white stripes, would you not understand that I speak of a zebra? This issue of complementarity, your Honours, cannot be decided on semantics as the Prosecution wants.

Now, your Honour, we've heard a little bit about Mr Ongwen's statement today. I would merely like to express again what our counsels have said previously this week which contradicts what our learned friends for the victims have said. Just recently Counsel Massidda quoted from paragraph 104 in the sentencing judgment.

Now, your Honours, as the Defence explained in its brief, we are not medical doctors. You cannot take one moment in time, even for 1 hour and 45 minutes, and conclude that is how a person acts. Persons go to school for years to become psychiatrists and psychologists in order to find the nuisances, and they spend countless hours with

patients to make a proper diagnosis. One cannot make a diagnosis merely from 1 hour and 45 minutes.

And furthermore, the Defence also objects to the Chamber's conclusions that because the Defence was speaking with its client, that that means it was taking instructions. The Chamber is not privy to what we speak. For all the Chamber could know, we were 10 minutes away from break and Mr Ongwen was saying that he had to use the loo. It is an impermissible inference by the Chamber to assume because counsels are talking to its clients, that is receiving instructions.

Your Honours, I move on to how the concurrence of crimes and cumulative convictions should be reflected in sentencing. From the outset, the appellant relies on paragraphs 114, 115, 118, 119 and 122 of the Defence's sentencing Appeals Brief which adequately challenges the sentencing judgment at paragraph 382 wherein the Chamber acknowledged, and I quote, "while mindful of the need to avoid that a single conduct or circumstance that is reflected in more than one individual sentence be subsequently be 'double-counted' on this ground in the determination of the joint sentence, the Chamber does not consider in the concrete circumstance of the case, any such issue to weigh noticeably in the present determination." End quote. And did so without providing a *reasoned statement amounting to an abuse of discretion.

This decision violated guiding principles of the *ne bis in idem* articulated in the Defence Appeal Brief at paragraph 277 to 288, that the appellant should not have been sentenced for the same conduct twice in light of this fundamental human right against double jeopardy.

The Chamber violated the sentencing objective by failing to apply the principle of non-accumulation of sentences and double counted the same conduct in the individual sentences and in the imposition of the joint sentence.

The Chamber used competing and analogous convictions on the same conduct for individual sentences, disregarded mitigating facts and disregarded mitigating personal circumstances.

The Chamber used the criteria of accumulation of the individual sentences constituting -- constituting -- constituting, sorry, total period of imprisonment for the joint sentence - and that's at paragraph 375 - and in violation of the principle of non-accumulation of penalties.

The Chamber further imposed a joint sentence based on impermissible occurrences and accumulation of convictions and double counted *aggravating factors as outlined in the Defence appellate brief.

Chamber promised at paragraphs 145 and 146 of the sentencing judgment that it would consider overlapping and partially overlapping of the constitutive elements in the imposition of the joint sentence.

Statement by the Chamber at paragraph 375 of the sentencing judgment that, and I quote: "all relevant circumstances and factors related to the gravity of the specific crimes, as well as the personal circumstances of Dominic Ongwen were taken into account for the determination of the individual sentences for each of the crimes of which he was convicted". End quote. And this is not demonstrated by the evidence.

Furthermore, the findings and determinations in the sentencing judgment establish that the Chamber did not take into account the mitigating and personal circumstances of Mr Ongwen in the imposition of the joint sentence. The Chamber found in paragraphs 377 to 379 and 382 of the sentencing judgment that the overlapping and partially overlapping factors existed, but disregarded them in the imposing of the joint sentence as it promised to do in paragraph 146 without a *reasoned statement.

This I submit, your Honours, was an abuse of discretion.

Furthermore, in paragraphs 376 and 384 of the sentencing judgment, the Chamber impermissibly established and relied on the principle of the accumulation of the victimisation of the crimes and evidence and factors which the Trial Chamber relied upon in its trial judgment in paragraphs 2790, 2798, 2802, 2805 and 2813, for contextual elements war crimes and crimes against humanity in which the Trial Chamber found the distinct elements for permissible concurrences and multiple convictions.

The Chamber impermissibly recharacterised and mislabelled forced marriage and conscription and deployment of child soldiers in hostilities as continuing crimes in the conviction judgments at paragraphs 2741 and 2271 and as aggravating factors when the charges were not labeled as continuing crimes as such in the confirmation decision.

The Chamber did not provide a reasoned statement demonstrating the construction of this label and the fulfilment of all the elements of criminalisation. That, your Honours, adversely impacted the decision of the Chamber on concurrence and multiple convictions under Article 25(3)(a) and the double counting of impermissible factors and sentencing based on the recharacterisation of underlying conduct at trial.

To move on to double counting of impermissible aggravating factors.

Your Honours, this Appeals Chamber in the *Bemba et al.* case stated that, and I quote, in paragraph 133 of the *Bemba et al.* decision 2267 -- sorry, 2276, "The convicted person is sentenced for crimes or offences for which he or she was convicted, not for other crimes or offences that persons 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." End quote.

In the Ongwen interlocutory appeals judgment, the Appeals Chamber decided that, and I quote, "Having regard to the need to ensure the fair conduct of the proceedings, the Appeals Chamber finds it important to note that in the impugned decision the Trial Chamber recalled that no evidence will be used against the accused in a manner which would exceed the scope of the charges or could not have been reasonably anticipated". And that's in the paragraph 159.

At trial, the Prosecutor submitted that evidence of some of the women on the crimes charged against Mr Ongwen directly was out of the Court's temporal jurisdiction and urged the Chamber to rely on it for vital context. Paragraph 160 of the Prosecution's closing brief. But, your Honours, the Chamber decided that it might use said evidence for corroboration. And that's in the trial judgment, 2216 to 2247.

The Chamber went further to promise that it would be bound by the text of the confirmed charges at paragraph 2009.

Despite these decisions, the appellant was convicted of -- for forced marriage and conscription and use of child soldiers under the age of 15 years for hostility as continuing crimes without notice in the confirmation of charges decision.

Not only did the Chamber not comply with its own judgment in this regard during sentencing, it disagreed with the trial judgment and in an unprecedented move excoriated the judgment at *footnote 548, which I will respectfully read out *aloud.

And this footnote 548 from the sentencing judgment.

And I quote, "Insofar as the bearing of children fathered by Dominic Ongwen constitutes a consequence and 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 time frame of the crime of forced marriage of which Dominic Ongwen was convicted under count 50". End quote.

Your Honours, I shall move on now to briefly outline the mental capacity issues, much of which has already been outlined for your Honour -- for your Honours in our appellate brief against sentencing.

The Defence submits that in the imposition of the joint sentence, the Chamber did not consider duress and Mr Ongwen's diminished mental capacity presented by the Defence. The Defence respectfully adopts its paragraphs in its sentencing Appeal Brief and adds the following:

The Trial Chamber found at paragraph 92 of the sentencing judgment a substantial diminished mental capacity is a mitigating circumstance explicitly provided for in Rule 145(2)(i)(a) of the Rules, but denied finding it as a mitigating circumstance for Mr Ongwen.

The Chamber relied on the findings in the conviction judgment as the basis of its decision. The Chamber further rejected Mr Ongwen's subsequent mental capacity as a mitigating circumstance, paragraphs 93 to 103 of the sentencing judgment.

The Chamber disregarded the expert evidence produced by experts Professor Ovuga and Dr Akena which Defence submitted for the purposes of sentencing.

As articulated at paragraph 161 of the Defence's sentencing appellate brief, the decision of the Chamber was based on an incorrect burden of proof standard. In paragraph 94 of the sentencing judgment, the Chamber used the standard of proof of beyond a reasonable doubt. The Chamber failed to assess the expert evidence of Dr De Jong, Professor Ovuga and Dr Akena on the balance of probability standards

outlined by the Defence in paragraphs 162 to 171 of its sentencing appellate brief. The Defence urges the Appeals Chamber to reverse the joint sentence on a finding that Mr Ongwen benefits from mitigating circumstances due to significantly diminished mental capacity.

Your Honours, on duress, the deference further adopts paragraphs 189 and 203 and substantive annex A of its appellate brief.

The Defence first notes that the burden of proof for mitigating circumstances is the balance of probabilities. As stated in paragraph 54 of the sentencing judgment, the Defence asserts that while the Trial Chamber stated the correct burden of proof, it did not apply that burden to the facts related to address -- related to duress, sorry. This failure to apply the correct standard is demonstrated in paragraphs 110, 111 of the sentencing judgment.

The Defence has noted in its close brief its sentencing brief, its appellate brief against the conviction, and its appellate brief against the sentence of the overwhelming number of persons testifying to the threats against leaving the LRA. These threats upon a person's life and the lives of their clan members and family, which were described heavily in the evidence, were as true then in 2002 to 2005 as it was when the Prosecution described these threats on the 23 May 2005 in its Article 58 for arrest warrant. And your Honours, that's Ongwen filing number 3, paragraphs 68 to paragraph 77.

These threats against persons did not stop and, as the Trial Chamber would like to make it seem, once someone reached the level of a deputy brigade commander. The Defence provided ample evidence on the murders of Otti Lagony at the end of 1999, the destruction of Mucwini Centre in 2002, the murder of Opoka James around 2003 and the murder of several high-level persons in 2007, most notably Otti Vincent.

Now, your Honours, this shall be the time - around 60 seconds - for a private session.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [11:35:46] Thank you.

Please, the arrangements are in place? Please, court officer.

THE COURT OFFICER: [11:35:56] We will need a few seconds to implement that.

Shall we go into private, please?

PRESIDING JUDGE IBÁÑEZ CARRANZA: [11:36:02] Okay. We will have some seconds to implement this.

(Private session at 11.36 a.m.)

THE COURT OFFICER: [11:36:22] We are in private session, your Honour.

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(Open session at 11.37 a.m.)

