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

Monday, 14 February 2022

(The hearing starts in open session at 1.10 p.m.)

THE COURT USHER: [13:10:06] All rise.

The International Criminal Court is now in session.

Please be seated.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [13:10:27] Good morning -- or good afternoon, better.

Court officer, could you please call the case.

THE COURT OFFICER: [13:10:55] Good afternoon, Madam President. Good afternoon, your Honours.

Situation in Uganda in the case of the Prosecutor v. Dominic Ongwen, case reference ICC-02/04-01/15.

And for the record, we are in open session.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [13:11:16] Thank you.

My name is Luz del Carmen Ibáñez Carranza. I am the Presiding Judge in these appeals. The bench is composed of Judge Piotr Hofmański, sitting on my right; Judge Solomy Bossa, sitting on my left; Judge Reine Alapini-Gansou, on my right; and

Judge Gocha Lordkipanidze, sitting on my left.

Before I take the appearances, I would like to apologise to the parties, participants and the amici for the three-hour delay today. The Chamber has instructed to the Registry to investigate this incident and submit a report.

Now I will ask the parties to make their best efforts to make their submissions and to stick to our original schedule.

I will take the appearances now.

I invite the parties and participants to introduce themselves for the record, beginning with the Defence team of Mr Ongwen.

The Defence team of Mr Ongwen, please, identify yourself, please, for the record.

MR AYENA ODONGO: [13:12:50] Might it please your Lordships, I am Krispus Ayena Odongo, lead counsel for Dominic Ongwen; and I'm being assisted by co-counsel Charles -- Chief Charles Achaleke Taku; with me also is Kifudde Gordon, assistant to counsel; and Morganne, case manager. We are being joined on link by Mr Obhof Thomas, who is in Ohio, US, and Beth Lyons, who is also in the US in New York. We have our client, Mr Dominic Ongwen, the appellant, in court. Thank you, Madam.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [13:14:00] Thank you very much.

Yes, I note for the record that Mr Dominic Ongwen is also present in the courtroom. Welcome.

Counsel for the Prosecution, please.

MS BRADY: [13:14:12] Good afternoon, your Honours. Appearing for the Prosecution today in the courtroom we have Ms Meritxell Regue, appeals counsel; Mr Matthew Cross, appeals counsel; and Mr Matteo Costi, appeals counsel. And then appearing on your screens remotely there is, well, from left to right, Mr Reinhold

Gallmetzer, appeals counsel; Ms Priya Narayanan, appeals counsel; above her, Ms Nivedha Thiru, associate appeals counsel; and next to her, Mr George Mugwanya, appeals counsel. And my name is Helen Brady and I'm the senior appeals counsel for the Prosecution. Thank you.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [13:15:01] Thank you very much. And now the Legal Representatives of the two groups of victims, starting with victims represented by Mr Joseph Akwenyu Manoba and Mr Francisco Cox, referred to by the Appeals Chamber in the appeals as Victims Group 1.

MR COX: [13:15:27] Good afternoon, your Honour. With me, Mr James Mawira. On screen, Anushka Sehmi and Priscilla Aling. Thank you very much.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [13:15:40] Thank you very much. Now victims represented by Mrs Paolina Massidda, referred to by the Appeals Chamber in the appeals as Victims' group 2.

MS MASSIDDA: [13:15:58] Good afternoon, Madam President, your Honours. The victims represented by the Common Legal Representative today are represented in court by myself, Paolina Massidda, principal counsel, accompanied by Mr Orchlon Narantsetseg and Ms Caroline Walter, both legal officers. Thank you very much.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [13:16:13] Thank you. Finally, will the amici providing the submissions today introduce themselves for the record, please.

I would like to start with Felicity Gerry QC, remotely. Is she present? Please introduce yourself.

MS GERRY: [13:16:32] Good afternoon, Madam President and your Honours. My name is Felicity Gerry, Queen's Counsel. I'm leading and appearing on behalf of the

group - we are individually named - on the issue of non-punishment. I'm joined online by Jennifer Keene-McCann, Anna McNeil, and Ben Douglas-Jones, Queen's Counsel. But I will be making the submissions today. Thank you.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [13:16:58] Thank you.

Now the PILPG, Professor Michael Scharf, present in the courtroom, please.

MR SCHARF: [13:17:11] Good afternoon, Madam President, your Honours. I am Professor Michael Scharf, Dean of Case Western Reserve University School of Law and the managing partner of the Public International Law & Policy Group. With me in the courtroom today is Milena Sterio, the managing director of PILPG. And appearing remotely, if it all works, is Jonathan Worboys, who is participating by video link. Thank you.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [13:17:35] Thank you.

Now Professor Braakman, he is in the courtroom?

MR BRAAKMAN: [13:17:40] Good afternoon, Madam President, your Honours. My name is Mario Braakman. I'm a psychiatrist as well as an ethnologist, and I work at Tilburg University. I'm a professor there of forensic psychiatry and I work within the department of criminal law. Thank you.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [13:18:03] Thank you.

And now Dr Behrens, in person in the courtroom.

MR BEHRENS: [13:18:08] Good afternoon, Madam President, your Honours. My name is Dr Paul Behrens. I teach international criminal law at the University of Edinburgh.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [13:18:23] Thank you very much.

We have taken appearances from everyone. Thank you very much again. If the composition of the different teams were to change during the different sessions today,

I would like to ask the parties and participants to inform the bench at the beginning of each session.

I welcome everyone to this hearing of the Appeals Chamber, which is held in a hybrid manner due to the exceptional circumstances we find ourselves in caused by the COVID-19 pandemic. Since French is one of the working languages of the Court, I will be alternating between English and French.

(Interpretation) Good afternoon, everyone. We are delighted to have you here with us today. I welcome the parties, participants and the amici curiae to this hearing held as part of this important appeal before the International Criminal Court.

(Speaks English) Present at the hearing today are the judges and members of the legal staff of the Appeals Chamber, counsel for the Prosecution, Mr Ongwen and his Defence team, the Legal Representatives of Victims and the amici curiae - invited to make submissions on issues to be discussed today - and staff of the Registry.

This is a partially virtual hearing, which means that some people are participating in person in the courtroom and others remotely, either from the seat of the Court or in other locations. I would like to note that people appearing in person are properly distanced from each other in accordance with the relevant health protocols.

(Interpretation) Furthermore, a limited number of members of the public have been allowed to sit in the public gallery. This is in accordance with the strict security measures that have been implemented at the Court for hearings held during the COVID-19 pandemic.

Furthermore, this hearing will be broadcast online on the Court's Internet site with the usual 30-minutes' delay that is applied to hearings held here at the ICC premises.

We do hope that the hearing will run smoothly and we thank the parties, the legal representatives of victims and the amici curiae for their assistance and their

cooperation in the preparatory work to ensure that this hearing runs smoothly and that the proceedings also run smoothly during this case.

During this hearing the Appeals Chamber will be hearing arguments and observations from parties, from the legal representatives of victims and from amici dealing with the Defence appeals of, first of all, the decision taken by Trial Chamber IX, dated 4 February 2021, which found Mr Ongwen guilty of war crimes and crimes against humanity as well as appeals against the decision taken by Trial Chamber IX, dated 6 May 2021, sentencing Mr Ongwen to a single joint sentence of 25 years' imprisonment.

I will be referring to these decisions as the conviction decision and the sentencing decision.

(Speaks English) Before inviting the parties and participants together with the amici curiae to make their submissions, I will summarise the background of these appellate proceedings.

The appeal of the Defence against the conviction decision arises from the Trial Chamber's decision which found Mr Ongwen guilty of 61 crimes, comprising of crimes against humanity and war crimes.

The Appeals Chamber has received written submissions on this appeal from the Defence, from the Prosecutor, the Legal Representatives of Victims and on selected issues from 19 amici curiae admitted to participate in this proceedings in light of their expertise and high qualifications.

The Defence also appealed the sentencing decision where the Trial Chamber sentenced Mr Ongwen to a joint sentence of 25 years of imprisonment.

The Appeals Chamber has received written submissions on this appeal from the parties and participants and, where relevant, from the amici. The Appeals Chamber

will render separate judgments in relation to the appeals against the conviction and the sentencing decisions.

On 28 January 2022, the Appeals Chamber invited 10 amici curiae to participate at the hearing. In inviting these amici, the Chamber made an effort to balance the representation -- the presentation of the views based on gender and geographic diversity, while at the same time minimising repetition of views amongst them.

I would like to extend the gratitude of the Appeals Chamber to those amici that, while not participating at the oral hearing, did make written observations on very important aspects of these appeals. Your submissions are an important contribution to assist this bench in the determination of the fundamental issues engaged in this appeal.

In its appeal brief against the sentencing decision, the Defence raises -- sorry.

This is the background which leads to today's hearing.

I turn now to the substance of the Defence appeals.

In its appeal against the conviction decision, the Defence raises 90 grounds of appeal consisting of alleged legal, factual and procedural errors that, in the Defence's view, materially affected this decision, as well as allegations of fair trial rights violations.

The appellant divided its appeal into six sections alleging several violations of Mr Ongwen's fair trial rights; errors in the Trial Chamber's rejection on the grounds for excluding his individual criminal responsibility under Article 31(1) of the Statute; errors in the Trial Chamber's conclusions on culture; errors in the Trial Chamber's failure to recognise Mr Ongwen as a victim of the organisation known as the Lord's Resistance Army, hereinafter, LRA; errors in its conclusions about LRA, Joseph Kony's control over Mr Ongwen; and errors in its findings on Mr Ongwen's individual criminal responsibility in relation to the different modes of liability. The Defence requests that the Appeals Chamber reverses the conviction and enter

a verdict of acquittal.

In its appeal brief against the sentencing decision, the Defence raises 11 grounds of appeal, alleging factual and procedural errors that, according to the Defence, materially affected the decision. While some of the grounds are intrinsically related to the findings of the Trial Chamber in the conviction decision, others raised important issues concerning, among others, mitigating and aggravating circumstances. This includes the Trial Chamber's assessment of Mr Ongwen's individual circumstances as a former child soldier. The Defence requests that the Appeals Chamber quash the sentence imposed by the Trial Chamber and impose a lower sentence, or remand the matter back to the Trial Chamber.

The appeal brought against the conviction decision is the largest ever considered by the Appeals Chamber. The appeal raises complex and novel issues concerning the assessment of the grounds, such as mental disease or defect and duress as grounds for excluding criminal responsibility. In addition, issues concerning the interpretation of sexual and gender-based crimes, in particular, forced marriage, forced pregnancy and sexual slavery are equally novel and complex. This also presents a unique opportunity for this Chamber to develop the interpretation of the law on some fundamental issues in the realm of the international criminal law relevant to the adjudication of the case.

May I also remind the parties and participants -- sorry.

Turning now to the conduct of these proceedings, it is recalled that in the directions on the conduct of the hearing before the Appeals Chamber issued on 28 January 2022, and revised on 8 February 2022 document, the Appeals Chamber indicated both the order and the time allocated to the parties, the legal representatives of the two groups of victims and the amici curiae to address the Appeals Chamber on each day of the

hearing.

The speakers are requested not to merely repeat arguments already made in their filings, but to make submissions on the issues outlined in the order, being guided by the questions set out therein by the Chamber. I will remind you to please speak slowly for the benefit of the interpreters.

Moreover, the Appeals Chamber would like to stay as much as possible in open session during the five-days' hearing, especially in light of the fact that it is partly held on a virtual basis. For that reason, the parties and participants are invited to refrain from referring to information that has been classified as confidential unless absolutely necessary.

If there is a need to refer to such information, please alert the Chamber before starting with your substantive submissions each day in order to allow arrangements to be made in advance for closed or private session.

I also remind the parties, participating victims and the amici curiae that they are expected to complete their submissions within the indicated time frame set by the Appeals Chamber. The court officer will be monitoring the time and will indicate to the party or participants when it is about to expire.

Now, I would like to invite the parties and participating victims to make their introductory submissions on the Defence's appeal against the conviction decision, including any responses to the participating victims' written observations filed on 21 October.

I am afraid that our schedule has -- has been moved once again a little bit more, but in any case, all the Defence counsellors and prosecution counsellors you have 30 minutes, each one. Okay? Now, we are going to start with the counsel for Mr Ongwen. You have the floor for 30 minutes. Starting now.

Counsel, you have the floor. Thank you.

MR AYENA ODONGO: [13:32:59] Madam President and your Honours, permit me to open this statement with a proverb I learnt -- a proverb I learnt in my early years. It goes, "Mean circumstances beget mean children and the fruits rotten as they ripen. My Lords, the appeal before you is about a child who was brought up under very mean circumstances, a child, who, as result of human trafficking, was abducted at the age of about nine years because the government of Uganda, who shamelessly proffered the charges against him before this Court and the international community which created the Court that tried him, as well as this one, failed to protect him against Joseph Kony and his LRA. A child who was not rescued by the same government of Uganda and the international community from the armed conflict between the government of Uganda and the LRA. A child, the government of Uganda and the international community failed to rescue from the evil grips of LRA for close to 25 years, under enslavement doing forced labour for LRA.

Your Honours -- Madam President and your Honours, even at the time of the charges against him, Dominic Ongwen was and still is a child because the spirits of Joseph Kony in which he invariably believed possessed him and he has not undergone any cleansing rituals required by his culture to become free of those spirits.

One of the traditional leaders of Acholi from where Dominic Ongwen hails, that is, Prosecution witness number 9 at transcript 83, page 16, lines 16 to 17, had this to say about Dominic Ongwen during -- I mean, what Dominic Ongwen was during the charged period, and I quote:

"If you go to your child and your child speaks like that, wouldn't he be showing his bitterness to you. If you go to your child and your child says, 'Daddy, this and that has already happened to me.'"

Madam President and your Honours, it is important to underline the fact that even at that time, this traditional leader recognised Ongwen as a child. It is, of course, quite mind-boggling though that in the end, this same daddy figure turned around - and, during the course of the Prosecution and the victims' representative - to shout, "Crucify him! Crucify him!"

And of course -- and like was the case of our Lord Jesus Christ - who Pilate did not find fault with - the trial court found fault with this man and convicted him and gave him unimaginable number of years behind bars. It is our voice, it is our hope that another chance has come today in this Court.

I shall deal with the -- the status of Dominic Ongwen as a child in more detail when I come to his mental status, but let me proceed to say the above statement of that witness cannot be viewed otherwise than that he was tacitly recognising the innocent child Dominic Ongwen was.

Your Lordships, before I delve into the main issues of my opening statement, permit me to start with some otherwise pertinent issues which were not necessarily ...

(Counsel confers)

My Lord, my Lords, I have just received information from my co-counsel, Beth Lyons, that it's totally shut off and she's not listening to what -- I mean, to the proceedings of the Court. And I must inform Court -- Madam President and your Honours, that these are serious consequences on the arrangement of the Defence because what my colleagues are going to say, in particular, Beth, who is going to deal in details with the issue of Article 31(1)(a)

PRESIDING JUDGE IBÁÑEZ CARRANZA: [13:39:27] One question, Counsellor. For these first introductory submissions, do you need your co-counsel or not?

MR AYENA ODONGO: [13:39:35] Oh, yes. Because the arrangement, the way we

have done it -- I mean, our presentation follows directly from -- from my presentation.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [13:39:44] But now you will take your 30 minutes by yourself or your co-counsel will be speaking part of this time?

MR AYENA ODONGO: [13:39:51] No, I will take it for myself, by myself.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [13:39:54] Okay. Then please continue with your submissions. We will take care after the end of your submissions. We take note of your -- of your concern. Okay. Thank you.

Wait a minute. I will stop.

(Pause in proceedings)

(Chamber confers)

PRESIDING JUDGE IBÁÑEZ CARRANZA: [13:41:59] Thank you. Counsellor, then you will be finalising your submissions in the 30 minutes arranged, then we are asking what is happening, then we will allow the Prosecution to make their submissions and then we will see if we need to stop, just to permit your co-counsel to come with us -- to reach the -- the transmission of the hearing. Okay, please continue.

MR AYENA ODONGO: [13:42:27] Much obliged, Madam President and your Honours, save for the fact that I want you to take cognizance of the fact that time has been spent on this. I hope -- I hope it will be put on my credit side (Overlapping speakers)

PRESIDING JUDGE IBÁÑEZ CARRANZA: [13:42:44] I will give you three minutes more, okay?

MR AYENA ODONGO: [13:42:48] It took more than three minutes.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [13:42:53] Five is okay. Thank you. Five is okay.

MR AYENA ODONGO: [13:42:55] I want to deal with some important matters that were not directly put in the question, and, number one, is that the Prosecution submitted at paragraph 7 of their response -- I mean, response brief that by the -- by the Defence incorporating by reference other arguments from previous submissions, they impermissibly extended the page limit.

Madam President and your Honours, our answer to this is that this is not correct because, as a matter of fact, you will see that the Defence used the total of 235 instead of the permitted 250, and, in any event, we made specific reference and quoted the footnotes that were already indicating documents, which are already on court record. We give an example of footnote number 15 of paragraph 15 of the Defence appeal brief, reference to * paragraphs 4,261 to 4,272. Footnote 57 refers to paragraphs 73 to 82 and so on and so forth.

And as for the defect series, Madam President, your Honours, this is part of the record, and therefore making reference to it does not in any way prejudice the Prosecution. In any event, the Prosecution has not demonstrated that the references extended the page limit. Like I've already said, the Defence recalls that the length of Defence appeals brief is only 235 pages as opposed to the permitted 250. The Prosecution has failed to demonstrate that these paragraph references in support of the Defence appeal submissions, when combined, extend to more than what was permitted.

Pursuant to Article 72 -- 74(2) of the Statute, the Chamber must base its decision and judgment on the entire proceedings on the trial record. Madam President and your Honours, it is the submission of the Defence that indeed this is a basic reason why the appeal is before you. The trial court did not base its decision and judgment on the entire proceedings. The Trial Chamber decided to cherry-pick what was

helpful in making sure that they obtained a conviction. And we dare say if you take a very close look at the manner in which the conduct was -- of the proceeding was made by the trial court, it appears that the court came with a pre-determined mind to convict Dominic Ongwen. And we are not surprised by this because the background to this case was a ferocious and atrocious war by the LRA in northern Uganda. And this war went viral on the international media. And I think everybody was looking for a chance to deal with the LRA. And when Dominic Ongwen appeared before this Court, it would appear the trial court found a chance and said, "Finally, we've got them."

But it is our submission that, just like was stated I think in Gower's book of company law, a court is like an auditor. A court, according to that quotation -- I mean, that reference I'm making, it said an auditor is not a bloodhound. He must approach his work with an independent mind. Not coming to find a thief.

In this case, I think the Court is also enjoined to approach its work with an independent mind, not with a fixation of mind that they're coming to convict somebody who has already committed a crime.

Madam President, your Honours, there's a problem about the judgment, evaluation of evidence, especially in terms of -- in respect to intercept evidence, intercept -- and, in our documents, which were brought before the Court, my Lords, there is a basic principle of chain of custody, which is important for evaluation of intercept documents. But the important thing that we want to draw the attention of this Court to was the submission of the Prosecution at the beginning of the trial. They said nearly or more than a half of their evidence was based on intercept evidence.

Now, you will find, my Lords, that in the proceedings, in the evaluation of evidence, the Court decided to throw out nearly -- I mean, most of this intercept evidence.

And these are very telling -- you know, they had very telling -- very telling pieces of evidence and this was merely on the ground that most of them were not in the working language of the Court.

But the contradiction, my Lords, is that they instead decided to -- apart from, you know, after failing to admit the intercept evidence, which were accompanied by contemporaneous notes made on them, they instead took the evidence of logbooks, which were based on memories of somebody who finally, you know, memorialised it. So we fault the trial court for this. But most importantly, my Lords, if it was the position -- if it was the case of the Prosecution that their case was based on -- half of it was based on intercept evident, you may want to query. After most of the intercept evidence were thrown out, how did the Prosecution reach the threshold of proving their case beyond reasonable doubt?

My Lords, I now go to the mental state of Dominic Ongwen.

My Lords, before discussing the important matter of spirituality in the LRA, I propose to start with the mental state of Dominic Ongwen at the material time. This is because the question shall inevitably be asked at the end as to what may have caused his mental state at the material time. And, you know, I'm sure -- I don't have to overemphasise the fact that this has a bearing on the issue of duress. Not only that, it also has a bearing on the question whether the trial court was right to put Ongwen on trial.

On the first day of the trial, your Lordships, the Defence said in its opening statement two -- made two important things -- I mean, statements which should have been of great guidance to the trial court in their deliberations. And number 1 was that we said, "Never before had the world witnessed a conflict so complex in nature, steeped in metaphysics and spiritualism as the -- as the one that forms the contextual basis of

the case before you."

And the second one we said, "The accused who is the subject of this investigation was just a child when he was abducted, brutalised and made into a fighter machine without a mind of his own."

Unfortunately, Madam President and your Honours, the way the Trial Chamber handled the case, it seems obvious that it did not take heed of this. If the Trial Chamber had put stock to the true statements above and heeded the caution, they would have avoided the errors pleaded in this appeal.

The simple message in those statements was: Treat the accused as a former child soldier entangled in Kony's spirituality. There is no gain in saying, your Honours, that the spirituality in the context of this case was so inextricably interwoven with duress, that the proper understanding of the former, would aid the appreciation of the latter – and, it would have answered most of the questions that the trial court was faced with – and we would have gone home much earlier. Unfortunately, this was never to be done.

I'll now talk about spiritualism and its affect in the cultural context of an Acholi child soldier. Your Honours, we shall adopt the positions in the reports of the following amici on spiritualism. We adopt the definition of spiritualism given by Professors Erin Baines, Kamari Clarke and Mark Drumbl. Paragraph 27 of document -- I think it is 1929. I'm not sure. And they say spirituality refers to a set of -- maybe I don't need to go there since I am -- time is not my best ally.

We also agree with their observation in paragraph 28 that spirituality played a large part in the indoctrination of child soldiers. Kony institutionalised the practice of magic as an existential function in order to explain fighters' misfortune and so on and so forth.

We also agree with Baines's finding in paragraph 29 that child soldiers' loyalty to Kony and belief in his powers increased among children who were with the with LRA for longer than a year. The younger the child was when recruited, the more likely he or she would be easily indoctrinated.

And they described LRA as both a political and spiritual project that re-emerges the child as someone who can be purified and made into a superior being.

I will not finish the quotation. It is on record.

What is contained in the above report of the amici were canvassed and established, your Honours, by the testimonies of many witnesses across the board, both Prosecution and Defence. And it established -- I mean, and the Court chose to totally disregard them.

For instance, this is what a Prosecution witness who was a practising -- a former practising spiritualist in Acholi, somebody called an * *ajwaka*, in the language of the Acholi. These are people who had the kind of power akin to what power -- akin to what Kony himself had and had a deep understanding.

At page 44, lines 6 to 8, he said:

In Acholi, everyone knows its common knowledge that Kony is possessed with spirits and he uses spirits. I believe that -- I do believe that Kony was using the spirit in him to confuse.

At page 9 -- and he goes on, I will not finish the quotation. At page 9, lines 16 to 19 of the same transcript 82, he says more or less the same thing.

At page 19, lines 8 to 11:

"In my own view, and how I have assessed it, Kony's spirit helps him more than myself," --

And so -- and so ...

"because if you see that the whole world go to follow him, but still manages to elude them, to elude and escape, that means he has something that protects him."

For the record, for those who follow, you know, the media, the other day the USA again issued and gave a ransom of $5 million for anybody who can either capture or help to capture Joseph Kony. For 30 years he has eluded everybody, including the most powerful army in the world, the USA.

And the Prosecution witness number 9 again, at page 14, lines 18 to 22, put his voice -- made his voice again. And again, at page 15, lines 6 to 11, he said more or less the same thing, emphasising what has already been said by the spiritual person.

Again, at page -- the same page, I think, lines 9 and 10, he said:

"For you, you are led by the spirit and the spirit will conduct all the activities [...] around you. The spirit knows what is going on."

At page 16, answering the Presiding Judge's question, he said: "When someone is possessed by the spirit, first [he] becomes confused and uncoordinated. His talks are uncoordinated and starts doing things which are [unusual]."

He makes the same statement again at line 2 to 9 of page 30. The same witness, again, at page -- I mean, proceeded to -- at page 9, lines 16 to 19, said:

"I explained to the Court that Kony says he works with the spirit. [...] the people who actually control him in fighting, so he fights, while he has defence in the spirits."

The same witness said, at page 14, 18 to 20 -- line 18 to 22: "When you are possessed by the spirit [...] You work according to what the spirit tell -- the spirit tells you because [...] your" activities are -- "your actions are not ordinary. You are led by the spirit [...] That means you are now led by the spirit and you are now a worker of the spirit."

At page 15, again, he says:

"Among the Acholi community there is an outline role of a spirit [...] when you are possessed. First, it confuses you."

He is saying more or less the same thing as earlier.

At page 16, to the Presiding Judge's question, lines 14 to 16, he said:

"When someone is possessed by the spirit ..."

I think that has already been referred to.

Then at page 19, lines 8 to 11:

"In my own view, and how I have assessed it, Kony's spirit helps him [...] because if you see that the whole world go [and] follow him ..."

That has already been said also.

Kony used to say: In Acholi, everyone knows. It's common knowledge -- I think that's not very important.

Page 45, line 6 to 25 --

THE COURT OFFICER: [14:03:14] Counsel has five minutes.

(Counsel confers)

MR AYENA ODONGO: [14:03:37] My Lords, UGA Defence witness number 15, at 963 and 964, confirmed that Dominic Ongwen believed in spirituality

in -- under -- the details are there.

But, most importantly, what the same tradition[al] leader said about Ongwen. In other words, he was emphasising that Dominic Ongwen was a traumatised child.

But the first thing, before I even go to his testimony, is what happened at the detention centre and also in this courtroom.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:04:52] Counsellor, I would like to ask you, please try to conclude because your time is about to expire. Thank you.

MR AYENA ODONGO: [14:05:09] In the testimony of Rwot Oywak, witness

number 9, he was -- I mean, explaining his encounter with Ongwen at different sites, and according to what he explained -- and I emphasise this. I'd invite the Court actually to look at the testimony of Rwot -- of that witness. And he said when he -- the man was aggressive, the man was very unhappy, and he kept on repeating this. At one stage, he was walking up and down, up and down, and challenging them. And he said: You people have spoilt my education, and all that kind of thing.