THE COURT OFFICER: [11:37:49] We're back in open session, Madam President.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [11:37:54] Thank you.
For the record, we are now back in open session.
Counsel, you can continue.
MR OBHOF: [11:37:59] Thank you, your Honours.
If the court officer could please remind me at five minutes.
PRESIDING JUDGE IBÁÑEZ CARRANZA: [11:38:07] Yes (Overlapping speakers)
MR OBHOF: [11:38:10] In relation to the -- in relation to the expert reports, at paragraph 114 of the sentencing judgment, the Trial Chamber criticized Professor Titeca, that's Witness D-60, for not critically assessing Mr Ongwen's statements and rejects it as evidence on sentencing. But nowhere does it apply the balance of probabilities test. In that report, Professor Titeca clearly stated that Mr Ongwen (Overlapping speakers)
THE COURT OFFICER: [11:38:40] Counsel has five minutes.
PRESIDING JUDGE IBÁÑEZ CARRANZA: [11:38:42] -- believed in the spiritual aspects of the LRA.
What is important about this report is that it answers the questions of how the role of the spirits permeates and influences Mr Ongwen's thinking and further elaborates on how the LRA itself thought.
In respect to D-114, that's Dr Ochen, the same problem of the wrong standard applies. In paragraph 116 of the sentencing judgment, the Trial Chamber dismissed Major Awich's expert report because it was not suitable for use as evidence in the case. There is no reason given, and even at footnote 214 the Chamber refers to the expert qualifications of Major Awich who served as a special representative for the United Nations on children -- on the Convention on the Rights of a Child for nearly eight years.

The report further discusses orders of non-punishment in the Beijing Rules on Juvenile Justice.

And, your Honours, this brings me to my last section about the non-punishment principle.

I would like to read from the amicus curiae brief from the UN Special Rapporteur on Trafficking in Persons, especially women and children, as Madam Siobhan Mullally stated at paragraph 13:

"The non-punishment principle applies to criminal offences, 'regardless of the gravity or seriousness of the offence committed.' The Council of Europe Group of Experts on Actions Against Trafficking [...] has repeatedly recommended that the non-punishment principle should be applied to all offences that victims of trafficking were compelled to commit, and has recommended the removal of exceptions. According to the OSCE Recommendations, 'the duty of non-punishment applies to any offence so long as the necessary link with trafficking is established.'" End quote.

Your Honours, the principle of non-punishment cannot be emphasised enough. There is no doubt that Mr Ongwen was abducted as a child at the age of 9. He was a victim of abduction, of child trafficking and being forcefully conscripted into a group which would be later known as the LRA.

This principle is shared by amici 1926, 1929 and 1936. And the same sentiment is shared by Defence experts Major Awich and Dr Ochen who argued eerily similar arguments in their evidence on sentencing and some at trial.

Madam President, your Honours, the principle of non-punishment is the wind of change. It is a shift of the societal norms which humanises persons who did not choose a life; it humanises and forgives persons who had their lives taken, exploited and destroyed by others. It tells persons that we are better than those who robbed

you of your life, and to put it bluntly, your Honours, we are better than Joseph Kony and the persons who ordered and stole the life of Mr Ongwen.

The Defence respectfully requests the Chamber to apply this principle and send a message to the world that while it does not condone the actions for which Mr Ongwen was convicted, it cannot further victimise someone who was robbed of his life at the tender age of nine years old.

I thank you, Madam President and your Honours, for giving me this time to speak on behalf of the Defence.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [11:42:48] Thank you very much, Counsel.

Now we are going to go to a break. We will reconvene by 12.13.

THE COURT USHER: [11:43:06] All rise.

(Recess taken at 11.43 a.m.)

(Upon resuming in open session at 12.21 p.m.)

THE COURT USHER: [12:21:01] All rise.

Please be seated.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [12:21:41] Welcome back. Before we continue with the submissions by the Prosecution, I note that the Chamber has received a request by the Defence to grant an extension of Mr Ongwen's allotted time to make his personal address from 10 minutes to one hour.

The Appeals Chamber has considered the request and decided to grant an extension of 20 minutes more, which means that Mr Dominic Ongwen will have 30 minutes tomorrow to make his personal address to the Chamber. Thank you.

Now we will continue with the submissions of the Prosecution.

Counsel, you have 30 minutes, starting now.

MS THIRU: [12:22:36] Thank you, Madam President.

Your Honours, in this segment of the Prosecution's submissions, I will answer question 12 that your Honours have asked and Ms Regué will respond to question 13. As for the further sentencing issues that the Defence raised this morning, we will address you on some of the key points in the five minutes allotted to us later today.

In question 12, your Honours have asked how the concurrence of crimes and cumulative convictions should be reflected in sentencing. This flows from yesterday's discussion of the permissibility of cumulative convictions in this case. My colleague, Ms Brady, explained yesterday the reasons why we say the Trial Chamber did not err in the cumulative convictions that it imposed -- entered applying the materially distinct elements test from Celebici. And today I will focus on how those convictions, once entered, should be taken into account in the sentencing procedure of this Court.

And I will then take your Honours through the Trial Chamber's correct approach in this case to show that it did not err.

So how should cumulative convictions be sentenced in the ICC? Article 78(3) requires a Chamber to follow a two-step process when sentencing a person who has been convicted of multiple crimes. In a nutshell, the Chamber must firstly determine an individual sentence for each and every crime for which a person is convicted. And an -- these -- sorry, these individual sentences do not amount to punishment in themselves. They only represent a step in the Chamber's reasoning.

Secondly, the Chamber must assess the individual sentences to calculate the joint sentence, specifying the total period of imprisonment, and this is the actual punishment imposed.

This two-step process is mandatory. It does not lead to what the Defence described

this morning as an accumulation of sentence. And moreover, this process has been uncontroversially applied and upheld since the very first case tried in this court, Lubanga. And this includes cases where there were cumulative convictions, such as in Bemba et al., Katanga and more recently, as some of your Honours may recall, in Ntaganda.

I refer your Honours to the cases at A1 of our reference list filed this morning.

I will explain this two-step process in a bit more detail and expand upon why it is appropriate. As I mentioned, in the first step, a Trial Chamber must determine an individual sentence for every crime for which a conviction was entered, fully reflecting the convicted person's culpability for that crime as if it were the only crime for which they were convicted. So, therefore, a Chamber must take into account the conduct and circumstances relevant to that crime, and this is regardless of whether those factors are also relevant to another crime for which they were convicted.

The authorities for these principles are at A2 of our list.

The Chamber will consider in determining the individual sentence the gravity of the crime, the individual circumstances of the convicted person, any aggravating circumstances that relate to the crime and any mitigating circumstances that arise from the facts.

Once the Chamber has identified all factors relevant to a crime, it must weigh and balance those factors to calculate the individual sentence being careful not to double count the same factor more than once within that sentence. Then, in the second step of the two-step process, the Chamber calculates the joint sentence. Here, it will take into account the number and feature of the individual sentences and reflect on the factors already considered there, such as the various aggravating and mitigating circumstances.

And it will calculate the joint sentence to reflect the total -- to reflect the person's total culpability ensuring that it does not count any overlapping conduct more than once. So it is at this second step that a Chamber pays specific attention to ensuring that multiple or cumulative convictions do not unduly prejudice a person by punishing them beyond his or her culpability.

This principle of only punishing a convicted person for their culpability is reflected throughout the Court's legal texts. Articles 81(2)(a) and 83(3) require the sentence to be proportionate to the crime. And Rule 145(1) of the Rules of Procedure and Evidence requires the totality of any sentence imposed to reflect the culpability of the convicted person.

Previous chambers have also confirmed that cumulative convictions cannot unduly inflate a person's punishment. As your Chambers will see in the reference at A3.

So, as Ms Brady said yesterday when answering Judge Hofmánski's question, the drafters of the Rome Statute provided a transparent framework under Article 78(3) for sentencing cumulative convictions. This was different to the ad hoc tribunals where Chambers had the discretion to impose sentences cumulatively as a single total *sentence or indeed concurrently where it might not be readily apparent if a Trial Chamber had accounted for the risk of duplicative punishment for the same conduct.

Your Honours, contrary to what the Defence have argued this morning, the Trial Chamber in this case precisely followed the two-step process to ensure that the cumulative convictions did not prejudicially increase Mr Ongwen's sentence.

It correctly stated these principles in paragraphs 59 and 375 of its judgment and then it correctly applied those principles. I will point you to the relevant point parts of its judgment.

First, when it calculated the individual sentences for each crime, the Chamber

assessed all conduct and circumstances relevant to that crime, even if there was factual overlap with other crimes. We see this, for example, when it calculated the individual sentences for war crimes and crimes against humanity based on the same underlying conduct.

The relevant paragraphs of the judgment are at A4 of our list.

Mr Ongwen is simply incorrect in law when he argues in ground four of his appeal that the Chamber incorrectly sentenced him for analogous war crimes and crimes against humanity. This was exactly what the Trial Chamber was required to do and which the Appeals Chamber affirmed recently in *Ntaganda, at A5 of our list.

Then when it came to the second step calculating the joint sentence, we see throughout the judgment that the Chamber was careful to avoid any overlap in the underlying conduct. For example, at paragraphs 146 and 149, the Chamber stated correctly that it would not take into account overlapping conduct more than once, and it repeated the same assurance in numerous other parts of the judgment wherever it identified a full or partial overlap in the underlying conduct as shown in the references at A6 on our list.

Then at paragraphs 377 and 378, the Defence completely *misconstrue the meaning of these paragraphs. Here, the Chamber expressly identified the areas of factual overlap between the individual sentences, such as between analogous war crimes and crimes against humanity, the crimes of torture and enslavement and certain conduct underlying the rapes, sexual slavery and torture.

At paragraph 379, the Chamber confirmed that it took these overlapping areas into account to ensure that the joint sentence did not punish Mr Ongwen beyond his culpability. So as you see, your Honours, the Chamber followed the textbook approach to sentencing. It did not accumulate sentences as the Defence have alleged.

It committed no errors. The Defence's arguments to the contrary are mere disagreements with the Chamber's ultimate findings. But even if, for the sake of argument, the Chamber had incorrectly included overlapping conduct more than once, this error had no impact on the sentence. And we know this because the Chamber said that the instances of concurrence or partial overlap in the factual basis of certain crimes did not weigh noticebly in its calculation. This was because of the strikingly large number of distinct convictions, each holding entirely different factual basis. This is at paragraph 379 of the judgment.

Indeed, Mr Ongwen was convicted for a large number of crimes which he committed by way of a number of distinguishable criminal conducts, each carrying its own distinct blame worthiness and not otherwise absorbed by any other crime or corresponding individual sentence. This is at paragraph 381.

The Chamber went even further and confirmed in footnote 691 of its judgment that even if it had totally excluded the individual sentences that had even a partial factual overlap with any other crime.

THE INTERPRETER: [12:33:28] Your Honour, could counsel slow down a bit so that we can follow?

PRESIDING JUDGE IBÁÑEZ CARRANZA: [12:33:31] Counsel, please slow down for the benefit of interpretation.

MS THIRU: [12:33:34] Thank you.