Now, as far as we're concerned, these words definitely what you would call a repetitive aggression, which had been discovered but dismissed or disregarded by the Trial Chamber.

The Trial Chamber -- I mean, also dismissed or disregarded evidence of two prominent, eminent, you know, academicians from Uganda in preference to evidence from -- I don't want to emphasise racism very much, but you could easily read it in this because all the evidence that was given by, you know, professors and experts who know better was completely ignored.

And the evidence that was given by witness number 150, who was a practitioner and knew, was also discarded. Now you want to ask: Who are -- who are they, the Trial Chamber, completely to disregard what they had little knowledge of when they had a foundation to believe in the evidence that was given?

My Lords -- and, Madam President, I know that you're about to stop me, but I can only say in conclusion that I take the position of the amici curiae who supported the issue of non-punishment. We were -- this was a child. And the amici who talk about, you know, Ongwen being somebody who was trafficked, was just like a slave. He provided slave labour, and, therefore, he should not be punished twice.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:07:46] Counsel, conclude, please.

You have 30 seconds to conclude.

MR AYENA ODONGO: [14:07:50] I will conclude it by making reference to what the victims' representatives, how they were allowed to conduct issues here, like they were part of the Prosecution. I think this is a matter that this Court should look at very, you know, seriously, because it devolves into unfair -- I mean, fair trial matters. Because if we have to contend with three parties, the Prosecution and the two representatives, who are saying and backing up the same things, that is not

(Overlapping speakers)

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:08:26] Counsellor, thank you. Your time has expired. Thank you.

MR AYENA ODONGO: [14:08:30] Much obliged.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:08:31] Thank you.

Now, Counsellor for the Prosecution, please. You have 30 minutes since now. Thank you.

MR AYENA ODONGO: [14:08:45] My Lord?

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:08:48] Wait a minute.

Yes? Yes?

MR AYENA ODONGO: [14:08:50] I have just received information from my colleague, Beth. We are dealing with a very sensitive area of the case. You know, this Article 31 is so central in this case, and my colleague, who is going to handle it, is saying that she needs to listen to the Prosecution.

I don't know how you are going to resolve that.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:09:18] We are working it, but now we are going to listen to the Prosecution, because we cannot delay more. Then we will stop. But we are working on the issue now. Okay? Thank you.

MR AYENA ODONGO: [14:09:27] My Lords, will it not be putting the shoes after the thorn has already pierced you, like we say in Africa?

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:09:39] No, no. We need to continue with the hearing now because we are much delayed. So we are going to listen to the Prosecution, and after that, we will stop to see. In the meantime, I can inform that we are working on the issue. I will -- I am allowed to receive the last report.

Please, court officer. Thank you.

MR AYENA ODONGO: [14:10:00] Much obliged.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:10:04] Counsel for the Prosecution, you have 30 minutes starting now, I think. Yes, 30 minutes.

MS BRADY: [14:10:09] Thank you, your Honours.

Your Honours, Dominic Ongwen was properly and fairly convicted of 61 crimes amounting to war crimes and crimes against humanity, after a trial lasting more than three years in which the Trial Chamber considered evidence from 179 witnesses, both from the Prosecution and the Defence, and more than 5,000 other items of evidence.

Dominic Ongwen's crimes occurred over a period of some three and a years, and included a large number of grave crimes committed on a discriminatory basis against civilians during four separate attacks against camps of internally displaced persons; sexual and gender-based crimes committed directly by him and by members of the Sinia Brigade, and child soldier crimes. These crimes included attacks against civilians, murder, rape, sexual slavery, enslavement, forced marriage as an inhumane act, forced pregnancy, torture, pillaging and destruction of property.

More than 130 people were killed during the LRA attacks on IDP camps. Hundreds of people were abducted, tortured and enslaved during those attacks, and houses

were looted and property destroyed. A large number of children were abducted, brutally integrated into the Sinia Brigade and used actively to participate in the hostilities. As a senior commander in the Lord's Resistance Army's Sinia Brigade, Dominic Ongwen played a key role in these crimes - planning them, organising them and issuing orders.

The Trial Chamber also found seven women and girls were forced by Mr Ongwen to be his so-called wives or domestic servants, and endured his repeated rapes, sexual enslavement, torture and forced pregnancy. At any time during the charged period, there were over 100 other abducted women and girls in the Sinia Brigade, and they also suffered these crimes. In his role as commander, Dominic Ongwen played an essential role in sustaining the LRA's methodical abduction and abuse of such women.

Ongwen himself was a child when he was abducted and recruited into the LRA. But he became an adult who rose up through the LRA's ranks to become one of its senior commanders who embraced further development -- further developed, and, indeed, implemented its policies.

The Trial Chamber properly assessed all the evidence before it, including that related to grounds for excluding criminal responsibility, namely, alleged mental disease or defect and duress, but found such grounds did not apply.

In his appeal, Mr Ongwen has largely repeated his trial arguments, but he fails to show that the Trial Chamber erred in law, in fact or procedurally. His appeal should be dismissed and his convictions upheld. Likewise, his sentence of 25 years' imprisonment was proportionate to the gravity of his crimes and his culpability. His appeal against it should likewise be dismissed.

Your Honours, on the victims' observations, we have no additional comments to

make about these, save to say that they are in line with our positions.
Now, we've addressed all of Dominic Ongwen's arguments in our response brief, including some of those mentioned today, such as intercepts. And so this week, we'll be focusing mainly on the areas that your Honours have identified in the questions in the directions on the conduct of the hearing and any additional issues which may arise. And we have organised ourselves so that the Prosecution's main speaker on each topic will be physically present in the courtroom unless, of course, they need to be appearing remotely due to COVID restrictions. But at all times all members of our team will either be present in the courtroom or remotely participating.
Your Honours, I will turn now to Ms Meritxell Regue and she will continue with our introduction. She will first outline some key points to pave the way for some of our submissions later this week in the appeal. And she will also give a brief road map on how we intend to respond in this appeal hearing.
So thank you, your Honours, and I'll pass it to Ms Regue.
PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:16:03] Thank you.
Thank you, you can continue, Ms Regué.
MS REGUE BLASI: [14:16:11] Good afternoon. Despite what you have just heard from the Defence, this case is not just about Mr Ongwen. It is about his criminal responsibility for the crimes that he committed when he was a legally capable adult. But it is also -- this case is also about the victims of those crimes. It's also about the mother of three who was killed by machete in Pajule. It is also about Catherine Amono who was carrying her child on her back when she was killed in Odek.
It is also about Akello Acci, Innocent Okello and Ojoko. They were four years old when they were killed in Lukodi.

It is also about Hatari Anyima, who was shot, and his two children who were burnt to death in Abok.

Like those and other victims, named and unnamed, they were killed, enslaved and tortured by the LRA during the attacks against the four IDP camps in northern Uganda.

These attacks all follow the same pattern and Mr Ongwen had a key role in each of them. I will recall some of the facts which underline his essential role and contributions to the crimes and also show his promotion to the top ranks of the LRA.

In Pajule, Mr Ongwen participated in the planning and in the execution of the attack. He led a group inside the camp. He ordered to abduct and to loot. He also took a group of abductees with him, he threatened them with death if they attempted to escape.

In Odek, after Mr Kony decided to attack, Mr Ongwen chose LRA soldiers under his command to conduct the attack. He designed the attack, gave instructions and set it into motion. He ordered to target everyone, including civilians, to abduct and to loot food.

In Lukodi and in Abok, Mr Ongwen independently decided to attack these camps. He planned and organised attacks, and again, he ordered to attack everyone, including civilians, to take food, and to abduct.

In Mr Ongwen's communications with Mr Kony and other LRA commanders that your Honours can find in the record of this case, Mr Ongwen assumed responsibility or vividly described the commission of the crimes. Likewise, Mr Kony praised his successes at work, also after the attack in Odek. And Mr Ongwen rose through the LRA ranks during the period of the charges. He went from battalion commander, at the beginning, to second in command to the Sinia Brigade shortly before the Pajule

attack, to the brigade commander of the Sinia Brigade shortly before the Odek attack. And, your Honours, this case is also about P-226 who was only seven when she was abducted by the LRA and 12 when she was forced to become Mr Ongwen's so-called wife. She and at least six other girls and women were held in Mr Ongwen's household during the period of the charges and not allowed to leave. They were beaten and forced to perform domestic duties. Out of the seven, five became his so-called wives during the charged period. Four were raped and sexually enslaved, and two of them were forcibly made pregnant and confined during their pregnancy. And they were not the only ones to suffer in the Sinia Brigade because Mr Ongwen, together with Mr Kony and other Sinia Brigade leaders, systematically abducted girls and women in northern Uganda. If they were very young, they were used as household servants and referred to as ting tings. They later became so-called wives and were forced to have sex with the man they had been distributed to. They lived under horrific conditions, continuously abused and under threat. Mr Ongwen played a key role in these actions. He helped to define and to sustain the LRA system of abduction and victimisation of women and girls. He also personally distributed them to his fighters, he assigned them as so-called wives and then used his authority to enforce the so-called marriage in the Sinia Brigade.

The Defence has emphasised today Mr Ongwen's own experiences as a child soldier, but this case is also about the many abducted boys, like those from Laliya, who Mr Ongwen personally abducted. It is about P-307, an abducted child, who thought that Mr Ongwen will kill him because he did not salute him properly.

Again, they were not the only ones. Mr Ongwen, together with other Sinia Brigade leaders and Mr Kony, systematically abducted children and ordered them to serve as Sinia fighters. Again, Mr Ongwen was instrumental in the commission of these

crimes. Despite his own experience, he did not see these boys as children. As he himself said, and, I quote: You call those kids children, but I call them my soldiers. The Sinia Brigade consisted of several hundred soldiers. It obtained new fighters by abducting civilians, including children. Recruits went through initiation rituals where beatings were common. They were also forced to brutally kill and to witness brutal killings. They were threatened with death if they attempted to escape or did not perform certain actions. They were trained in fighting skills and subjected to a violent disciplinary system and extremely coercive and harsh conditions. The Chamber -- the Trial Chamber acknowledged that Mr Ongwen must have -- must have suffered similar experiences when he was abducted as a child more than a decade earlier. Yet, there is a fundamental distinction between new recruits and low-ranking officers on the one hand, and on the other, senior high-ranking officers like Mr Ongwen during the period of the charges. The latter had some level of autonomy and they themselves were a source of threat and punishment. Also, Mr Kony had to coordinate with them, had to rely on them in order to execute the LRA policies, in particular in Sudan.

Your Honours, this is a court of law and we are bound to apply its legal framework. And the Trial Chamber did just that. It ensured the fairness and expeditiousness of the proceedings in full compliance with Mr Ongwen's rights. It found that the two grounds excluding criminal responsibility that Mr Ongwen alleged did not apply to him. It convicted him on the basis of a wealth of reliable evidence.

Now I would like to give you a brief road map of what are going to be our submissions for this week in response to your questions.

Like we just did this morning, every day we will file a list with the authorities that we will cite during our submissions. Today, your Honours, you will hear from

Mr Cross, Mr Costi, and --

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:25:05] Just to inform -- thank you, sorry. Just to inform to the Defence that Mrs Beth Lyons, Defence co-counsel, is connected now. Okay?

Thank you. Thank you very much.

You can continue.

MS REGUE BLASI: [14:25:19] Today, your Honours, hopefully you will hear from Mr Cross, Mr Costi and myself on how the Trial Chamber correctly found that the two grounds alleged by Mr Ongwen as excluding his criminal responsibility did not apply to him.

At trial, Mr Ongwen had argued that during the period of the charges, he suffered from several mental illnesses. He also argued that he had committed the crimes under duress. The Chamber correctly rejected both arguments.

First, it found that there was no reliable evidence that Mr Ongwen's mental capacities were destroyed during the period of the charges. It reasonably rejected the opinion of two Defence experts, based on a careful assessment of their reasoning and methodology. Instead, it relied on three further expert witnesses called by the Prosecution, as well as other evidence, such as the testimony of lay witnesses who had closely interacted with Mr Ongwen during the period of the charges. None of them described Mr Ongwen in a manner compatible with the existence of a mental disease or defect under Article 31. Mr Ongwen's careful planning of complex operations, his thriving within the LRA were also found by the Chamber to be incompatible with a mental disorder.

Witnesses described Mr Ongwen as a skilled fighter, a good leader, a socially skilled person. They described how Mr Ongwen carefully assessed the feasibility of

military operations, sought further information when needed and openly stated his views. He was, in the Chamber's words, a self-confident commander who took his own decisions on the basis of what he thought was right and wrong.

Second, as to duress, the Chamber found that Mr Ongwen was not subjected to a threat of imminent death or continuing or imminent serious bodily harm when he decided to commit the crimes. The Defence's suggestion that his failure to follow Kony's orders would result in death was, as found by the Chamber, totally unsupported by the evidence. Instead, the Chamber found -- and I will just highlight four findings:

One, that Mr Ongwen was a high-ranking officer who was not in a situation of complete subordination vis-a-vis Mr Kony in the sense that he often acted independently and did not always execute his orders.

Two, Mr Ongwen had a realistic possibility to escape and didn't do so. Instead, he rose through the ranks, including during the period of the charges.