Even if it had totally excluded the individual sentences that had even a partial factual overlap with any other crime, this would have had no practical impact given the circumstances of this case.

So in conclusion to question 12, your Honours, the Chamber correctly and appropriately accounted for cumulative convictions in determining the joint sentence,

yet even if your Honours were to find that it had erred, this error had no impact on the joint sentence because any overlap was indeed negligible.

Those are my submissions on question 12, your Honours. With your leave, I will hand over to my colleague, Ms Regué.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [12:34:26] Ms Regué, you have the floor for the remaining time.

MS REGUÉ BLASI: [12:34:29] Your Honours ask in question 13 whether "in its determination of the joint sentence the Trial Chamber duly considered the circumstances alleged by Mr Ongwen as mitigating, in particular duress and Mr Ongwen's alleged substantially diminished mental capacity". Those are mitigating factors under Rule 145(2)(a)(i).

Our answer to this question is yes. Yes, because the Chamber had already considered the possible application of these factors in determining the individual sentences for each of the 61 crimes for which Mr Ongwen had been convicted.

In that analysis, the Chamber found no reliable evidence that Mr Ongwen suffered from any type of diminished mental capacity and much less substantially diminished mental capacity. It also found that duress was not applicable as a mitigating factor since Mr Ongwen's criminal actions were free of threat or of imminent or continuing serious bodily harm.

Consequently, and because the alleged circumstances simply didn't exist, the Chamber did not give weight to these factors in considering the individual sentences. And for the same reasons the Chamber could not and did not take them into account in determining the joint sentence either.

On the other hand, the Chamber found that Mr Ongwen's personal history, in particular his abduction and early years in the LRA, were relevant for the

determination of his sentences and gave it a substantial weight when considering both the individual sentences and the joint sentence.

I will explain in more detail how the Chamber conducted this assessment by going through the two-step process that my colleague (Overlapping speakers).

THE INTERPRETER: [12:36:35] Interpretation requests counsel to slow down.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [12:36:38] Slow down, please. Thank you.

MS REGUÉ BLASI: [12:36:40] As Ms Thiru has explained, the Chamber had to first determine an individual sentence for each of the 61 crimes for which Mr Ongwen had been convicted. In doing so, the Chamber distinguished between two categories of relevant factors. One, personal circumstances of Mr Ongwen, which applied to all the crimes; and two, factors applicable only to certain categories of crimes. I will focus on the first group and I will briefly touch upon the second.

In this first group, the Chamber considered the Defence's allegations regarding Mr Ongwen's alleged substantially diminished capacity and duress. Like the grounds excluding criminal responsibility under Article 31, these factors must be established at the time of the relevant conduct.

With respect to Mr Ongwen's alleged substantially diminished mental capacity, the crux of the Defence's argument was that Mr Ongwen had suffered mental illnesses since his abduction in the LRA, including during the period of the charges up until now.

The Chamber considered the Defence's arguments and all the relevant evidence, including a new report by one of the two Defence experts who had provided expert opinion at trial.

The Chamber found this report to be unreliable, since it was built up on the previous

Defence expert reports and had similar methodological shortcomings.
The Chamber instead relied on the opinion of three Prosecution expert witnesses, as well as trial evidence, such as the testimony of lay witnesses who had spent a considerable amount of time with Mr Ongwen during the period of the charges. These witnesses described Mr Ongwen in a manner which was simply not compatible with the mental illnesses alleged by the Defence, as well as with substantially diminished mental capacity.
The Chamber especially noted the description of Mr Ongwen as a careful planner of complex military operations. Because of this, the Chamber found that Mr Ongwen was in full possession of his mental faculties and this mitigating factors was not established to a balance of probabilities. This was wholly reasonable on the evidence before it.
Mr Ongwen has argued that the Chamber failed to assess the evidence and instead it applied a higher threshold of beyond reasonable doubt. This is incorrect from a plain reading of the sentencing decision. The chamber correctly articulated the standard in paragraph 54 of the decision and reasonably assessed the relevant evidence in paragraphs 92 to *100, which largely coincided with the evidence at trial. It concluded that this evidence did not demonstrate to a balance of probabilities that Mr Ongwen had a substantially diminished mental capacity. The Defence had simply failed to prove this -- that this fact applied more likely than not.
And with respect to duress, Mr Ongwen mostly repeated his trial arguments that he believed that Mr Kony had the spiritual powers and that he was afraid of Mr Kony's punishments.
But the Chamber correctly found that Mr Ongwen was not subjected to any threat of imminent death or of imminent or continuing serious bodily harm at the time of the

charges.

Since this first and fundamental element of duress was not established, the mitigating factor could not apply.

Again, overwhelming evidence supports this finding. I will briefly recall four indicators that we discussed on Monday. One, Mr Ongwen was a high-ranking officer who was not in a situation of complete subjugation, vis-à-vis, Mr Kony. The Defence has argued today that still Mr Ongwen fears punishment that some other LRA commanders had been executed. However, the Chamber already considered and rejected this evidence in paragraph 2614 of the trial judgment. It found that these LRA commanders had been killed because they politically challenged Mr Kony, but not because they failed to obey military orders.

Also, your Honours, Mr Ongwen had a realistic possibility to escape and he didn't do. Again, counsel for the Defence argued yesterday and today that he was arrested in 2003 because he had tried to escape. Again, this is not supported by the evidence. The Trial Chamber already rejected these allegation in paragraph 2620 of the judgment.

The same thing with the belief of Mr Kony's spiritual powers. The evidence shows that experienced LRA members, like Mr Ongwen, did not believe that Mr Kony had such powers.

Contrary to what Mr Ongwen has said this morning, the Chamber carefully assessed -- carefully considered the report of Mr Pollar, D-133, but it simply considered that it was not suitable for use as evidence in this case because it was based on Mr Pollar's own experience and recollection of what had happened to him and other abductees, but did not provide an objective assessment of the conditions within the LRA on abductees and the influence that it could have on their free will.

*And four, Mr Ongwen committed some of these -- most of -- some of his crimes in private where the threats could not have such an effect.

Finally and to the extent that Mr Ongwen argues that he was subjected to a lesser form of coercion during the period of the charges. Again, this was not established by the evidence. Mr Ongwen's circumstances were significantly different from those of low-ranking officers. He was a high-ranking commander during the period of the charges, and a source of threats and punishments himself.

In other words, by the time of the charges, Mr Ongwen did not live in fear. He instilled fear in others. Because of this, the Chamber rightly refused to consider duress as a mitigating factor.

However, the Chamber considered one individual circumstance and gave it considerable weight in mitigation, that is Mr Ongwen's abduction and early years in the LRA. He was taken from his family, his education was interrupted and he was likely subjected to similar cruel treatment as other child recruits in the LRA. But there is no contradiction between the Chamber's decisions to consider this factor in mitigation and the Chamber's previous finding that Mr Ongwen did not have substantially diminished mental capacity at the time of the charges.

The Chamber rejected the Defence's arguments which tried to establish such a link. It rightly found that there was no reliable evidence that any traumatic experiences that Mr Ongwen suffered as a child led to his substantially diminished mental capacity at the time of the charges.

This conclusion is supported by the testimony of the Prosecution expert *witnesses. They also explained that exposure to trauma does not automatically result in the type of illnesses that the Defence allege. They also noted that previous trauma is not generally associated with persistent violent behaviour, which is precisely

Mr Ongwen's behaviour during the period of the charges.

Also, there is no contradiction with the Chamber's finding that Mr Ongwen did not act under a threat. As I said, Mr Ongwen was himself a source of threats. And as a leader of the Sinia brigade he actively contributed to the LRA violent practices. His situation was significantly different from his experience as an abducted child.

The Chamber also distinguished Mr Ongwen's early years from the time that Mr Ongwen became more experienced and began to rise through the ranks. Around *1996 when he was 18 years old, Mr Ongwen was already noticed for his good performance as a commander and he also perpetrated SGBC crimes. It is pertinent that no mitigation is afforded to his being with the LRA after that time. As the Chamber noted, this is important to recognise in fairness to other children and to other persons who were placed in similar circumstances as Mr Ongwen but made different choices.

In conclusion, your Honours, the Chamber correctly assessed Mr Ongwen's individual circumstances. And after it assessed the factors applicable to the individual sentences -- sorry, after the Chamber assessed the factors which applied to all the crimes, it then assessed some factors which were relevant to only certain categories of crimes. It didn't find any mitigating factor, but it found some aggravated factors. I will not develop on this point, your Honours, and I will move directly to the determinations of the individual sentences.

Then the Chamber imposed an individual sentence for each of the 61 crimes. It considered their gravity, the applicable aggravating factors and, in mitigation, it considered Mr Ongwen's abduction and early years in the LRA. The Chamber agreed with the Prosecution's recommendation that this factor could reduce his individual sentences approximately by one-third of their length. On this basis, the

Chamber imposed 61 individual sentences which ranged from 8 years to 20 years. Finally, and after pronouncing the individual sentences, the Chamber had to determine the joint sentence.

THE COURT OFFICER: [12:47:28] Counsel has five minutes.

MS REGUÉ BLASI: [12:47:30] Thank you.

As other Trial Chambers have done, the Chamber assessed the factors that it had considered as established in determining the individual sentences. For example, it noted the extreme gravity of the numerous crimes, their impact on victims, the high degree of Mr Ongwen's culpability and it also considered any factual overlap between some of the crimes which found to be negligible.

Based on these factors alone, the Chamber will have imposed a joint sentence of life imprisonment. However, in light of Mr Ongwen's abduction and personal history, the majority of the Chamber *decided to reduce the sentence to 25 years.

Judge Pangalangan would have imposed 30 years.

In this assessment, the Chamber could not have considered factors that it had already excluded in determining the individual sentences, such as Mr Ongwen's alleged substantially diminished mental capacity and duress. But in any event, and since the Defence arguments on the application of these factors were largely based on Mr Ongwen's abduction and related traumatic experiences, the Chamber had already considered these facts in mitigation to the extent that they related to the early years within the LRA.

In conclusion, the sentence imposed on Mr Ongwen reflects the gravity of his crimes, his culpability and takes into account Mr Ongwen's particular circumstances, which had been established by the evidence. And your Honours just to conclude, about -- counsel remarks of the principle of non-punishment and suggesting that

Mr Ongwen was a trafficked person. There is simply no link between his abduction and the crimes that he committed. The crimes were not the necessary or proximate result of his victimisation, and he was not deprived of his autonomy or will during the material time of the charges.