Three, there was no evidence that the belief in Mr Kony's spiritual powers played a role in Mr Ongwen's criminal conduct. We have addressed the Defence submissions on this point today in our response brief, paragraphs 355 to 363 in detail.

And finally, your Honours, Mr Ongwen committed some of his crimes in private, where threats would not have an effect.

Now on appeal - and, in response to the observations of some amici - Mr Ongwen has developed an argument that he already foreshadowed at trial. He says that he should not be criminally responsible ever because he has been victimised himself. But as we will explain, this argument is unfounded and the Chamber already dismissed it. There is no rule under human rights law that perpetually immunises a victim of human rights violations from criminal responsibility.

And tomorrow, your Honours, you will hear from Ms Brady and Ms Narayanan that the Trial Chamber correctly interpreted and applied the distinct elements of the crimes of rape, sexual slavery, other inhumane acts, including forced marriage, and forced pregnancy. The Trial Chamber correctly found that all these crimes are included in the Statute, have different elements and protect different interests.

You will also hear from Ms Brady how the Trial Chamber entered lawful cumulative convictions with respect to concurrent crimes. This is because the crimes have materially distinct elements that require proof of facts not required by the other.

The Trial Chamber correctly applied the so-called materially distinct elements test adopted by the ICTY Appeals Chamber in Celebici in 2001 and applied by international criminal tribunals thereafter, including the ICC. We submit that this test is correct and consistent with the Rome Statute.

On Wednesday, you will hear from Mr Gallmetzer on how the Trial Chamber correctly interpreted and applied the law on indirect perpetration and co-perpetration under Article 25(3)(a) of the Statute. The Trial Chamber correctly applied the consistent jurisprudence of this Court, which has been upheld by the Appeals Chamber in three different cases. And also, on Wednesday, we will address any other issues arising from Mr Ongwen's appeal against his conviction.

And then on Thursday, you will hear from Ms Thiru and myself on Mr Ongwen's sentence. We will demonstrate that Mr Ongwen received a proportionate sentence of 25 years, which reflected the gravity of his crimes and his culpability. It found that Mr Ongwen did not have substantially diminished mental capacity during the period of the charges and reiterated that he acted free of threat in committing the crimes. Consequently, it rightly rejected the Defence's request to reduce his sentence on those bases. Instead, the Chamber considered Mr Ongwen's personal history in

mitigation as requested by the Prosecution.

In particular, the Chamber gave substantial weight to Mr Ongwen's abduction when he was nine years old and his early years in the LRA. It reduced the length of the individual sentences by approximately one-third, and then it reduced the joint sentence from life imprisonment to 25 years.

And, finally, your Honours, on Friday, Ms Brady will present the Prosecution's final submissions.

Your Honours, we maintain that Mr Ongwen was correctly convicted and fairly sentenced. We respectfully request you to dismiss his appeals and confirm his conviction and sentence.

Your Honours, this concludes the Prosecution's introductory submissions.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:32:37] Thank you very much.

MR TAKU: [14:32:38] May it please, your Honours.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:32:41] Yes. Another interruption. Okay.

MR TAKU: [14:32:46] I rise to draw your attention to the question of time and that looking at the time both of them have used, the Court will compensate by giving more time to my friend, Beth Lyons, in her presentation.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:32:56] Counsel, if I am right - please, court officer - I gave Mr -- the counsellor for Mr Ongwen more than 30 minutes, 35, it was about 35. And now -- and the Prosecution has just taken 25 minutes, so there is no more time.

What is your concrete -- your concrete request?

MR TAKU: [14:33:20] Your Honours, I'm just saying that I was not keeping the time, but I just say that there should be an accommodation of time. He was given more

time because of the interruption --

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:33:24] Yes --

MR TAKU: [14:33:24] -- the technical problems. It's not that we voluntarily

(Overlapping speakers)

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:33:31] But what would you like? What is your request?

MR TAKU: [14:33:34] Well, because of these technical problems, and the ability of my colleague not to hear, following the interruptions, the Court should know that she'll be talking from New Jersey, and you should make accommodation for time for her to be able to make her representation.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:33:50] We will see. We will see in the moment. Okay?

MR TAKU: [14:33:51] She was entitled to hear all this because it has a bearing on what she's going to say.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:33:56] But now, please, let us continue with the schedule of the hearing. Thank you.

Well, thank you to the Prosecution.

Now, victims represented by Mr Joseph Akwenyu of victims' group 1, please, the counsellor. You have the floor for 10 minutes, starting now. Thank you.

MR COX: [14:34:23] Thank you, Madam President, your Honours.

The victims we represent believe this case has been correctly and fairly adjudicated. Mr Ongwen was correctly and fairly convicted of 61 crimes, counts of war crimes and crimes against humanity by the Trial Chamber.

The evidence at trial showed that persons from the household of Mr Dominic Ongwen gave testimony that he was a strict commander, but that he could

differentiate and be caring with the children, making jokes, even disobeying orders from Mr Kony. You can see that in the testimony of P-16, among others.

You can see that, your Honours, in the testimony of P-26, a woman who he kept for himself even at the time of 1998. This is far before the alleged -- the period, sorry, of the charges. And on an issue that was critical for Mr Joseph Kony, the distribution of wives.

The evidence in trial showed that Dominic Ongwen was a battalion and brigade commander, a member of Control Altar, and therefore, played a significant role implementing LRA policy on abduction and attacks on civilian IDP camps.

Moreover, he was an adult when he committed the charged crimes, which took place - and this is important also for duress - in a period of three years, three and a half years, between 1 July 2002 and 31 December 2005.

Dominic Ongwen ordered his fighters to abduct civilians in the IDP camps of Pajule, Odek, Lukodi, and Abok, and personally participated in the abduction of children, male and female, and other -- with other commanders, and distributed girls to be a forced wife. His contributions were multifaceted, continuous and essential. The lives of victims and thousands of other people were affected and irreparably damaged as a result of his action. Many of those whom we represent have been left with horrific physical and psychological scars as a result of these actions.

The Trial Chamber considered all the evidence before it and was guided by established legal standards and the Statute -- in the Statute and the jurisprudence of the ICC.

On behalf of the victims that we represent, we submit to the trial -- that the Trial Chamber was correct in finding a conclusion on each crime to find Dominic Ongwen guilty.

Your Honour, I must contradict my distinguished and learned friend from the Defence. It seems that everybody that approaches this case from the abstract raises the issue of Dominic Ongwen being a child soldier. And like I say, in the abstract, this makes sense. It is when you see the evidence that you disregard this approach. Mr Dominic Ongwen, when he committed the crimes, was not a child soldier. As one of our clients said to us when we met them, "Yes, he was abducted, but it seemed he loved his job so much." And this is something that is reflected by none other than himself.

If you see Professor - I'll probably mispronounce his last name - Weierstall-Pust quoting de Jong, Professor de Jong's conclusion, when he asked, "How was it, Mr Ongwen, that you rose through the ranks?" And he himself says, "Because I was a good fighter. Because I knew about ammunitions. Because I did my job well." Your Honours, in the de Jong report, which is not a basis for the conviction, but it's interesting because since Dominic Ongwen decided not to speak to anybody else but the experts of the Defence and the court-appointed expert, it's interesting to hear his words. He himself told Mr De Jong that he did not stroke -- he stroke, sorry, he did stroke people when they tortured civilians. Isn't this -- or isn't it not a reflection of actual knowledge of the unlawfulness of his acts? He could distinguish, he could control his acts, and he would decide. He would disobey Kony's orders, and therefore, your Honours, I respectfully submit to your Honours that none of the standards that have been posed for appellate review have been met by the Defence. They have not met the standard for legal errors. And it is well known that in legal errors, an Appellate Chamber may have more leeway or less deference to the Trial Chamber, and this is reasonable because legal standards can be analysed just legally.

But it's interesting that in factual errors, there must be, we submit, a higher, stricter standard for the Appellate Court to review the decision of a Trial Chamber. And this is based on general principles of criminal procedure.

It is the Trial Chamber who has the benefit of hearing all of the evidence, posing questions to the experts, posing questions to the witnesses and sees first-hand immediately how these witnesses react, how experts answer. This is the basis why this standard of review for errors of fact has been even upheld by the Inter-American Court of Human Rights in the Catriman case or the Lonkos case against Chile, in paragraph 294, where it says -- and this is exactly the same standard that the ICC has followed, that for errors of -- factual errors, the Appeals Chamber must see that it was unreasonable to reach that conclusion. That it violates --

THE COURT OFFICER: [14:42:48] Counsel has two minutes.

MR COX: [14:42:52] I'll be finishing, your Honour.

That there has been a violation of common sense, of experience, of scientific knowledge, and that an objective reader could not understand objectively how is it that the Trial Chamber has reached its conclusion reviewing all the evidence.

We submit, your Honour, that anybody that reads the 1,077 pages of the Trial Chamber's decision to convict can see why, can see that they have respected common sense, that they have respected scientific knowledge and logic, because somebody that decides to rape -- to order to rape, pillage thousands of people knows the difference between bad and good.

Thank you, your Honour.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:43:41] Thank you. Thank you, counsellor.

Now, victims represented by Mrs Paolina Massidda, identified in the case as victims'

group 2. You have 10 minutes, starting now.

MS MASSIDDA: [14:43:56] Thank you, Madam President.

Madam President, your Honours, this appeal is not about a child abducted at a young age by the LRA, injured and manipulated to the point of losing understanding and perspective of what was wrong and right or put under such fear of death for himself, for his loved ones that he did not have any other choice than to commit, in the most cruel ways, the 61 crimes he has been convicted for, both in the privacy of his home and in the bush and in front of his soldiers, during the three long years covered by the charges. If it were, these proceedings would not be occurring before this Court today.

It is not disputed that Mr Ongwen might have been a victim of one or several crimes when he was a minor. However, this fact alone does not constitute a legal basis for excluding criminal liability under the Rome Statute.

The fact that Mr Ongwen had been abducted at a young age does not absolve him from criminal liability for the acts and conducts he committed as an adult.

By arguing that the situation of Mr Ongwen should be addressed as if he were a child and a disabled individual, the Defence continues to entertain a fiction that is not only contradicted by facts, but also by expert evidence.

Mr Ongwen is an adult. He was an adult at the time of the commission of the crimes he's convicted for, and, at that time, he had attained the stage of moral and intellectual development of an adult. His alleged disability has never been established at the time of the commission of the crimes nor now.

By arguing that Mr Ongwen was under duress at the time of the commission of the crimes he's convicted for and that he had no choice but to commit in the most cruel

fashion each of the 61 crimes concerned in this case, the Defence fails to acknowledge the vast amount of evidence to the contrary and, notably, that Mr Ongwen consciously decided to rise in the LRA ranks rather than trying to escape, as so many other abductees did.

The events Mr Ongwen might have been a victim as a child when abducted are extraneous to this appeal. What this appeal is about is the correctness of the evaluation by the Trial Chamber at the required standard of proof - beyond reasonable doubt - of the evidence pertaining to Mr Ongwen's conduct and actions as an adult. The ones that he chose to take or not to take at the time of the charged crimes and finding that he bears criminal responsibility as per the terms of the Rome Statute.

The evaluation of the evidence by the Trial Chamber was correct in law and in fact, and the accurate standard of proof was applied to all claims the Defence is presenting before this Chamber.

Your Honours, let's put the facts as supported by the evidence straight. During the period covered by the charges, Mr Ongwen was a military commander in the LRA. He commanded a battalion in the Sinia Brigade. He became a commander of Sinia Brigade. He had effective command and control or authority and control over his subordinates during the entire period of the crimes. He knew about the common plan to attack the civilian population, in particular, the Acholis, or anybody supported -- as perceived as government supporters.

He participated in meetings to plan the attacks. He gave orders to his subordinates to attack Lukodi, Odek, Abok and Pajule. He explicitly ordered looting, destruction of properties, murder, torture, and inhumane and cruel treatments, as well the abduction of adults and children under the age of 15 to be integrated in the LRA,

including in the Sinia Brigade, and used as soldiers.

Mr Ongwen himself used children as soldiers and bodyguards. He directly perpetrated sexual and gender-based crimes against young girls and women under his control. He ordered the abduction and distribution to commanders and soldiers so that women and girls became wives, knowing in full the fate reserved to them.

More importantly, as clearly demonstrated by the reasoning of the Trial Chamber, Mr Ongwen had the necessary mens rea in accordance with Article 30 of the Statute.

None of the grounds for excluding liability has been proven by the Defence.

The evidence at trial clearly, and without any doubt, points to the opposite direction, showing a different reality from what was depicted early this afternoon by the Defence, indicating that Mr Ongwen was without a mind of his own.

He took active part in maintaining and enforcing the system of terror that the LRA operated, taking initiatives, decisions and actions, fostering the crimes ordered by Joseph Kony.

Mr Ongwen is known amongst the victims as the most brutal of the men who served Joseph Kony. He has a record of protracted atrocities against his own people and brutality against his forced very young wives. He was proud of his achievements in the battlefield. He showed no remorse.

This appeal, your Honours, is also about the victimisation suffered by victims and the qualification of the different crimes perpetrated by Mr Ongwen and his subordinates.