This concludes the Prosecution's submissions on questions 12 and 13.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [12:49:44] Thank you. Thank you. Now, we continue, please, with the Victims' Group 1, your submission. Counsellor, you have 15 minutes starting now.

MR COX: [12:49:57] Thank you, your Honour. As I said in the morning, this will be addressed by Ms Anushka Sehmi. Thank you. By video link.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [12:50:05] Thank you. Ms Anushka Sehmi you have the floor. Fifteen minutes starting now, please.

MS SEHMI: [12:50:11] Thank you, Madam President, your Honours. At the outset, we'd just like to highlight that our submissions echo those stated by the Prosecution.

Your Honours, we submit that the approach undertaken by the Trial Chamber in this case is the correct manner in which the concurrence of crimes and cumulative convictions should be reflected in sentencing.

The first step of the application of Article 78(3) of the Statute requires the relevant Chamber to pronounce a sentence for each of the crimes which the convicted person is convicted of.

In calculating such individual sentence, all relevant circumstances concerning the gravity of the crime and the individual circumstances of the convicted person must be considered.

The second step requires that any relevant factual overlap between two or more crimes must be taken into account by the relevant Chamber in order to ensure that the

convicted person is not punished beyond his or her culpability.

We submit that although cumulative convictions are permissible within the Rome Statute framework, Article 78(3) provides a two-step test in order to prevent the occurrence of cumulative sentencing. In this case, we submit that all relevant circumstances and factors related to the gravity of the specific crimes, as well as the personal circumstances of Dominic Ongwen were taken into account by the Trial Chamber.

Indeed, the Trial Chamber considered the extreme gravity of the crimes committed by Dominic Ongwen, including the degree of his culpable conduct and found that a joint sentence of life imprisonment would have been in order in this present case.

The victims participating in this case had overwhelmingly requested the Trial Chamber to pronounce a life sentence against Dominic Ongwen given the large amount of distinct criminal conducts underlying the different crimes of which Dominic Ongwen was found guilty of.

In our opinion, Judge Pangalangan's partly dissenting opinion provided a more appropriate sentence of 30 years of imprisonment given that - and I am quoting from the dissenting opinion at paragraph 16, decision 1819 - quote "The scale and cruelty with which these crimes were committed in this case are not outweighed by the sad twist of fate of Dominic Ongwen's abduction and conscription as a child soldier." End quote.

However, after considering all the relevant circumstances, the Chamber decided not to sentence Dominic Ongwen to life imprisonment. With regards to the concurrence of crimes, whilst we acknowledge instances of concurrence or partial overlap in the factual basis of some crimes of which Dominic Ongwen was convicted, we submit that this overlap does not have any significant impact on the determination of

Dominic Ongwen's joint sentence.

Given the existence of a large number of distinct convictions, holding an entirely different factual basis which have been pronounced by the Trial Chamber.

For instance, war crimes and crimes against humanity are distinguished only by different contextual elements and not by the conduct of the perpetrator or its consequence. This was found to be a permissible concurrence by the Chamber.

It is evident throughout the Trial Chamber's analysis that in its decision on the sentence, that it was cognisant of the need to avoid possible overlap in the underlying conduct between different crimes. Indeed, the Trial Chamber identified five particular aspects of overlap between the individual sentences.

The acts and conduct underlying concurrent war crimes and crimes against humanity, the acts and conduct underlying the crimes of attacks against the civilian population, and the separate crimes committed in the context of those attacks. Thirdly, the acts, conduct and discriminatory dimension underlying the crimes of persecution and the specific crimes through which the persecution was permitted where discriminatory dimension was found to be aggravating circumstance.

Fourthly, the conduct underlying the crimes of torture and enslavement committed in the four attack. And lastly, certain criminal conduct and elements underlying rape and sexual slavery and sexual slavery and torture.

Therefore, we submit that the position taken by the Trial Chamber in this case that none of the crimes for which Dominic Ongwen was convicted can be absorbed within any other crime is the correct approach. Indeed, the large number of other crimes for which Dominic Ongwen was convicted of are designed to safeguard wholly distinct protected interests or values and, therefore, there cannot be any question of absorption, consumption or even partial overlap in terms of the relevant conduct.

In relation to the question regarding mitigating circumstances, we submit that in its determination of the joint sentence, the Trial Chamber considered all the circumstances alleged by the Defence as mitigating factors. This includes duress and Mr Ongwen's alleged substantially diminished mental capacity. And the Chamber rightfully found that they could not be relied upon as mitigating factors in the case. Rule 145(2) of the Rules of Procedure and Evidence allow the court to take into account, as appropriate, mitigating circumstances, such as substantially diminished mental capacity or duress amongst others.

As a circumstance falling short of constituting grounds for exclusion of criminal responsibility, both are linked to mental disease or defect under Article 31(a) of the Statute. Therefore, we submit that it follows that the question of substantially diminished mental capacity, like the question of mental disease and effect under Article 31(a) of the Statute, must be determined by reference to the time of the relevant conduct.

The Trial Chamber, on the basis of a detailed analysis of the evidence, including expert evidence which the Prosecution has just alluded to, and the corroborating evidence heard during the trial, found that Dominic Ongwen did not suffer from a mental disease or defect at the time of the conduct relevant under the charges.

The Chamber concluded that the evidence indicated that he was in full possession of his mental faculties and exercised his role as a commander effectively.

As such, we submit that it would be illogical then for the Trial Chamber to consider the possibility of substantially diminished mental capacity as a mitigating factor in sentencing, given that it did not find Dominic Ongwen had suffered from a mental disease or defect at the time relevant to the charges.

Furthermore, Mr Ongwen's current mental health status cannot have any bearing on

diminished responsibility, as it does not relate to his mental state at the time relevant to the charges.

Similarly, duress, when falling short of constituting a ground for the exclusion of criminal responsibility under Article 31(d) of the Statute, can still be a mitigating circumstance as provided for by Rule 145(2(a)(i) of the Rules. This mitigating circumstance can be found in cases of duress that fail to meet the thresholds of necessity or reasonableness of the action taken by the perpetrator to avoid a particular threat or where the specific mental element is not met.

We concur with the Trial Chamber's reasoning that the application of this mitigating circumstance is not automatic and must be assessed on the facts of each case. In the trial judgment, the Chamber undertook a detailed analysis of all facts and evidence relevant to the potential applicability of duress under Article 31(d) of the Statute.

The Chamber found that there was no basis in the evidence to hold that Dominic Ongwen was subjected to a threat of imminent death or imminent or continuing bodily harm either to himself or another person at the time of the conduct underlying the crimes -- the charged crimes, sorry.

On the contrary, the Chamber found that Dominic Ongwen was not in a situation of complete subordination vis-à-vis Joseph Kony, but frequently acted independently and even contested orders from Joseph Kony. Nor did the evidence indicate that Dominic Ongwen faced punishment by death or serious bodily harm when he disobeyed Joseph Kony.

Therefore, based on a thorough analysis of the evidence, duress was excluded in the present case as the criminal conduct of Dominic -- the -- sorry, as the criminal conduct Dominic Ongwen was convicted of was not caused by threat of death or serious bodily harm to him or another person. Therefore, accordingly, and on the same

basis, we concur with the Chamber that duress cannot be applicable in the present case as a mitigating factor pursuant to Rule 145(2)(a)(i) of the Rules, as it has no evidentiary foundation in the judgment.

In conclusion, given that duress and diminished mental capacity are intrinsically tied to an evidentiary finding in the judgment, they cannot be relied upon in sentencing as a mitigating factor without such an evidentiary basis.

That concludes our submissions, your Honour.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [13:01:30] Thank you very much.

Now I give the floor to counsel representing Victims' Group 2. Ms Paolina Massidda, you have the floor for 15 minutes.

MS MASSIDDA: [13:01:45] Thank you, Madam President. For the record, Ms Caroline Walter has joined the Common Legal Representative team as of this session.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [13:01:54] Thank you. You are going to take the floor now?

MS MASSIDDA: [13:01:57] Yes.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [13:01:58] No? Yes, okay. Go ahead, please. 15 minutes.

MS MASSIDDA: [13:02:01] Madam President, your Honours, this appeal is not only about the correctness of the judgment issued by the Trial Chamber, but also about the correctness of the sentence imposed on Mr Ongwen.

Before going to the merits of the sentence, allow me as a preliminary remark to remind that victims are still of the view that the decision to impose 20 years of imprisonment, instead of life imprisonment, as they requested, is not really proportionate to the gravity of the crimes, nor to the victimisation recognised by the

Trial Chamber in full.

However, victims acknowledge the Trial Chamber's discretion in the determination of the sentence and consider that the Chamber did not commit any error in arriving at said determination.

On the merit of the appeal, the Defence fails to show that the Trial Chamber committed any error in sentencing Mr Ongwen. The Trial Chamber correctly used its discretion in the determination of its sentence, correctly interpreted the law and the facts, and appropriately balanced the relevant factors related to gravity and personal circumstances of the accused.

In accordance with Article 78(3) of the Statute and consistently upheld by the jurisprudence of this Court, the Trial Chamber first correctly indicated the sentence for each crimes for which Mr Ongwen was declared guilty. This exercise ensures that the final sentence reflects the totality of the culpable conduct of the convicted individual, taking into account the unlawful behaviour, the means employed to commit or execute the crimes, the degree of participation in the commission of the crimes and the intent of the different interests and rights violated.

Subsequently, the Trial Chamber correctly imposed a joint sentence. And the reasoning of the Chamber, as recalled by my colleague Mr Obhof, at paragraph 375 of the judgment, clearly shows, contrary to the Defence argument about the double counting of overlapping factors underlying conducts of the appellant, that the Chamber did acknowledge that a number of crimes for which Mr Ongwen was convicted are in concurrence with each other in that the same conduct and consequence are characterised as more than one crime and other instances of partial overlap in the underlying conduct between different crimes he committed.

However, as indicated in paragraph 379 of the sentencing judgment, the Chamber

correctly considered that any such overlap, taken individually or in combination, will not have a significant bearing in the determination of a joint sentence given the strikingly large number of distinct convictions holding entirely different factual bases. The Defence also advances several arguments about the Trial Chamber correctness in assessing the gravity of the crimes and the mitigating and aggravating factors and personal circumstances of Mr Ongwen.

I will limit my observation in this regard to three discrete issues.

First, on the alleged non-consideration by the Chamber of Mr Ongwen's abduction and early experience in the LRA as constituting specific circumstances bearing a significant relevance in the determination of a sentence, the Chamber did consider said factors as warranting approximately a one-third reduction in the length of the sentence.

Your Honours, in concrete terms, the Chamber's assessment of the gravity of the crimes for which Mr Ongwen was convicted, along with the aggravating factors, against the mitigating and personal circumstances of the appellant, including his abduction at a young age, actually worked in his favour.

Second, and in response to the question of whether in the determination of the joint sentence, the Chamber duly considered the circumstances pleaded by the Defence in relation to duress and alleged substantial diminished mental capacity. The Trial Chamber in paragraph 54 of the sentencing judgment did state that mitigating circumstances must be established on the balance of probabilities.

It also noted that a substantially diminished mental capacity is a mitigating circumstance explicitly provided in Rule 145(2)(a)(i) of the Rules, and as a circumstance falling short of constituting grounds for excluding criminal liability as in Article 31(1)(a) of the Statute.

But after recalling its assessment of all the expert evidence, as well as the factual evidence, the Chamber held that the results of the detailed evidentiary analysis of the possibility of mental disease or defect in Mr Ongwen's case, I quote, "are also incompatible with any consideration of substantially diminished mental capacity". End of quote. Paragraph 92-94 of the sentencing judgment.

In other words, the Chamber reassessed all relevant evidence, focused on the mental state of the appellant during the charged period, against the proper standard of proof, and made a conclusive factual finding that he did not suffer from any substantially diminished mental capacity.

The Defence does not show how this evidentiary standard under Rule 145(2)(a)(i) was erroneous. It cannot be possibly suggested, your Honour, that the Chamber should have individually reassessed each piece of evidence and reached a conclusion pertaining the mental state of the appellant categorically opposed to its factual findings in the judgment.

Third, and this is my final point, on the Defence's arguments that the Chamber used the appellant's unsworn statement to negate the mitigating factor and personal circumstances of substantially diminished mental capacity, I just want to recall, again, the evaluation of the Chamber in paragraph 104 of the sentencing decision that I quoted in full earlier this morning.

Having considered all the circumstances of the case, the Trial Chamber also concluded that the appellant's current mental health could not be taken into account as a mitigating circumstance for sentencing.

In line with the jurisprudence of international criminal tribunals, the Trial Chamber held that poor health is mitigating factor only in exceptional cases. The health of the convicted person at the time of sentencing needs not automatically be taken into

account or be seen as a mitigating circumstance. Paragraph 103 of the trial decision. A reasoning which is shared by Trial Chamber II in the sentencing decision -- sorry, decision on sentence Trial Chamber IV, 22 March 2017, paragraph 187.

Moreover, in paragraph 394 of the sentencing decision, the Chamber stated, I quote: "In addition, while not an aggravating factor in and of itself or an element otherwise impinging as such on the length of the prison sentence to be imposed in the present case, the Chamber cannot overlook the absence, in Dominic Ongwen's submission during the hearing on sentence, of any expression of empathy for the numerous victims of his crimes - and even less of any genuine remorse - supplanted by a lucid, constant focus on himself and his own suffering eclipsing that of anyone else." End of quote.

In conclusion, your Honours, victims consider that the grounds of appeal raised by Defence in relation to the sentencing decision are all unfounded. Thank you.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [13:12:40] Thank you.

With this, we will go -- we have concluded the submissions and we will go for a lunch break. In an hour, we will reconvene by 14.15.

THE COURT USHER: [13:12:56] All rise.

(Recess taken at 1.13 p.m.)

(Upon resuming in open session at 2.18 p.m.)

THE COURT USHER: [14:18:33] All rise.

Please be seated.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:19:13] Welcome back.

Now we will have the responses to the submissions on sentencing.

Counsel for Mr Ongwen, you may now respond to the submissions made by the Prosecutor and the participating victims.

You have the floor for five minutes.

MR AYENA ODONGO: [14:19:37] Good afternoon, Madam President and your Honours. I think this session is going to be handled by Obhof, Thomas Obhof. He's going to take two minutes and hand over to Chief Taku.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:19:55] Okay. Counsellor Obhof, you have the floor, please. Are you with us?

MR OBHOF: Thank you very much, Madam President.

PRESIDING JUDGE IBÁÑEZ CARRANZA: Please go ahead.

MR OBHOF: [14:20:02] Thank you.

First, we'd like to respond back to the infamous paragraph 94, and the Defence reiterates that this paragraph dealt with the burden of proof as related to Article 31, not the burden of proof as related to Rule 145. It refers back to a trial judgment and a decision in the trial judgment, and the Defence argues that it was an error for it to use at the trial judgment.

Secondly, your Honours, the Defence would like to note about the non-punishment principle briefly discussed by the Prosecution at the end of their presentation. The non-punishment rule works similar as this analogous -- analogous issue. A person is trafficked and taken to a different country or a different location and is forced into prostitution. Over the next ensuing ten or 15 years, said person who was trafficked as a minor then become -- goes up the hierarchy to be one of the heads of the prostitution ring. And it is of no fault of their own that they were abducted and trafficked and put into this illegal situation. And this is the exact type or analogous situation in which Mr Ongwen was taken. He was abducted at the age of nine and beaten, tortured and brainwashed into something. And we say there is a direct causal link between his abduction in 1987 and the actions for which he was convicted

between 2002 and 2005.

Now I shall pass the floor over to Chief Charles Achaleke Taku to talk on another topic.

Thank you, your Honours.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:22:11] Thank you.

Counsellor Chief Taku, you have the floor for the remaining time.

MR TAKU: [14:22:13] Thank you, your Honours.

The first group of victims raised a very important issue in this case when she that said they considered the contextual elements as a distinguishing element that distinguishes different crimes. That is the separate -- the separate elements that were considered in the determination on ideal concurrence in conviction and in sentencing. Your Honours, you will verify this judgment and you will find out whether the judges made any determination in each conviction with regard to the contextual elements. Because it's perfectly possible that some of the crimes were committed as war crimes, in the context of war crimes and not as crimes against humanity, especially an other.

Secondly, you look at the pleading. Of course, we contested the pleading of contextual elements, but they said that the evidence about the intercepts, the audios, that was evidence for the contextual elements which it disallowed in many, many paragraphs, most of if, on the grounds that it was in a non-working language for the Court, which was often stated in the interests of justice.

So these contextual elements, your Honours, were not -- these requirements were never proved, they were never pleaded, there was no notice and the -- for example, forced pregnancy. You cannot say that it was done in a widespread and systematic fashion. Or the seven wives, many of them which occurred outside the jurisdiction

of the Court.

So it's perfectly possible that some of the crimes here may have been war crimes, but not necessarily widespread. Or the attack on Odek on 10 October 2003, or the three other attacks within a space of two months in 2004. You will make a determination. And even if you found that the two contextual elements were present, in evaluating, using the construct of society, you will say which -- for sentencing, which of the contextual elements aggravated the crimes, which had the greatest impact? That will surely consume the one that has less impact whatsoever because it was the same victims, the same conduct, the same *mens rea*. That will reply to that, your Honours.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:24:39] Now counsel for the Prosecution, you have the floor for five minutes for responses.

MR GALLMETZER: [14:24:49] Good afternoon, your Honours. If I may address you on two points that were raised by the Defence this morning. First, the Chamber appropriately considered Ongwen's evidence and submissions regarding Acholi traditional justice mechanisms, known as *mato oput*. The Defence this morning repeated their arguments that they made in their written appellate submissions and we have responded to them in paragraphs 67 to 89 of our brief. I simply would like to highlight some of the key issues in this context.

First, Ongwen argues that the Chamber ignored or disregarded his evidence and submissions regarding Acholi traditional justice and this is inaccurate. The Chamber devoted nearly 30 paragraphs in its sentencing judgment on this issue, and it carefully addressed each of Ongwen's arguments one by one. See paragraphs 15 to 43. And the Defence merely disagrees with those findings without showing an appellate error. Also, the Chamber held that the relief requested by the Defence, namely, to order that Ongwen be admitted or, rather, submitted to Acholi traditional justice, was precluded

as a matter of law under the Rome Statute. The Chamber correctly held that it may only impose punishment as specified under Article 77 of the Rome Statute. And this indeed has been confirmed by the Appeals Chamber in the *Bemba et al.* sentencing appeals judgment. And third, the Chamber noted that Ugandan courts themselves who know best, they found 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 justice proceedings. And this is what the Chamber also found in paragraph 34 of its sentencing judgment.

The second point that I would like to respond to is, the Chamber did not - contrary to the Defence's assertion - did not rely on Ongwen's actions outside the charged period to aggravate his sentence. And, again, we have fully responded to all of the Defence's arguments in paragraph 104 to 121 of our brief. First, the Chamber did not erroneously rely on evidence indicating that in the late 90s Ongwen abducted girls, raped them and made them his so-called wife to aggravate his sentence. Instead, the Chamber simply drew a distinction between Ongwen's abduction and early years in the LRA from the time where he started to commit crimes. The Chamber then rightly afforded mitigation to the former, but not to the latter. However, it did not rely on this latter period in the crimes committed to aggravate his sentence.

Second, the Chamber did not rely on P-226's abduction in 1998 to aggravate Ongwen's sentence. Instead, it considers aggravating the fact that victims of the crimes, including P-226, were particularly defenceless within the meaning of Rule 145(2)(b)(iii) during the period of the charges. So what matters in the Chamber's assessment is not when the victim two -- P-226 was abducted, but that at the time of the charges she was in a state of particular defencelessness.

And third and finally, the Chamber did not rely on the fact that Ongwen had fathered

children with girls who were forced to be his wives to aggravate his sentence. 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 continuous and ongoing nature between Ongwen and the victims. And then the Chamber expressly stated that it focussed on the nature of this association between Ongwen and the victims that existed as a result of the crime during the period of the charges and treated as irrelevant the fact that he had fathered some of these children before 1 July 2002. And I refer you to the express statement to that fact in footnote 548 of the judgment. Thank you.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:30:07] Thank you.

Counsel for Victims' Group 1, please, have the floor for five minutes.

MR COX: [14:30:14] Thank you, your Honour. I'll take a couple of seconds and then hand it over to Ms Anushka.

Just briefly, I'm not sure I completely understood the analogy of Mr Obhof. Is he suggesting that in her case -- in his case that person could drug traffic, kill, kidnap new children, put them into slavery, use them as sexual slaves, rape them and that should go unpunished? Is that the -- the principle that they are adhering to -- they are supporting? If that's the principle, then I beg this Chamber to dismiss such a principle. Because as Mr -- Dr Burns said yesterday, upholding such a non-punishable principle would incentivate the more kidnapping of child soldiers because the liability would only stay in a few hands and they could make large, large armies of child soldiers.