Madam President, your Honours, beyond the theoretical debate we will entertain this week, thousands of victims are attentive to these proceedings. While we entertain arguments about the applicability to Mr Ongwen of the provision of international human rights treaties - a right which we do not contest in substance, but which are not applicable in the terms the Defence and certain amici curiae plead in this

Court - do not forget 4,065 victims participate in these proceedings.

THE COURT OFFICER: [14:52:11] Counsel has 10 minutes.

MS MASSIDDA: [14:52:13] Their fundamental human rights were systematically violated for years. Their lives ruined, as well the ones of their family. The extent of the prejudice they suffered, tremendous.

In this regard, and, in concluding, your Honours, it's underlined by one of the experts called by the victims at trial, and, I will quote:

"[a]n optimistic outlook focused on growth and recovery following insult and trauma can be facilitated through education, medical and psychological treatment, reparations, financial assistance, and the execution of justice."

End of quote.

This is, your Honours, the legitimate expectation of victims from these proceedings.

Thank you.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:53:03] Thank you.

We will now take a break of 30 minutes, please. We will be resuming exactly at 15:22 hours, please. Thank you.

THE COURT USHER: [14:53:32] All rise.

(Recess taken at 2.53 p.m.)

(Upon resuming in open session at 3.24 p.m.)

THE COURT USHER: [15:24:48] All rise.

Please be seated.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [15:25:11] Welcome back.

We will now turn to the submissions on the grounds of appeal concerning grounds for excluding criminal responsibility pursuant to Article 31(1)(a) and (d) of the Statute.

The parties' and participants' submissions should be guided by the questions posed

by the Appeals Chamber in its Directions issued on 28 February 2022. The questions are as follows:

i) Pursuant to Article 66(2) of the Statute, the onus is on the Prosecutor to prove the guilt of the accused and, according to Article 66(3) of the Statute, the standard of proof to convict the accused is that the Court must be convinced of the guilt of the accused beyond reasonable doubt. In light of this, when a ground excluding criminal responsibility under Article 31 of the Statute is alleged, who bears the burden of proof and what standard of proof is applicable?

ii) Considering the wording of Article 31(1)(a) of the Statute that a person shall not be held criminally responsible provided that it can be established that such a person suffers from a mental disease or defect that destroy the person's capacity to appreciate the unlawfulness or nature of his or her conduct, could lesser forms of diminished mental capacity be compatible with this provision?

iii) Considering that Mr Ongwen was abducted at a young age by the LRA, could considerations from international human rights law exclude his criminal responsibility? And how would this be compatible with the object and purpose of the Rome Statute?

iv) How should the elements set out in Article 31(1)(d) of the Statute that result in duress, including the threat of imminent death or of continuing or imminent serious bodily harm, be established?

Now, counsel for Mr Ongwen, the Defence of Mr Ongwen, you have the floor for 30 minutes.

Who will be appearing? Please, who will be taking the floor?

MR AYENA ODONGO: [15:28:12] Madam President and your Honours, the person who is taking the floor is Lyons Beth, yes, by -- by video link.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [15:28:26] Via video link?

MR AYENA ODONGO: [15:28:22] Yes.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [15:28:23] I don't have the counsellor in the -- in the screen. Okay.

Okay. Counsel, you have the floor for 30 minutes.

MS LYONS: [15:28:53] Thank you very much, Madam President.

Can you hear me?

PRESIDING JUDGE IBÁÑEZ CARRANZA: [15:28:55] Yes. Please go ahead.

MS LYONS: [15:28:56] Okay. Good. All right. I will try to answer, at least as much as I can, all of the questions that have been provided by the Appeals Chamber.

Now let me start with, what is my starting point?

First of all, I would like to point out that no one has appealed the Trial Chamber finding at its judgment, paragraph 231, that the burden of proof is on the Prosecution and that the standard of proof be beyond a reasonable doubt must be satisfied in order to convict.

Secondly, in its recent submission on response to amici observations at paragraph 9, the Prosecution explicitly states its agreement with these propositions.

Where there is divergence is, one, whether the Trial Chamber correctly applied the standard to the affirmative defences. The Prosecution says, yes. We, the Defence, say no.

For the purposes of this argument I'm relying on the representations of the Prosecution in paragraph 9, as I said, in the amici observations.

There was an earlier position espoused by the Prosecution which appears to be different. In its closing brief approximately one year ago, the Prosecution argued that neither party bears the burden to prove the applicability of Article 31(a), and the

Prosecution proposed a standard of, quote, "substantial evidence" on the Defence who was raising an affirmative defence.

I am assuming that this argument has been superseded now and has been abandoned. If it hasn't, I will deal with this point in questions, in specific.

Now, the Defence in its litigation in the Trial Chamber proposed a formulation for a standard of proof related to affirmative defences to reflect Article 66(2) and 66(3). What was it?

We said the Prosecution disproved each and every element of the affirmative defence beyond a reasonable doubt. How did we arrive at this formulation? Quite simply, frankly. It seemed to be the logical statement that was consistent with the legal principles of Article 66.

Now I want to talk a little bit about how the formulation works in practice. I understand that there may be some confusion, perhaps, as a result of different legal systems or different nomenclatures. Basically, the Defence proposed that it has an evidential obligation to raise an affirmative defence. This means that the Defence has to produce some evidence of the affirmative defence. We did this for both mental disease and duress.

Now there's a distinction between two terms which are used to talk about affirmative defences sometimes. Burden of production and burden of proof.

Using those terms, we would argue the Defence has a burden of production, but this is not a burden of proof. We would also argue that we've met our burden of -- burden of -- excuse me -- we've met our obligation to produce some evidence in respect to both duress and mental disease and defect.

And I will add that all of these principles under Article 66 are applied to the evidence where the principle of *in dubio pro reo* applies to both direct and circumstantial

evidence.

Now my next point is that the Defence of Mr Ongwen -- Mr Ongwen was prejudiced because before he presented his affirmative defence of mental disease or defect, the Trial Chamber did not articulate what its standard would be for affirmative defence. The Defence was put in a position where it would have to guess what the standard would be and this affected the fair trial right of Mr Ongwen under 67 -- Article 67(1)(e), his right to present a defence.

We've been operating under the understanding that our evidentiary obligation is to produce some evidence. It's what we've done. But yet to this day, when I review again and again the judgment and documents, it is still unclear what standard the Trial Chamber applied.

There's only one instance in the 1,077-page document where the Trial Chamber says the Prosecution did not satisfy its burden of proof beyond a reasonable doubt. I think this was -- may have been in respect to intercepts -- an intercept issue, if I recall correctly.

Now, our position is that the judgment, at paragraph 231, articulates the correct standard, the problem is the Trial Chamber erred by not applying it to Article 31(a) -- 31(1)(a). Basically, the Trial Chamber found that there was no credible evidence and rejected all the evidence of the Defence experts.

We find this, given the Defence experts, their testimony, their reports, to be unfathomable. I am not sure what the right word is, but we certainly believe that a reasonable trier of fact examining the evidence could reach a different conclusion that some credible evidence for the defence of mental disease or defect was submitted.

Now, the Defence is well aware that appellate courts extend a, quote, "margin of

deference" to trial chambers who had the opportunity to hear and also to view the demeanour of witnesses.

What we are asking this Chamber to do, because mental health -- mental disease or defect is such a critical issue, we are asking you to review the evidence, review the videos, read the reports and make a *de novo* assessment of whether there is some evidence -- some credible evidence to support an affirmative defence, and then to reach a decision on whether the Trial Chamber erred, or not, in applying the beyond a reasonable doubt standard to the evidence.

I say this because both Professor Ovuga and Dr Akena, our Defence experts, are well-respected and well-renowned Ugandan psychiatrists and academics, both in their own country, the rest of the African continent, Europe, and elsewhere in the field of psychiatry. For decades, as practitioners, professors and researchers, they've written and they've been published in scores of publications, and they've also developed testing tools for psychiatric diagnosis. Their complete CVs are available to you in the trial record.

Now, the Trial Chamber's rejection of all the Defence evidence was based primarily on two Prosecution experts, Dr Mezey and Professor Weierstall-Pust, and particularly on Professor Weierstall-Pust's critique of the Defence experts' methodology in his rebuttal evidence towards the end of trial.

Now, in his report on rebuttal, he wrote: The Defence experts' report, that his second report, is, quote, insufficient, unfounded, inconsistent or contradictory, sloppy in every aspect and does not fulfil the minimal qualities of a professional forensic report according to the state of the art.

We've refuted this piece by piece in our appeal brief, and also in our -- in our appeal brief and also in our closing brief. I'm not going to repeat the arguments. But I

think that the accusations from Professor Weierstall-Pust are -- are such that they must -- that the record must be set straight. His accusations are not founded and he makes allegations that are simply not supported. But we trust that the Appeals Chamber will judge the evidence for itself.

Now the second question I want to -- to address is the question of the meaning of "destroy" and whether it's compatible with diminished capacity.

The quick answer of the Defence is yes.

It is true that the Defence did not raise diminished capacity as a defence at trial because it was not in the Statute specifically as a defence in -- you know, as a defence. And furthermore, we believe that the evidence provided by our experts, as well as the court-appointed expert Professor de Jong, support mental disease or defect under Article 31(a).

Now I want to point out that Eser's commentary on Article 31 states that an interpretation of "destroy" to mean complete or utter elimination of a person's capacities would set a, quote, "unrealistic hurdle" for those defendants asserting the mental disease defence.

And he continues: This is based on the premise that mental disorders do not leave mentally -- mental -- do not leave mentally ill people absolutely incapable of self-control or total -- or totally disoriented.

Now, the analysis of what is an unrealistic hurdle reflects the character or nature of mental illness, which is supported by the evidence in Ongwen, from both Defence and Prosecution experts. We know that mental illness is an invisible disease. We know that mental illness -- the character of mental illness comes and goes. It does not show itself 24/7. There's evidence from Professor Ovuga. I would also add here, one of the amici briefs by Dr Braakman talks about this. I would now also add

the opinion of Professor Weierstall-Pust, who says in his first report, "mental disorder fluctuates over time".

And I would lastly add the testimony of Dr Mezey, who described persons re-experiencing symptoms of -- symptoms in the context of PTSD, this notion of re-traumatisation, re-experiencing symptoms implies that a fluctuation exists over time.

And I would also add one more point from * Dr Ovuga on this. He said specifically: "[t]he problem is mental identity disorder," which was one of the diagnosis he and Dr Akena made, "or any form of dissociation does not occur all the time every day. [...] and not even a medical doctor", he said, "would recognise severe mental illness on its face". This is at transcript T-51, page 28. And we'll be happy to provide line transcripts to the Chamber, if requested.

Lastly on this point, I would say that the Defence posits the notion of diminished capacities as a, quote, "lesser included element" of the notion of "destroys". This would be a proper or a correct resolution, think of it this way. This gives Mr Ongwen a fair chance to present and hopefully prevail on the defence, and is commensurate with the evidence - from both the Prosecution and Defence witnesses - on the character of mental illness.

Now the next question I would like to address is the question regarding international human rights law considerations and their compatibility with the Rome Statute.

The Defence supports the international human rights law position that those who are victims of crime should not be held criminally responsible for crimes which are a result of, or connected to their status as victims.

The doctrine of non-punishment based on international conventions and resolutions is well argued in a number of the amici briefs. We won't repeat the arguments.

Now, Mr Ongwen should be treated as a victim of trafficking. He was a victim of the crime of abduction because of his forced separation from his parents, which is prohibited by the Convention on the Rights of Children, Article 9, and this is consistent with the object and purpose of the Rome Statute.

I know that lead counsel talked about this a little bit. I'm sorry I missed a lot of the previous arguments, so I cannot refer back to anybody's argument here.

The Rome Statute states:

"Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity."

We submit that Mr Ongwen's abduction at a young age, the ensuing indoctrination, the brainwashing, the rules, the punishments in the LRA at the hands of Mr Kony meets the definition in the Statute of "unimaginable atrocities".

I will never forget how Dr Akena described the traumas Mr Ongwen went through, but one particularly heinous situation, you know, stuck in my mind. He described that Mr Ongwen had been forced to skin alive a young abductee who had tried to escape. Our point is that, but for trafficking, Mr Ongwen would not be where he is today, convicted and punished for the crimes of the LRA.

But lastly on this issue, the problem of Article 26 and how to interpret it remains. We rely on the arguments on our amici briefs, but in addition we want to call the Court's attention to the fact that, from an evidentiary point of view, the Defence experts, and even Prosecution expert Dr Abbo, challenged the notion of child soldier being defined by chronological age.

And in other cases, for example, in Lubanga, there was a Prosecution expert, Dr Elizabeth Schauer, who testified about the longevity or the lasting and enduring effects of child soldiers, which is the same testimony that our child expert gave.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [15:48:42] Professor -- Dr Lyons, are you on line?

THE COURT OFFICER: [15:48:58] Your Honours, it appears that co-counsel Beth Lyons has disappeared. And I've informed IMSS, who are currently looking into re-establishing the connection for her.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [15:49:28] I need to inform you that it appears that we have lost the connection with Dr Lyons. We are trying -- our technicians are trying to reinstate the connection.