And, now, your Honour, I will give the floor to Ms Sehmi for the remaining time. Thank you.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:31:31] Thank you.

Counsellor Anushka, please, you can continue.

MS REGUÉ BLASI: [14:04:20] Excuse me, your Honours --

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:31:54] We are not counting the time.

Counsellor, Anushka, are you with us? Counsellor?

Dr Cox, what is happening? We cannot listen you, Counsellor.

MR COX: [14:32:18] Sorry. It seems she's speaking, but we can't hear her.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:32:23] We cannot -- we cannot hear you, Counsellor.

MR COX: [14:32:27] You're muted. She's muted.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:32:29] You need to restart your participation.

Yes?

MS REGUÉ BLASI: [14:32:33] We have been informed from our colleagues that they are unable to follow us from the same link, so probably it happens the same with Ms Anushka that she cannot hear us or see us.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:32:43] Thank you. Court Officer, please check it.

THE COURT OFFICER: [14:32:50] Your Honours, the technicians have been informed of this and are looking into it.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:33:20] We are trying to check what is happening. It appears there is a problem with the link. Just a few seconds, please.

I have noticed that there are some hands from the amici, raising hands through this screen. Who are them, please, try to identify you.

MS GERRY: [14:34:02] Felicity Gerry, Queen's Counsel here, on behalf of the

non-punishment principle group.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:34:06] Yes, but now -- you don't have the floor now. I just -- I just was trying to check. After the parties --

MS GERRY: [14:34:12] And I believe Professor Braakman also has a hand up.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:34:15] After the parties have finished their responses, I will allow some time for you, the amici. Okay?

MS GERRY: [14:34:22] Thank you very much.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:34:24] Okay. Thank you.

MS MASSIDDA: [14:34:27] Sorry, Madam President. Since we are filling the gap, because the intervention of the amici was not actually, in my understanding, fore seen at this point in time. If the amici are going to provide any kind of information, we would like to have a right to respond. Thank you.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:34:47] Okay. Noted.

MS GERRY: [14:35:00] Sorry. Madam President, if it assists while there is a break, I'm not going to say very much, just about three of four --

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:35:04] But you don't have the floor, Madam. You don't have the floor.

MS GERRY: [14:35:09] Understood.

MR COX: [14:35:56] Sorry. Madam President, may -- may I say something?

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:36:06] Yes, Counsellor Cox.

MR COX: [14:36:10] Madam President, your Honours. We would just note or like to object to the possibility of the amicus to give a statement at this time. The opportunity was opened on certain issues and on a certain time. Keeping them opining over what's going on, seems more like the role of a Defence than an amicus. Or maybe a Defence, a Prosecutor, depends on which side you'll stand. But they're

looking a lot like acting parties or even third-party interested, which doesn't seem the role of a an amicus, your Honour. Thank you.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:36:49] Thank you, Counsellor. Indeed, the Chamber has already considered the situation and has decided that at this point in time amici won't be allowed -- allowed to participate due that their time has expired. If after this time for responses of the parties the judges would like to put some questions for the amici, they will be allowed to -- to respond the questions of the judges. Not at this time. Please amici, be informed of that. Thank you.

I think that the problem has been solved. So Counsellor Anushka, you have the floor for the remaining time.

MS SEHMI: [14:37:39] Thank you, Madam President. At the outset, we'd like to endorse the submissions made by the Prosecution regarding *mato oput*. Indeed, we submit that whether the label of complementarity was specifically mentioned by the Defence in the appeal brief or not is irrelevant to the extent that we submit *mato oput* is wholly inapplicable within the context of this case. As the Chamber is aware, *mato oput* is an Acholi traditional justice mechanism which seeks to bring the crime of the victim and the perpetrator together for mediation through truth and the payment of compensation. This is a voluntary process and cannot take place without the acquiescence of victims. However, as we have noted in our previous submissions, victims have vehemently opposed the possibility of *mato oput*.

Secondly, not all victims participating in this case, are of the Acholi ethnicity, but also from the Teso and Lango communities. Furthermore, for this process to work, the perpetrator must acknowledge his or her crimes and apologise. This did not happen within the context of this case.

Lastly, we believe it's not important to over romanticise the use of traditional justice

mechanisms, as they can often be discriminatory towards women. For example, how could *mato oput* be deemed suitable to respond to the harm suffered by victims of sexual and gender-based crimes such as forced marriage, rape, sexual slavery amongst others. With regards to the issue of non-punishment for alleged victims of trafficking, we would like to refer the Chamber to paragraphs 30 to 35 of our response to the amicus curiae submissions, filing 1953. Overall, we submit that the non-punishment of Dominic Ongwen, taken into consideration the immense harm suffered by victims participating in this case, would be contrary to the purpose, spirt and objective of the Rome Statute and the expressive goals that it aims to serve. Thank you, your Honour.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:39:55] Thank you. Now, Victims' Group 2, please. Madam Massidda, you have the floor for five minutes.

MS MASSIDDA: [14:40:04] Thank you very much, Madam President. Only two brief remarks. The first, it's in relation to *mato oput*. All the victims are represent -- are from Acholi tradition and they vehemently opposed this possibility. But in any case, if you agree or not agree, I think there is a precedent of this Chamber which may be considered conclusive on the point. I'm referring to the *Bemba et al.* sentence appeal judgment of 8 March 2018, document 2276, paragraph 77. I quote, "the Statute and related provisions contain an exhaustive identification of the types of penalties that can be imposed against the convicted person and specify mandatory, aggravating and mitigating circumstances, as well as parameters to be considered for the determination of the quantum of such penalties".

And here is the relevant part.

"The corresponding powers of a Trial Chamber are therefore limited to the identification of the appropriate penalty among the ones listed in the Statute and a

determination of its quantum. No inherent powers may be invoked to introduce unregulated penalties or sentencing mechanisms not otherwise foreseen in the legal framework of a court." End of quote.

And my second remark, your Honour, goes to the issue of the - I can put it - fatherhood of Mr Ongwen, which was also taken up, I think, on Tuesday by Madam Alapini-Gansou. And I would like, because of time involved, I would like simply to refer the Chamber to paragraph 57 to 61 of our response to the Defence appeal on sentence in which we make an analysis, including some reasoning on the issue, indicating that the Trial Chamber correctly did not consider the issue of Mr Ongwen's fatherhood as a circumstance guaranteeing mitigating the sentence. And we make in that paragraph, also, a reference to the compliance of this finding to international human rights law.

Thank you very much.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:42:35] Thank you. Now, I will give the floor to my learned colleagues in case they have questions. I remind the parties and the participants that you have two minutes to respond to each question posed by the Chamber.

Judge Hofmański, do you have any questions?

JUDGE HOFMAŃSKI: [14:42:55] Thank you. I have no questions, Madam President.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:42:59] Thank you.

Judge Bossa, do you have any questions?

JUDGE BOSSA: [14:43:01] Madam President, I have one question.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:43:05] Thank you, go ahead.

JUDGE BOSSA: [14:43:06] It is directed to the Defence. I want to know whether the

question of trafficking was canvassed at the trial.

MR TAKU: [14:43:20] Since the issue was raised yesterday, I went back and made a global search in the judgment, trial judgment. I went back and made a -- I searched the trial judgment and found it in two locations, your Honours. So it's not only an issue that is coming up for the first time, just that I didn't know the question was asked, by the global search, you will see it coming up in the trial judgment located particularly in the footnotes.

MR OBHOF: [14:04:20] Further noting, your Honours -- sorry, it's (Overlapping speakers)

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:44:04] Sorry. Who is --

MR OBHOF: [14:44:07] This is Thomas Obhof for the Defence.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:44:13] Okay. Okay. Go ahead, Counsel.

MR OBHOF: [14:44:14] You will see, as I stated during our presentation this morning, your Honours, this was an issue that was touched upon slightly by Major Awich, Defence expert D-113, when he discussed about Dominic being abducted as a child soldier, which is essentially child trafficking.

Thank you, your Honours.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:44:39] Are you satisfied, Judge? Please go ahead.

JUDGE BOSSA: [14:44:45] I just want to know whether the Defence specifically raised this question with the Trial Chamber.

MR AYENA ODONGO: [14:45:01] Madam President and your Honours, I think the central -- I thought the central theme of the Defence case was that Ongwen was abducted. And we laid evidence to show that Ongwen was abducted, taken to the

bush, remained there for 27 years.

Now, in my view, no matter the nomenclature used, so long as it describes child trafficking, in my view, that should be sufficient. Because what happened, in effect, was really child trafficking and slavery as, you know, maintained or as -- I mean, expatiated upon by many scholars, and especially in the report of the United Nations' Special Rapporteur that was well canvassed.

So it is -- our answer to that question, that matter, yes, was canvassed during the Trial Chamber. Although, may be it is possible that we did not specifically, especially when we are leading evidence, raise it as a matter of specificity. But Major Awich, one of the witnesses that testified, specifically mentioned that. So to that extent, I think it was properly canvassed during the trial stage. Thank you.

JUDGE BOSSA: [14:46:57] Thank you, Madam President.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:04:20] Thank you.

Judge Alapini-Gansou.

MS MASSIDDA: [14:47:00] Madam President, with your leave, may I have one words on this matter?

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:47:07] Yes, yes. First, Madam Paolina Massidda two minutes and then Madam Regué two minutes.

MS MASSIDDA: [14:47:08] Thank you, Madam President. Just to note that I was probably attending another trial because this is -- or I was probably disassociated, I don't know --

MR AYENA ODONGO: [14:47:16] It's possible.

MS MASSIDDA: [14:47:16] The two option -- it is possible, Mr Ayena.

Because I have never heard about discussion on trafficking during the entire trial.

This is one.

And the second, just to be clear, the word "trafficking" is mentioned twice in the judgment. The first one is in paragraph 2711, and this paragraph is contained in the part in which the Chamber is dealing with the relevant applicable law. In substance, the Chamber is indicating Article 7(1) relates to, Article 7(3) relates to, just stating the law.

And the second place where it appears is in footnote 7152 in which the Chamber simply states paragraph 1 of the Elements of Crimes of Article 7(1)(c) of the Statute. The Chamber is dealing with -- generally with the crime of enslavement.

Now, from here to say that the Chamber considered the issue of trafficking and that the issue of trafficking was dealt with and taken up by the Defence at trial, this is an entire other matter. Thank you.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:48:48] Thank you.

The Prosecution, please. Two minutes.

MS REGUÉ BLASI: [14:48:50] I was just going to echo what Ms Massidda said. And also in terms of the Witness D-133, Paul Awich, that I understand that Mr Obhof suggested that he was testifying about this issue, he was testifying about his own experience as an abductee, former abductee person, but at no point he was talking about the concrete circumstances of the LRA or Mr Ongwen. It was about his own experiences. So that's also no basis to support the allegation that the issue was raised at sentencing.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:49:26] Thank you.

No other parties?

The Defence counsel already had the opportunity to --

MR TAKU: Yes, your Honour, just to --

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:49:34] -- respond. To supplement?

MR TAKU: Yes, your Honour .

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:49:35] Just 30 seconds.

MR TAKU: [14:49:37] Just to refer the Court to the expert report of Major Awich, and it was said that he was in the convention -- US Convention on the Rights of the Child for nine years in his report. And later Ongwen wanted to expatiate. You will see how the judges dismissed his support in the judgment and also the restrictions they put on him when he was mentioning specific areas of law, including -- so you will look at the report -- and I also said that most of the report that was submitted, admitted into evidence, you look them and you will find more than what you find in the transcript.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:50:15] Thank you. Thank you. Judge Alapini-Gansou, do you have any questions, please?

JUDGE ALAPINI-GANSOU: [14:50:22] (Interpretation) I did have two. The first had to do with complementarity in relation to traditional justice in Uganda, and I believe that the answers have been provided by the various parties and I'm already very happy with that.

Now, my second concern has to do with -- well, I speak to the Defence in actual fact, and I would like to ask them for a favour, a small favour. In light of the means that the Defence raised, what does the Defence suggest for the victims? I know that mention has been made of probative facts. We've talked about the Prosecution, we've talked about victims, but in terms of the means developed by the Defence, I want to make sure that somewhere the interest of the victims were taken into account within their own arguments. So in short, what does the Defence suggest for the victims.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:51:42] The Defence, please,

Counsellor, you have two minutes to respond.

MR AYENA ODONGO: [14:51:54] Madam President and your Honours, first of -- first of all, the applicability of traditional justice system of the Acholi in relation to the ICC, Madam, we are going to refer to the complementarity provision of the -- of the Statute. And we are saying, your Honours, that as far as we are concerned, this is one of the ways that you are going to integrate applicable customary law of -- of the country of Uganda into this to make ICC relevant.

And secondly, on the question of what happens to the victims, we start from the premise that the accused himself is a victim. And what is already happening -- and I shall refer you to the testimony of Defence witness number 150, who was a traditionalist, and also to the witness statement of D-20 -- 20 -- D-0009, a traditional leader in Acholi. They elaborate very comprehensively on what has happened to the children or, rather, returnees -- the LRA returnees home. They said because of the spiritualism, that it affected those who were in the bush. None of them was purely -- completely healed until they had to go through rituals of cleansing. And rituals of cleansing is part of the traditional mechanisms that is used.

And I want to add my voice to the fact that northern Uganda is peaceful now because, as far as the country is concerned, they don't believe in punitive justice. They don't believe in retributive justice, but restorative justice.

And we the want to draw the attention of this Court to the fact that one of the people who are specialised in a traditional justice system of Acholi, they had made an application to give testimony on the question of *mato oput* and the applicability of -- the relevance of Acholi traditional justice system. For some reason, we do not understand, the Trial judge rejected his -- his participation.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:55:44] Counsellor, 30 seconds to

conclude, please. Your response.

MR AYENA ODONGO: [14:55:50] Yes. I think --

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:55:52] You're concluded?

MR AYENA ODONGO: [14:55:53] Okay. So to the extent -- I don't know whether I satisfied the -- what, I mean, her Lordship really wanted to know, but one, the relevance of the Acholi traditional justice mechanism in relation to the ICC, and then what happens to the victims? The victims are in very much the same position as Dominic Ongwen. They cherish and applaud the application of the Acholi traditional justice mechanism. Thank you.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:56:33] Thank you.

MR COX: [14:56:35] Sorry, your Honour. May I just rise --

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:56:37] Yes, Counsellor, two minutes.

MR COX: [14:56:39] -- to make a comment?

Your Honour, we meet with the victims. We -- I have been long -- it has been long since I haven't met them, but Mr Manoba, Listowel, Priscilla are in the ground and they meet constantly with the people. At least the participating victims have no interest in traditional justice. They have not mentioned once that they would be satisfied with traditional justice. This is not some hypothetical anthropologist study from Harvard. No, no. This actual people, actual victims that are saying this. So there's no space. And as my colleague, Ms Sehmi said, it's incompatible with the object and purpose. I mean, I think that will satisfy. And let me give it a try, your Honour. How about forgiveness? How about asking for forgiveness even if you're not responsible for the damage that you caused?

Thank you, your Honour.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:57:51] Thank you.

Wait a minute -- wait a minute, please, Counsellor.

Judge Alapini-Gansou, you wanted the floor?

Wait a minute. Judge is going to -- to speak.

JUDGE ALAPINI-GANSOU: [14:58:02](Interpretation)

Madam President, I asked a question about the fate of the victims and that was all. If the Defence wants me to be more specific, I'll put the question differently.

No matter who the victim may be in this trial, do they need reparations?

MR TAKU: [14:58:27] Your Honours --

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:58:29] Counsellor, you have the floor for two minutes.

MR TAKU: [14:58:33] Yes, your Honours, they deserve reparations. And let me say why.

All the witnesses for Mr Ongwen were victims - women, children - and they came here and made a fervent appeal that the Court should show indulgence and send Mr Ongwen back to Uganda.

Prosecution witness after Prosecution witness, at the end of their testimony you will find in the transcript -- in the transcripts, each of them got up and said Mr Ongwen should be returned of them. In fact, one of them said that when he heard Mr Ongwen had surrendered, 20 of them rushed to Gulu in order to welcome Mr Ongwen because Mr Ongwen was a different type of person. And the Prosecution witnesses have said this.

But more important, your Honours, is the fact that starting with the victims, the women that they said were -- Mr Ongwen had children with them, within the context of this case and this record, there are many correspondences in which Mr Ongwen, for the stipend that they pay him whenever he does some manual work in detention,

he sends the money home for the upkeep of those women and their children. And lately, the (indiscernible) families of Mr Ongwen, to solve one (indiscernible) of reparations, they gave land to those women and to the children to settle, which is the key aspect. I was thinking that during the reparations hearing, lead counsel would make sure to bring that to the attention of the Court.

And Mr Ongwen will also -- my Lord, in the process of reconciliation in northern Uganda and elsewhere, I said that he is a symbolic, very, very -- a strong symbol for (indiscernible) because it was the very first time to be adopted in northern Uganda. And he would spend the rest of his life.

And about the question of forgiveness. Mr Ongwen will speak for himself, your Honours. He's extremely very, very remorseful. You also understand the challenges he had when he got up to talk here, having listened to the accusations of (indiscernible), but he expressed himself. He's very, very, remorseful. And with the benefit of a priest, a priest that had been counselling him and helping him, Mr Ongwen is understanding a lot of things. He's very, very remorseful. And we really honour the victims, what happened to Mr Ongwen or what happen to everyone. He doesn't glorify that. And we believe strongly that his own witnesses, including some of them who were the wives of senior commanders, some of that I cannot mention in public, working for him, each of them, most of them, pleaded for Mr Ongwen. This is not something I'm inventing. You will find it in each transcript.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [15:01:07] Thank you.

Madam Judge Alapini-Gansou, are you satisfied with the response? Yes?

Judge Lordkipanidze, do you have questions? No?

JUDGE LORDKIPANIDZE: [15:01:16] No, not at this stage.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [15:01:17] Well, I would like to ask a last question just in way of clarification. This is mainly for the Defence. You have referred to the principle of complementarity to support your proposition that the Trial Chamber should have seriously considered *mato oput* in its sentencing decision. Well, the question here is what exactly does it mean, one? And two, what will happen with the victims if it's -- *mato oput* is applied, what will happen with the victims? Yes, please two minutes to respond.

MR AYENA ODONGO: [15:02:06] I will begin by the last -- answering the last leg of the question. What will happen to the victims is that some of them who could identify positively that Ongwen was directly involved -- well, this is not a matter of, you know, court trial. Back at home, according to the customs of the Acholi people, it is once somebody identified that person is the person who killed so and so, the communities -- the two communities of the person who is killed -- who was killed and the person -- the perpetrator find a medium, somebody who will bring them together and they talk about it. They talk to Dominic Ongwen and even Dominic Ongwen said yes. That one skipped my mind. In fact, it also skipped the mind of the Prosecutors. It is possible that I did it.

Now, once he admits that, that is accountability in itself. Then the next leg is for them, now, to go through the rituals. And it is so comprehensive the way they do it. In fact, the notion of impunity about Acholi traditional justice system is just a mere misunderstanding of what goes on. The justice system is replete with all the hallmark of modern justice system because you go through accountability. That is admitting, yes, I did it.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [15:03:47] Counsellor, I asked one question. What exactly means *mato oput*?

MR AYENA ODONGO: [15:03:56] *mato oput* --

PRESIDING JUDGE IBÁÑEZ CARRANZA: [15:03:59] Exactly. Because you are asking the principle of complementarity to be applied in the sentencing decision and the Trial Chamber shouldn't seriously consider that. And, also, I would like to add, what are the legal basis for you to continue suggesting this, please? Exactly describe what -- how does its institution works and what are the legal basis you have to -- to suggest this, please.

MR AYENA ODONGO: [15:04:26] Yes, Madam President, *mato oput* is a ritual through which a person who has committed an offence against another comes and apologises to the affected community. Because in our -- in the tradition of the Acholi, certain crimes are communal. You commit it, actually, as an individual, but the responsibility is upon your clan. And the other party, the responsibility is also upon that clan. So the two clans find a middle ground somewhere, you know, an arbitrator who will stand in between the two of them.

And the way *mato oput* works is that the person -- the perpetrator is, first of all, asked to admit to his responsibility. And once he admits it and those people are asked whether they would like to forgive him, is it provided -- then the answer is provided we go through these rituals of *mato oput*. And *mato oput* this time, in effect, is the drinking of bitter root. There is a bitter root that is brought in a common pot, you know, a half pot. It is prepared. The perpetrator and the person -- one of the representatives of the victim, they come and put their mouths together in the half pot and drink that bitter root commonly. That is to say there has been bitterness. We have now drank this bitter root. From now, we shall become friends. We shall now forgive each other and from now we shall help each other.