(Pause in proceedings)

PRESIDING JUDGE IBÁÑEZ CARRANZA: [15:51:02] Well, Doctor -- sorry, Counsellor Lyons has left 10 minutes. Now, as we are very, very delayed, we will allow the Prosecution to start with their submissions. And after the Prosecution, we will come back to Counsellor Lyons to allow her 10 minutes to close or to continue with her submissions. Okay?

Counsel for the Prosecution, you have the floor for 30 minutes, please.

MS REGUE BLASI: [15:51:35] Thank you, your Honours.

I will respond to your first question and my colleagues Mr Cross and Mr Costi will respond to the next three questions. Your Honours asked who has the burden of proof and what is the applicable standard when an accused alleges a ground excluding criminal responsibility under Article 31.

Our answer is that the Prosecution has the burden and the standard is beyond reasonable doubt. It is the same burden and it is the same standard that applies to any fact which is indispensable to establish the guilt of the accused. This was also the position of the Trial Chamber in this case.

I will first explain how this operates more generally in the criminal proceedings, and

also I will explain the Chamber's correct approach in this case.

In any trial before the Court, the Prosecution has the burden to prove beyond reasonable doubt the guilt of the accused in accordance with Article 66. And this requires the Prosecution to prove the facts upon which a conviction depends; namely, the elements of the crimes and the modes of liability. Your Honours can see authorities in A1 of our list of authorities.

The Prosecution will present evidence to meet this standard. The Defence doesn't have any obligation to present evidence, but it may choose to do so. And in practice they will present evidence in order to raise an alternative interpretation or hypothesis which is incompatible with the accused's guilt. However, only those hypotheses which are based on evidence are capable of raising a reasonable doubt.

Your Honours, that's reference A2 of our list of authorities. However, if the totality of the evidence establishes guilt beyond reasonable doubt, the Chamber must convict.

The burden and the standard remain unchanged if an accused chooses to raise the application of a ground under Article 31. In that case, the Prosecution must prove beyond reasonable doubt that the ground does not apply.

If there is a reasonable possibility that the ground applies, the accused cannot be convicted. This means that there is a reasonable doubt about his or her guilt.

Equally, the Chamber will have to make a finding as to the absence of the ground.

In this case, the Trial Chamber correctly articulated and applied the burden and the standard to the evidence generally, but also to the grounds with respect to which Mr Ongwen alleged.

In the judgment, paragraphs 231, 2455, 2588, the Chamber recalled that the Prosecution retains the burden to prove the facts which are indispensable to establish the guilt of the accused. In this case, this also includes the absence of the two

grounds that Mr Ongwen alleged. Before the judgment, the Chamber had already provided guidance on this issue in its decision 1494 at paragraph 13.

In fact -- well, Mr Ongwen agrees that the Chamber correctly articulated the burden and the standard. He also acknowledged that he has the evidential obligation to raise the grounds and to submit evidence as to their existence. This is -- this is -- has been defined as the burden of production of evidence and arguments to substantiate or oppose a claim and it is different from the burden to prove or disprove the claim. This approach is also consistent with Rule 79(1)(b) of the Rules.

And the Chamber also correctly applied the burden and the standard. It considered all the submissions of the parties and it considered and assessed carefully all the relevant evidence before it, including Prosecution and Defence evidence as I have just explained in my introductory remarks.

On the evidence, the Chamber did not find a possibility that Mr Ongwen suffered a mental disease or defect under Article 31(1)(a). Instead, it found that Mr Ongwen was in full possession of his mental faculties. It also found that Mr Ongwen's criminal conduct was not caused by a threat of imminent death or of imminent or continuing serious bodily harm.

In sum, in conclusion, the Chamber correctly found beyond reasonable doubt that the two grounds alleged by Mr Ongwen did not apply to him.

The Defence is asking you to revisit the record of the case, but it merely disagrees with the careful assessment of the evidence that the Trial Chamber did, thus cannot require your Honours to alter the Trial Chamber's correct interpretation of the law and correct application of it to the facts of this case.

And with that, I will now pass the floor to my colleague, Mr Cross.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [15:56:58] Thank you. Mr Cross, you

have the floor.

MR CROSS: [15:57:01] Good afternoon, your Honours. Article 31(1)(a) requires that the destruction of Mr Ongwen's capacities by mental disease or defect caused the charged crimes. If satisfied, it has the effect of excluding Mr Ongwen's criminal responsibility altogether, leading to his acquittal and absolute discharge from the Court's jurisdiction.

Your Honours will be familiar with the claims about mental health addressed at length in the parties' written submissions and at trial. You have heard them again this afternoon and it -- on that basis, we are happy to rest on the arguments in our response brief.

But it bears repeating that the Trial Chamber found the Defence experts' opinion to be wholly unreliable. They did not reach this conclusion lightly or in inadvisedly, but with the benefit of the evidence of three further and no less distinguished experts, and, on that basis, it led them to find significant inconsistencies in the Defence experts' opinion and flaws in their methodology.

They also accepted the expert opinion that any mental illness, which could have destroyed Mr Ongwen's capacities, would have been manifest in his behaviour, at least to the extent that it would have been observable at some point in that prolonged period by lay witnesses around him, even if they did not understand precisely what they saw.

None of the extensive eyewitness evidence in this case supported anything of the kind. To the contrary, the evidence consistently showed Mr Ongwen to be a confident, personable, capable commander who was fully responsible for his own participation in the charged crimes. Furthermore, as experts such as Dr Abbo noted, even if one were to accept - for the sake of argument - the diagnoses of the Defence experts, there

was still no basis to conclude that Mr Ongwen's criminal conduct was caused by any such mental illness.

Simply put, therefore, there was no reasonable possibility that Article 31(1)(a) was made out. Indeed, the Trial Chamber considered that the very same evidence did not even suffice to establish that Mr Ongwen's mental capacity was substantially diminished, which is a lower standard for the purpose of mitigating his sentence.

Now, in this appeal, some amici curiae have suggested that Article 31(1)(a) could be interpreted to include some degree of impact on mental capacities, which is less than destruction. And given the very significant consequences of this provision, your Honours' question ii) rightly asks whether that can really be so and we say it cannot for five reasons.

First, there is the plain meaning of the term. Article 31(1)(a) expressly says "destroy", which ordinarily means to nullify, invalidate, neutralise or annihilate. And that's in the OED at reference B1.

The Appeals Chamber of the ICTY has reached the same conclusion. And Eser and Ambos, which is the same academic cited by my learned friends opposite, have stated that, at minimum, destruction entails, and I quote, "an extensive and far-reaching loss of self-control or reason." And those references are at B2.

Of course, in practice, whether or not a material capacity has been destroyed is a question of fact and chambers may often have recourse to expert opinion on this question provided that's within the framework of the evidence at trial. That's reference B3.

And this ensures that the standard remains a sensible one, grounded in the best medical knowledge available and does not become abstract or indeed impossible to achieve.

Second, let's turn to context.

Rule 145(2)(a)(1), which provides for mitigating circumstances in sentencing, also expressly states that it is concerned with circumstances falling short of constituting grounds for exclusion of criminal responsibility.

In other words, it is addressed precisely to conduct which falls below the standards set in Article 31. And critically for any mitigation based on the mental capacity of the accused, it still requires proof that this was substantially diminished. This remains a high standard and indeed the standard which the amici would seem to contend should apply to Article 31.

It is very hard to see how there could be an intermediate standard excluding criminal responsibility which is higher than substantially diminished mental capacity but lower than destroyed mental capacity.

Third, relatedly, the drafters of the Statute consciously rejected any standard lower than destruction. In 1996, the PrepCom had identified two potential options for consideration, of which one indeed did merely require a lack of substantial capacity. Yet ...

(Overlapping speakers)

THE INTERPRETER: [16:03:01] Your Honour, a request from interpretation. Could counsel slow down a bit.

MR CROSS: [16:03:07] (Overlapping speakers) Instead, Argentina proposed a draft - based on the other option presented by the PrepCom - where responsibility was excluded only if the accused's capacities were destroyed. And it was this proposal upon which States quickly agreed. Your Honours can see the references at B4.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [16:03:29] Could you go slowly, please.

MR CROSS: [16:03:30] Thank you, your Honour.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [16:03:30] It's for the benefit of the interpreters. Thank you.

MR CROSS: [16:03:35] Fourth, the strict approach is consistent with the approach of national jurisdictions. From a theoretical perspective, the exclusion of responsibility may only be defended if, and I quote, it "causes effects so strong that it would not be reasonable to expect the author to have avoided the criminal law violation." That's reference B5.

Lesser degrees of mental illness, even if causally relevant to the commission of the charged crimes, are not exculpatory. And that's reference B6.

For example, if we consider the position in the civil law, section 20 of the German Criminal Code bars criminal responsibility if a mental disorder or abnormality renders an accused incapable of understanding the nature of their actions or acting accordingly.

Where this is not met, the accused may still claim diminished responsibility under section 21, but only with the consequence, if successful, of reducing punishment.

This strongly resembles the approach in the Statute of this Court. And your Honours will find a similar approach in other civil law jurisdictions. For example, Articles 88 and 89 of the Italian Criminal Code and in the other jurisdictions we cite in reference B7.

Likewise, most common law jurisdictions also apply a strict standard either within the framework of the M'Naughten rules or a derivative. While the Law Commission of England and Wales has proposed an update to what is still called there, the insanity defence, it has stressed that the threshold must remain a total or complete lack of the relevant capacities which they regard as central to justifying the exclusion

of responsibility.

In Uganda, section 11 of the Penal Code excludes criminal responsibility only if the accused is "incapable" of exercising the required capacities, and it expressly retains responsibility where this threshold is not met, even if, and I quote, "his or her mind is affected by disease".

* In general for Commonwealth States – (Overlapping speakers)

THE INTERPRETER: [16:06:02] Your Honour, the speed is too high. Could the speaker slow down? (Overlapping speakers)

MR CROSS: [16:06:02] -- as Professor Yeo has observed, "a substantial impairment will not" – (Overlapping speakers)

PRESIDING JUDGE IBÁÑEZ CARRANZA: [16:06:07] Please –(Overlapping speakers)

MR CROSS: [16:06:07] -- "suffice". (Overlapping speakers)

PRESIDING JUDGE IBÁÑEZ CARRANZA: [16:06:07] -- please. Counsellor, the interpreters are working so hard. Please, I beg you, go slowly. And you can please go a little bit –

MR CROSS: [16:06:17] And I apologise to the interpreters.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [16:06:20] Okay. Thank you.

MR CROSS: [16:06:20] Thank you. And your Honours can see that authority for Professor Yeo at B8.

It is true, your Honours, that practice in the United States is somewhat mixed, but this represents something of an outlier. In particular, the Model Penal Code had suggested a lower threshold, which is that same substantial capacity standard which was rejected by the drafters of the Statute, but this was only adopted by one-third of the United States. By contrast, almost half still adhere to the stricter M'Naughten approach and federal legislation also notably declined to include the substantial

capacity standard from the Model Penal Code. And that's reference B9.

To conclude on this point, your Honours, the broader logic of the Statute makes it inappropriate to interpret the term "destroy" in anything but the most natural way.

By setting a simple, clear, high standard for Article 31(1)(a), the drafters ensured that the Court could find criminal responsibility when it is due.

This contributes to the object and purpose of the Statute, including the role of such findings in establishing the truth and allowing victims to claim reparations under Article 75.

And importantly, this approach is balanced by the absence of any minimum penalty in the Statute, even though this Court only has jurisdiction over the most serious crimes of international concern.

This ensures that the Trial Chamber can set the right penalty for the particular circumstances of the case and the accused, if necessary, imposing a reduced sentence if their mental capacities were substantially diminished.

Of course, in this case, as I've mentioned, the Chamber found no reliable basis in the evidence to meet this lesser standard. But the legal possibility is nonetheless important to illustrate that the high standard of Article 31(1)(a) does not cause unfairness.

In view of the time, I will now very briefly turn your Honours' next question, number iii), as to whether international human rights law requires a different interpretation of Article 31(1). We've already set out in writing why we consider that the most natural interpretation of Article 31 is perfectly consistent with the rights of persons with disabilities and of children. That's reference B10.

For now, I'll touch very briefly on just three key points.

First, neither the Defence - nor any amicus here with us today - has even identified an

inconsistency with the rights of persons with disabilities. As we said in our brief, the criticism from one amicus concerning the link between Article 31(1)(a) and in national jurisdictions the possibility of involuntary hospitalisation simply does not arise at this Court. If an accused person successfully raises Article 31(1)(a), they are acquitted and discharged.

In every other respect, the Statute ensures that all persons regardless of disability are equal before the law. Nothing in international human rights law, however, speaks to the precise balance which should be struck between the exclusion of criminal responsibility and the mitigation of sentence. This is a question which remains instead within the margin of appreciation accorded to States and consequently where the deliberate choice of States in drafting the Statute should be respected.

Second, the Statute already ensures that the Court does not punish the conduct of children. That is established by Article 26. And in response to the argument by Defence counsel that we heard just now concerning Doctor Abbo, I refer your Honours to paragraphs 288 to 292 of our brief recalling her finding that Mr Ongwen had indeed reached the highest level of moral development.

Now, the fact that a person may have been victimised as a child does not mean that they must necessarily be excluded from criminal responsibility for their whole life, as the Trial Chamber noted at paragraph 2672 of the judgment. Victims can also be survivors. And those who were once subject to the control of others, may regain the power to control their own lives and their own conduct. And with that control, with those choices, comes responsibility.

Finally, your Honours, Article 31(1) together with Rule 145 is effective in differentiating between those who cannot reasonably be expected to avoid criminal conduct and those who can, but deserve mitigation of punishment. And this is

exactly what Mr Ongwen got. The evidence did not permit the exclusion of his responsibility because his mental capacities remained intact and he was not subject to any form of duress.

But his sentence was mitigated because of his abduction into the LRA, and, as such, no matter our instinctive sympathy for Mr Ongwen's earlier experiences, these were fully addressed within the framework of the Court's legal texts and consistent with his human rights.

Your Honours, in view of the time, at that point, I'll conclude my submissions and I'll pass the floor to my colleague, Mr Costi.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [16:12:32] Thank you. Mr Costi, you have the remaining time. You have the floor.

MR COSTI: [16:12:39] Madam President, your Honours, good afternoon and thank you. In the remaining time, I will address your Honours' question on duress, how should the elements set out in Article 31(1)(d) should be established?

As the Trial Chamber properly found, Article 31(1)(d) has three elements. First, the existence of a threat of imminent death or continuing or imminent serious bodily harm; two, the person's reaction is necessary and reasonable; three, the person acts only to avoid the threat.

In this case, the Chamber found that not even the first element was satisfied. It found no basis in the evidence to hold that Ongwen's crimes were caused by a threat.

In addition, based on the evidence, we submit that neither the second or the third element could be established. As I will show you, Ongwen's reaction was unnecessary, unreasonable and intended to cause a greater harm.

The threat. Article 31(1)(d) requires that the crime is caused by a threat of imminent death or continuing or imminent serious bodily harm. An abstract danger or an

elevated probability of harm in the future is not sufficient. Our reference is C1. For example, the possibility of future disciplinary measure, as unsuccessfully alleged by Ongwen, is not enough to meet the imminent requirement.

Now, in response to your question, we submit that the existence of a threat must be objectively established. Based on the totality the evidence, it should be established that a threat exists in reality. It is not sufficient that a threat is simply believed to exist by the accused.

But what is a threat? Again, the Oxford dictionary says that it is, a -- "declaration of hostile determination or of loss, pain, punishment, or damage to be inflicted in retribution for or conditionally upon some course". End of quote.

So a declaration of hostile determination may exist regardless of whether the harm could actually materialise.

Thus, a threat, a real threat that can be objectively established may well be an empty threat in the sense that a retrospective assessment may show that the threatened harm could not actually materialise. This is the classic scenario of one person threatened by another, pointing a gun that happened to be unloaded. Even if the accused cannot be harmed, the gesture is certainly threatening and the threat can be objectively established as existing.

But there is an important caveat when we talk about empty threat. They will meet the standard if the alleged threat, if -- only if it must be established at least that a reasonable person in those circumstances would nonetheless apprehend the risk of serious harm. The requirement would not be satisfied if it was not reasonable to apprehend that risk. And this irrespective of whether the accused genuinely but mistakenly believed to be under threat.

However, on the facts of this case, your Honours, these questions don't arise because

in this case there was no unloaded gun nor any other empty threat. There was simply no threat of immediate or ongoing harm. Ongwen's actions were, as the Chamber found, free of threat. In particular, the Trial Chamber found two important considerations. First, it found that there was no objective -- there was no objective threat to Ongwen, given his status in the LRA and the way in which the LRA disciplinary regime was applied to him. Specifically, Ongwen did not face prospective punishment or death or serious harm.

Second, the Trial Chamber found that Ongwen's own behaviour was "entirely incompatible with a commander [acting] in fear for his life or similar [...]" And this is trial judgment, 2665.

THE COURT OFFICER: [16:17:50] Counsel has four minutes.

MR COSTI: [16:17:53] Thank you.

This conclusion both corroborate the objective absence of any threat, but also that Ongwen acted without -- mistakenly believe that a threat existed.

The second element is that the measure needs to be reasonable and necessary. I beg your pardon, not the measure, but the reaction should be reasonable and necessary. The accused must have acted upon a threat that a reasonable person in comparable circumstances could not fairly be expected to endure. Again, it should be established objectively. So a chamber must find that not only it is necessary to act at all, but it's necessary -- it was necessary to act in a way which would otherwise be criminalised as the accused * did.

Second, the conduct of the accused must be limited in its nature and consequences to the conduct of a reasonable person in comparable circumstances.

As we explained in our submission, we do not think that there is a proportionality test in assessing whether the conduct was reasonable. * However, it's very unlikely

that a disproportionate reaction would be considered reasonable for the purpose of Article 31.

Finally, your Honour, Article 31(1)(d) requires the accused to act only for the purpose of avoiding the threat and that he or she does not intend to cause a greater harm. I'll be happy to answer more questions on this point, if you -- your Honour might have in the next stage. But let me get to the conclusion.

Going back to the fact of this case, your Honours, it is abundantly clear that Ongwen's conduct was neither necessary or reasonable and that he intended to cause a greater harm. As the Chamber noted at paragraph 2586, this case is not about a single discrete act. Ongwen's criminal conduct are complex and spread -- or spread over the course of three and a half years. As Ms Brady and Ms Regue explained this morning, they include violent crimes during the attack and three and a half years of rape, torture and sexual enslavement of young girls. Your Honours, even if Ongwen was under threat, which he wasn't, and even if he erroneously believed that a threat existed, which he didn't, Ongwen's numerous crimes affecting hundreds of innocent victims were unnecessary and unreasonable. The facts of this case only point one way: Ongwen intended to cause harm immeasurably greater than any harm he could have potentially suffered. Duress under Article 31(1)(d) does not and cannot apply in this case.

That ends my submission, Madam.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [16:20:53] Thank you. Thank you. A minute, please. I would like to be brief -- Counsellor Lyons is connected, please? Yes?

Well, Counsellor Lyons is now connected.

You have -- can you hear us? Can you hear us?

MS LYONS: [16:21:16] I can hear you.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [16:21:18] Thank you. You have 10 minutes --

MS LYONS: [16:21:17] Can you hear me, Madam President?

PRESIDING JUDGE IBÁÑEZ CARRANZA: [16:21:18] Yes. Thank you. You have left 10 minutes to conclude your submissions. You have the floor for 10 minutes.

MS LYONS: [16:21:25] Okay, thank you. Thank you.

Madam President, your Honours, I realise I spoke -- a lot of what I said before wasn't -- wasn't in the transcript. I will try to be very, very brief.

In terms of duress, we only want to point out that the Chamber's position that imminence applies to harm is in direct contradiction to Judge Cassese's opinion in Erdemović that imminency applies to the threat. We favour Judge Cassese's formulation as a formulation between the two because the trial judgment's formulation does not deal with the realities of the evidence of what life in the LRA was, as I'm sure our lead counsel has already described.

The second point that I want to make has to do with defects and notice. We've argued the defects issue. It's before this Chamber, contrary to what the Prosecution says, because the Appeals Chamber granted us leave to present issues if -- if Mr Ongwen were convicted. He has been convicted and sentenced. I think it was paragraph 160 in the Appeals Chamber decision. Therefore, the defects series should be ruled on in our view. There's never been a substantive analysis and ruling and evaluation of what we have argued as defective pleading. This is a basis of the whole trial. This, if found -- if the defects are found in the -- in the notice, this has been in other courts grounds for dismissing the convictions.

Now, secondly, I want to point out that the Trial Chamber argued that -- or held that

the Defence made untimely objections. This is simply not true. The first objection on the jurisdictional defect of forced marriage was made during the CoC hearings in January 2016. Two months later, the CoC decision refers to objections raised by the Defence. So the Defence made objections, obviously. They're referred to in the CoC decision. One's on concurrence, paragraph 29, on indirect co-perpetration, paragraph 37, on forced marriage, paragraph 87.

Now the Trial Chamber gives a second reason for rejecting the defects series, which is the reasoning section in the Confirmation of Charges decision is separated by some sort of a legal wall from the operative section, the second part. We disagree and we rely a lot on the -- on the holdings of Judge Brichambaut in his dissenting opinion on the leave to appeal the CoC decision. He points out that the -- for an alleged separation between the reasoning and operative part is, in his words, odd because the grounds for a decision are supposed to lead logically to its operative part, they form the foundation. And secondly, he points out that the Trial Chamber manual, which is oft-cited by the Prosecution, the Trial Chamber is simply a set of recommendations. It's not there to constrain the judgment or the conduct of the Trial Chamber.

And Brichambaut was very clear in his separate opinion on the Confirmation of Charges decision in March that, in fact, the reasoning and operative part are related to each other. He didn't just object to reasoning, lack of reasoning in the CoC decision, he pointed out to a number of paragraphs where there was no evidentiary -- evidentiary grounds identified to give proper notice to the Defence. And I refer to paragraphs 18 to 21, 23 to 24 and 25 in his separate opinion from the CoC decision.

Now in terms of incorporation by reference, lead counsel made a number of arguments this morning. I want to simply add one. In the holding of this Appeals

Chamber, I think in a decision on page limits, stated, that, quote, "substantial submissions must be contained within the text of the document itself and that it is impermissible to attempt to incorporate by reference [...] contained in other documents." This is paragraph 15.

Our position is that we have made substantial submissions on defects within the appeal. Yes, we have footnotes to previous litigation for the ease of the Court and also for preservation purposes. But out of the ninety -- there are 96 paragraphs for ground 5, which is where we discuss pleading defects in our appeal, and only six of them are -- use the term "incorporating by reference".

We ask the Trial Chamber to please look at this again and look carefully at the footnoted paragraphs, particularly 148, which argues -- makes a substantial argument on the question of why we are raising the defects issue, what is *ultra vires* in terms of forced marriage et cetera, et cetera.

I will be happy to answer in more detail if I'm asked about this.

Now I want to talk a little bit about my third point about the rebuttal case. The Prosecution's response is that the -- is that the Trial Chamber properly admitted rebuttal evidence. This is -- this is in their response at paragraphs 161 to 165.

Our position is no. It was improper. First of all, the argument is that the Ongwen conduct of proceedings, document 497, paragraph 9, requires that a party should seek leave for a rebuttal or rejoinder case. This was not done. Now, in fact, both the Prosecution and Trial Chamber acknowledge that no formal request was made. And this was in contrast to the situation where the Prosecution made a request earlier for Dr Blattmann's evidence on rebuttal, and it was rejected by the Trial Chamber. But in --

THE COURT OFFICER: [16:29:41] Counsel has two minutes.

MS LYONS: [16:29:43] Pardon me? Two minutes? Okay.

In this case, the rebuttal case, the evidence of Professor Weierstall-Pust, all of these rules were basically thrown out. It's important because the rebuttal case and the evidence that was submitted there in writing and orally is the basis on which the Trial Chamber made most of its findings concerning the Defence experts as the basis on which the Trial Chamber erroneously rejected the Defence experts' evidence as unreliable. That's part of the reason.

The Prosecution says, "Oh, they did okay because they looked at regulation -- they adhere to Regulations 43 and 44." Read those regulations. They're not about rebuttal cases. One is about testimony of witnesses, Regulation 43. And 44 governs the conduct of the Trial Chamber vis-à-vis experts in terms of instructing single experts or joint experts in topics. It's not about a rebuttal case. This is an error of law.

The very last point I want to make is, this week, we're holding these hearings following February 12th, which is the International Day Against the Use of Child Soldiers. And, as former ICC Prosecutor Bensouda said last year, a crime against a child is an affront to all humanity.

It's the Defence viewpoint that the Trial Chamber judgment did damage in terms of reflecting an understanding of child soldiering. It sent a wrong message to the, whatever the number is, a quarter of a million or more child soldiers in the world, it sends a wrong message. And here, we -- we contend the Appeals Chamber, depending upon how it -- obviously depending on how it rules, but how it examines this question of child soldiers, how it deals with the question of age, whether it accepts the evidence that child soldiering and its effects have long-lasting or everlasting impact, how it rules and decides these questions is really important.

And here, in my view, or in the view of the Defence, is an opportunity to repair the damage that has been done in terms of the message the trial judgment (Overlapping speakers)

PRESIDING JUDGE IBÁÑEZ CARRANZA: [16:32:43] Counsellor, try to conclude, please. Your time is about to expire. Try to conclude --

MS LYONS: [16:32:42] I'm done.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [16:32:43] Thirty seconds to conclude, please.

MS LYONS: [16:32:49] Okay. Thank you. I'm finished, your Honour.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [16:32:54] Thank you very much. Well, just for the record, IT has requested co-counsel Lyons to turn on her video, but it appears that her band -- her system does not allow her to do so without risking --

MS LYONS: [16:33:06] No --

PRESIDING JUDGE IBÁÑEZ CARRANZA: [16:33:07] -- a drop in connectivity. Is that -- yes, is that the problem?

MS LYONS: [16:33:17] Yes.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [16:33:18] But now I think you -- it is okay now?

MS LYONS: [16:33:23] (Indiscernible) your Honour, but it's on and off because I (Indiscernible) struggle over bandwidth, but I -- in the last day or two.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [16:33:35] Okay, thank you.

MS LYONS: [16:33:36] Sorry.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [16:33:35] In any case, I have been told that the Defence respectfully has asked that her video remain off for her submissions, is that okay?