In fact, there was a great story of one -- I mean, two clans who went through this

many years, maybe 100 years ago. But because they went through this *mato oput*, they are now so close to each other that there is a situation where one of -- a member of one of the clans was at fault and they were supposed to be charged, but the only person who could give, you know, cogent evidence was a member of the clan with whom they had done *mato oput* 100 years ago. And because of that understanding, the man declined, actually, to give evidence against the other person. So that is *mato oput*.

I now come to the relevance of that *mato oput*. *Mato oput* is an Acholi traditional justice mechanism. And like I was saying, it is replete with all the hallmarks of the justice system we are practising because it talks about accountability and then it talks about punishment of a certain crime. But this punishment is communal. But the other thing that -- I mean, so I am saying after, there is what they call blood compensation in the case where somebody has been killed. If blood was not spilled, there is an arrangement for compensation for the victim.

So the complementarity principle now sets in, in the sense that, first of all, this Court is meant to be complementary to domestic jurisdictions. The only setting where there is no way of handling cases, we are now seeing. In Uganda, first of all, we have the international crimes division, which has already recognised the effectiveness, although not to the same extent of the *mato oput* system. We are saying if -- I mean, this Court should consider, especially in view of the fact that the principle of this Court is that an accused must be afforded an opportunity to be rehabilitated. And my colleague has already --

PRESIDING JUDGE IBÁÑEZ CARRANZA: [15:09:33] Counsellor, just in way of clarification, because we are getting lost with it, similar issues that you are raising now. The question is what does exactly *mato oput* means, you have already

described.

MR AYENA ODONGO: [15:09:49] Yes.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [15:09:49] I wanted to know under which legal basis you propose that this Appeals Chamber should depart from the norms of Rome Statute on sentencing issues in favour of rituals of clans and practices of clans. I would like to know. Because complementarity is such a big issue. We are not going to discuss about complementarity here, but maybe you have a more convincing legal basis to propose this. And I will allow you one minute to finalise with this discussion.

MR AYENA ODONGO: [15:10:27] Yes, the legal basis upon which I would propose this is this: Yes, whatever sentence that he should serve, we are saying give him some form of suspension of the sentence. Let him go to Acholi and save his life so that he's cleansed, to begin with, so that if there is an opportunity -- if there is an -- I mean, if some people raise specific issues for him to go -- undergo the *mato oput* itself, it can be done. And then the man integrates with the society. Yes.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [15:11:21] Thank you.

I believe that Judge Alapini-Gansou has a question. Judge Alapini-Gansou, you have a question, complementarity question?

JUDGE ALAPINI-GANSOU: [15:11:37](Interpretation) On the basis of your question, I have a further question relating to the replies given by Defence counsel.

In his explanation, I'm understanding that there is this parallel way of law and justice in Uganda, and that gives me a problem because we are no longer at that stage. We have moved on. We're really looking at the jurisdiction -- of a unique jurisdiction, and now I'm being told that there is a criminal justice system which is in Uganda which is in parallel with modern criminal justice. And I have a bit of a problem with

this because I wonder how one could apply this complementarity, which is a principle of the Statute of Rome, and to what extent that should be done, given this -- given what's being spoken about in terms of the Lord's Resistance Army. So I have a bit of difficulty with this.

Could counsel tell us whether one could in fact find complementarity by returning to Acholi justice, to Acholi criminal justice. You raised the question, but I'm not really very convinced by the -- or happy with the replies from Defence counsel because that's why -- that's why I raised this question. We've passed the stage of talking about a parallel justice system.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [15:13:58] In first place, Defence Counsellor, you have two minutes to respond. Please stick to the question. Thank you.

MR TAKU: [15:14:03] Your Honours, thank you very, very, much for this observation. I think it is a lively debate that we heard in a domain, and it is a very, very important issue that her Lordship has raised.

In this particular case where we are talking about complementarity, we're asking that the judges should look as for the circumstances in which Mr Ongwen can be rehabilitated back into the community, you should take that into consideration, so that this system does not damage him once and for all.

Secondly, while looking also at the system, it is not challenging -- this Court has already given a judgment. We are only saying given the conviction, you should look at this *mato oput*, the whole Acholi society together. The performance of *cen* which two of the experts, one Prosecution expert and Dr Ovuga wrote about, Catherine Abbo and Dr Ovuga, Prosecution, they wrote about *cen* and also *mato oput*. And witnesses gave evidence that this is what whole decided at the end, at the end of this

case, he will go back to Acholiland and the family, but they have to live as a community wherever they can when all the others have gone. And, therefore, they should encourage, for the purpose of rehabilitation, to take that into consideration. Because he is a victim -- a victim perpetrator. That is an aspect of victimhood. And there are also thousands, probably many other victims who are not in this court process who are as Ongwen. So the *ajwakas* came here. The traditional chiefs came here. And in the course of the trial Rwot Oywak and others, Prosecution witnesses and others, at some point they talk about *mato oput*. This is what holds the society together. Irrespective of the judgment from here, when they go back, they will remain people in the same community, the same ancestral background, the same country, they need this permanent situation of reconciliation and hold -- and get together.

So we say you should consider this in the sentencing, even if we are not saying he should suffer through the sentence, he has been here for about seven or eight years, we will also ask that for time served, they can send him back home to go through the *mato oput* so that he can integrate and reconcile with the community.

In fact, one of the leaders who was in charge of this came to testify here about this. It is one of the other question that was made by the community, just as the ones that testified in this case, that you find when they participated. It might not have gone directly the crimes committed or not committed, but they explain this mechanism in their evidence which you will find in the record.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [15:16:35] Thank you, Counsellor.

I think it was first Madam Regué. Prosecution, please. Counsel, two minutes.

MS REGUÉ BLASI: [15:16:41] Thank you, your Honours. The Defence is confusing two points. What they are effectively asking you is to basically impose a penalty

which is not regulated in the Rome Statute. And with all due respect, you cannot do that. The Appeals Chamber has already ruled in the Article 70 case that you have to impose the penalties which are regulated in the Rome Statute. So you cannot do that.

And then it's mixing up this request with the principle of complementarity, which is regulated in the Article 17. For that purpose, we need to have a domestic proceeding where the same person has been investigated or prosecuted for the same conduct, or it has been already tried with a final sentence. And in that context, they should have challenged. But here we don't have anything of that. There has not been any domestic proceeding by the national authority with respect to the crimes that, you know, the Trial Chamber has decided. I mean, there is simply no basis. And actually, it's -- we should make the point that we have to talk about criminal proceedings in order to be able to challenge the complementarity before this case or a domestic investigation that will lead to criminal proceedings. They are not talking about that at all, you know. Actually, what they are requesting is effectively impunity, and that will be contrary to the preamble of the Rome Statute. So it has no legal basis whatsoever.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [15:17:57] Thank you.

Counsel for Victims' Group 2, two minutes, Madam.

MS MASSIDDA: [15:18:02] Thank you, Madam President.

This was actually what I was meant to say. Impunity, the only word that victims would like not to listen in this court of law. And this is what actually the Defence is advocating for.

Now, *mato oput* is an inter-clan disputes in Acholiland which, by the way, has been performed between 2000 and 2005 - going to Madam Judge Alapini-Gansou's

question - 50 times, meaning in the reasoning of the judge, if I follow correctly, that there is actually a sort of tradition of not even using anymore *mato oput* in favour of different type of jurisdiction and -- in terms of parallelism -- parallelism of jurisdiction.

But what I want to be very clear of is that the issue of *mato oput* is opposed strenuously by the victims. They are not interested at all, because for them, what mattered to them is justice before a court of law, to see the crimes they have suffered from recognised by judges and the victimisation issued -- recognised by judges. This is what will help them in turning the page of their life.

And in any case, Mr Ayena has indicated three elements which are needed for *mato oput*. One, identification of a victim. It's not always possible with all the victims who died. Second, confession of a crime. Never happened on the side of Mr Ongwen. Third, asking forgiveness. When and how Mr Dominic Ongwen has ever asked forgiveness?

And one final point on the issue of rehabilitation. Now, one issue is the rehabilitation of a convicted person, which is absolutely an important principle. You can do it as in any national jurisdiction via sentencing. The period that the person is passing in detention per the sentence, this is the period of rehabilitation. It should also help the person to rehabilitate himself or herself for a sort of new life after the crimes committed.

And second, the issue of the reconciliation of the communities. This is for me, and for the victims, is a complete separate issue from the adjudication of a crime and the sentencing. And victims have already put forward to the lawyers that they would be in favour of reconciliation but eventually in the reparation process, which is, again, another aspect of criminal liability and how victimisation can be -- I can't find the

word -- addressed. Thank you very much.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [15:21:37] Any other parties? No? Okay. Thank you very much.

MS SEHMI: [15:21:41] Madam President, I had one comment.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [15:21:42] Sorry?

MR AYENA ODONGO: [15:21:42] I wanted to --

PRESIDING JUDGE IBÁÑEZ CARRANZA: [15:21:42] No, wait a minute. Wait a minute.

Who is talking?

MS SEHMI: [15:21:47] Sorry. It's Anushka Sehmi for the Victims' Team 2.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [15:21:51] Ah, Victims' Team 2. Two minutes, please. You have the floor for two minutes.

MS SEHMI: [15:21:54] Thank you very much. Thank you, Madam President. Just to come back to Victims' team 2's comment, Ms -- Counsel Massidda, we also believe that traditional justice mechanisms, on the face of it, we do not oppose the use of these mechanisms. However, we submit that there's a time and place for the implementation of these types of mechanisms, and sentencing is not the time and place for this.

The Rome Statute framework is clear on how the sentencing procedures should take place within this framework. Whether victims want to instigate by their own volition a traditional justice mechanism, we submit that the correct stage of the proceedings for such a mechanism to take place would be during the reparations phase of the proceedings. However, in this case, as it has been reiterated on numerous times, victims are not interested in engaging in the *mato oput* process themselves and it's not something that can be opposed -- imposed on them without

their consent. Thank you.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [15:23:03] Thank you.

Thank you. We have now reached the end of the fourth day of hearing. We will reconvene tomorrow at 10 a.m. to hear the parties' and the participants' final submissions.

The hearing is now adjourned until then.

THE COURT USHER: [15:23:21] All rise.

(The hearing ends in open session at 3.23 p.m.)