MS LYONS: [16:33:46] Yes, that's --

PRESIDING JUDGE IBÁÑEZ CARRANZA: [16:33:48] Thank you. Thank you, just for the record. Thank you.

MS LYONS: [16:33:52] Thank you, your Honour.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [16:33:53] Now is the time for the counsel representing Victims' Group 1, I think it's Mr Cox. You have the floor for 10 minutes, starting now. Thank you.

MR COX: [16:34:13] Your Honour, I will follow the instructions you have given us not to repeat and I think the Prosecutor was very eloquent in covering many of the issues. So I will focus on a few.

With regards to the burden or standard of proof, I would like to submit to you that it is true that the burden to prove guilt beyond a reasonable doubt comprehends all the elements. This includes of course the subjective elements of a crime, *mens rea dolus directus* or *eventualis*, according to which standard, but the Defence must prove the elements of an act of defence. This is a general principle of procedure. That party who claims a fact must prove it.

This does not mean that this shifts the *onus probandi* of the Prosecutor. The Prosecutor has to do its job. In this case they did. That's why they present experts that rebut and deal with this issue.

But this is the only way you can make compatible the rule that requires disclosure from the Defence, and it's so specific saying you must notify which witnesses, which circumstances you will raise. And what is the standard then that the Defence must meet? It must meet the standard to create at least a reasonable doubt. Not a hypothetical doubt, but a reasonable doubt that is based on reason and elements. This is what has not been done.

Defence counsel says that one expert said that mental disease don't show not every time or every day. But do they not show any time? There's not a thread of evidence in this case that showed that Dominic Ongwen had multiple personalities, that he feared going to fight because he would relive trauma. There's not a thread of evidence of none of this.

Quite the contrary -- and this is what the Trial Chamber ruled upon when asserting the facts: It said, "We have all this evidence of witnesses that saw Dominic Ongwen in action." He himself, as I have said previously, claimed to be a good fighter. This is not compatible with post-traumatic stress. People avoid those situations. So this is one of the things that I wanted to say.

And I would also like to deal with question number 2.111, considering the age at which -- was abducted, Mr Ongwen. Is this compatible or should international -- or does international human rights law require you to exclude his criminal responsibility?

I would say that quite the contrary. Quite the contrary.

International human rights law, if it would be judging a child soldier, of course, he should be acquitted. But they're not. And this is what I insist upon. He is not a child soldier, not when he committed the acts. He was a commander. He was a chief. He was part of the Control Altar. That is the highest rank in the LRA. That's what he was.

And I would even put forward another principle of international human rights. The guarantee of non-repetition. The Inter-American Court of Human Rights has said that impunity is a violation of the American Convention of Human Rights, and standards of human rights must be applied by this Court.

If these crimes of the people that we represent go unpunished, it would mean that

the -- there is non-guarantee of non-repetition. It's even -- as you correctly put in your question, would it -- how could it be compatible with the object and purpose of the Rome Statute? It can't.

Your Honour, if somebody, when he is a commander, because he suffered unimaginable crimes, means that he can commit any crime, that he has carte blanche to commit any crime because he was a victim, would mean that this Court would run out of cases. It would only -- I mean, most of the cases deal with child soldiers, deal with the abduction. Many of these crimes are committed from people that were introduced in these militias against their will. So if you give an excluding responsibility, then it would devote -- or would empty the purpose of penal law, which is, one of them, deterrence, or even retribution.

So I say that international human rights law demands that crimes don't go unpunished. That this is a way we guarantee non-repetition of these crimes, and because of the facts, this is something that Mr Ongwen must stand guilty of. He committed the crimes when he was not a child soldier. Those are the facts and that is the law.

Thank you, your Honour

PRESIDING JUDGE IBÁÑEZ CARRANZA: [16:40:51] Thank you Counsellor.

Now, counsel for victims' group 2, Mrs Paolina Massidda. You have the floor for 15 minutes. Thank you.

MS MASSIDDA: [16:40:59] Thank you, Madam President.

In light of a lot of the arguments already made, I will really briefly limit a few additional observations on two or three matters.

First of all, in relation to the question posed by the Chamber on grounds excluding criminal liability, I would like to refer the Chamber to our closing brief in which we

discuss some of the issues of the questions. It's confidential document 1720, page 76 until page 103.

On question 1, I fully share the position of my colleague, Mr Cox. Our position is that the party alleging a claim bears the burden of proof as to the support of that claim. In this case, the burden of proof of defences raised pursuant to Article 31 of the Statute rests on the Defence.

In circumstances where an accused decides to present an affirmative defence, nowhere in the legal texts of the Court it is written, nor even suggested, that the Prosecution - in addition to the burden of proving beyond reasonable doubt - shall also disprove any defence or evidence put forward by the accused.

Under no circumstances the dynamics before this Court can be construed in a way, including an inherent obligation for the Prosecution to go as far as to disprove defences presented in the proceedings, and even less to carry the burden of proof for such defences in lieu of the Defence.

In fact, your Honour, if we look at the only provision in the matter, which is Rule 80 of the Rules of Procedure and Evidence, the Rule indicates that when an affirmative defence is raised, the Prosecution shall be able to adequately address it.

Now, the term "address" can under no circumstances be interpreted as synonymous of "disprove" or "refute". To the contrary.

In fact, in this Court Trial Chamber III in the Bemba case recognised that when the Court's legal framework does not expressly provide where the burden of proof lies, the compelling logic is that should an accused raises arguments to support a claim, I quote, "it falls to him to establish the facts and other relevant matters that are said to support the argument". End of quote. It's in the Bemba case, decision 802, 24 June 2010, paragraphs 201 and 203.

And this is in compliance with the established principle in law, already recalled by my colleague, *onus probandi actori incumbit* - he who alleges, must prove.

And, in fact, your Honour, to give maybe one more road for thought, if we look at the preparatory works, there is no argument or no discussion specifically about the burden of proof in relation to these defences. So this means that in this case the Chamber can apply, in accordance with -- can apply Article 21 of the Statute and look at other international tribunals. And this is referenced in our list of authorities number 6, the ICTY Appeals Chamber in the Celebici case, faced with a plea of insanity at the time of the offence raised by the Defence, the Chamber ruled, I quote: "[...] if the defendant raises the issue of lack of mental capacity, he is challenging the presumption of sanity by a plea of insanity. That is a defence in the true sense, in that the defendant bears the onus of establishing it [...]"

End of quote.

On the standard of proof, the Trial Chamber correctly elaborated the standard it applied, referring to Article 66 of the Statute, when evaluating the affirmative defences and correctly applied said standard.

And for argument on the standard of proof, I recall our previous submission before the Trial Chamber in the matter, document 1441, 8 February 2019.

On question 2, I will be very brief, we completely share the arguments presented by the Prosecution in accordance with the wording of Article 31(1)(a)(ii).

A mental disease or defect induces an impairment of a high degree of severity and duration. The severe nature of the disease or defect appears, in our submission, to consequently rule out the mere expression of a momentarily psychological outburst or crisis caused by circumstantial physical pain or the experience of a temporal affection.

We also share the arguments and the Prosecution's position and Mr Cox's arguments on the issue of the international human rights law.

And, finally, on question 3, we share the Prosecution's position in relation to the objectivity of the threat and the fact that the Trial Chamber correctly evaluated all the factors in dealing with duress.

And I only want to recall the paragraph of the judgment dealing with this matter, paragraph 2450 until 2580, in which the Trial Chamber correctly considered the possible existence of a threat, both from the accused's perspective and from the position of - I quote:

A reasonable observer from the social circle of the acting person who has the benefit of the special knowledge of the defendant. End of quote.

And the Chamber considered all the elements of the defence of duress, in particular, in the words of the Chamber, I quote:

The accused had acted -- if the accused had acted necessarily and reasonably to avoid the threat.

The conclusion was, your Honours, in the negative.

In concluding, and in any case, your Honours, the evidence shows that Mr Ongwen was not suffering at the time of the commission of the crimes of any disease or defect, of any degree of severity, and that he was not acting under duress.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [16:49:18] Thank you.

With this, we will go for a break, and we will come -- of 30 minutes. We will reassume by 17:25. Thank you.

THE COURT USHER: [16:49:32] All rise.

(Recess taken at 4.49 p.m.)

(Upon resuming in open session at 5.28 p.m.)

THE COURT USHER: [17:28:41] All rise.

Please be seated.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [17:29:07] Welcome back.

Considering the unforeseen delays that we have encountered today, we have slightly amended the schedule for today. The remainder today is, as follows:

For the next 40 minutes, we will hear the amici's observations. Then we will have 20 minutes for responses by the parties and participants. Each of you will have five minutes to respond to the submissions made by the parties, participants and the amici.

The questions by the Bench on this topic will be postponed for tomorrow morning.

This means that today we will be finishing about 18 -- just about 18:30.

We will now hear the submissions of the amici curiae in relation to the questions I read earlier today and that were included in the directions on the conduct of the hearing.

The order will be as follows:

First, Mrs Felicity Gerry and Mr Douglas-Jones, representing a group of seven amici curiae. Second, Professor Michael Scharf, representing the Public International Law and Policy Group. Third, Professor Braakman, and fourth, Doctor Behrens. Each of you will have the floor for 10 minutes.

Mrs Gerry and Mr Jones, you have the floor for 10 minutes, starting now.

MRS GERRY: [17:31:08] Madam President and your Honours, in fact, it's just myself speaking, but Mr Douglas-Jones is with me.

Our submissions are made as amicus curiae with the utmost deference to this Chambers and the parties. The Chamber has asked us to address the specific questions of criminal responsibility, duress and sentencing. These raise, in our

submission, the broad question as to how an international criminal-justice system can accommodate protection and prosecution in a victim-perpetrator paradigm.

The circumstances as outlined by the Prosecution and the victims groups are, of course, shocking, but legal principle for all former child soldiers is, we submit, important.

Our core contribution is to suggest that there are certain identifiable principles which enable this Chamber to provide a coherent framework within Article 31(1)(d), to protect victims of trafficking, including modern slavery, who offend.

The principles of non-prosecution or non-punishment of victims of human trafficking where criminal culpability or responsibility or criminality is reduced or extinguished can be applied in the context of the framework provided by Article 31(1)(d).

Protection through non-prosecution or non-punishment is, in our submission, a necessary corollary to the fact that slavery and slavery-like practices are themselves atrocities. This Court has rightly, expressly aligned itself to the protection of child soldiers and reparations frameworks recognise the long-term effects of such harm by others.

Recruiting child soldiers, in our submission, is an extreme form of human trafficking. It is recognised as such through a number of the crimes in Article 7.

The framework which we suggest can be applied in decision-making as to whether or not a victim of trafficking or former child victim of trafficking should be prosecuted or punished involves the following principles:

First, we are not suggesting blanket immunity from prosecution or punishment when a victim of human trafficking, including slavery and child soldier recruitment, commits a criminal act.

Second, there will be occasions when prosecution is not appropriate.

Third, where a decision is made to prosecute -- to prosecute, a legal framework should be and can be applied within the existing framework of Article 31(1)(d).

Fourth, there will be occasions when victim status or former victim status expunges culpability, because the criminal act is a direct consequence of compulsion arising from trafficking circumstances.

Fifth, there will be other occasions when compulsion from trafficking circumstances reduces, but does not expunge culpability and thus amounts to mitigation of sentence.

And, sixth, there will be occasions when victim status or former victim status is an excuse which carries no legal weight. These, we suggest, are matters of law, which the Trial Chamber did not clearly identify in *inter alia* paragraph 2581 of the Trial Chamber judgment.

We submit that Article 31(1)(d) incorporates duress as an element. It is not a definition of duress by threat. It encompasses duress of circumstances, including long-term effects of recruitment.

We suggest it is, first, helpful in the trial process to consider whether the person was indeed a child soldier.

Were they a child under the age of 18?

Were they so physically and psychologically traumatised by being recruited into acts which amount to atrocity for their perpetrator's cause?

As such, they were victims of human trafficking. This must be what is meant by "made" in Lubanga and Ntaganda, being made into a child soldier.

As we have said, this form of recruitment is an international crime in itself. Lubanga and Ntaganda recognised the specific protective purpose of the Rome Statute in the context of child soldiers.

The Prosecutor in this appeal is correct to observe: It is not solely a question of age. It is age combined with extreme conduct towards them that amount to appalling human rights violations as victims of trafficking, but also amount to breaches of international humanitarian law. Child soldiers can be described as "made" because international humanitarian and human rights law related to armed conflict negates any autonomy of a child to choose to participate. The prohibition, and thus the weight of the violation, is on the adult who recruits a child into an armed group. Assessing the childhood trauma is an important step in our submission for the Trial Chamber to reach conclusions as to whether an accused person was a child soldier at all, even if they go on to be commanders. Identification as a victim is a crucial procedural step even if ultimately the perpetrator's criminality is not extinguished or significantly diminished.

The next task we submit for the Trial Chamber is to go on to consider: Is that person suffering a continued compulsion from their experiences or circumstances of this extreme form of human trafficking? This is relevant to the reparations, accountability and transitional justice aims of the International Criminal Court. In relation to some adults, the continuing effects can be so severe that they continue to lack culpability. If they are adults who progress to positions of power and responsibility, and where there is a question to be answered as a matter of law as to their regaining of agency or autonomy, this can be by assessing whether, a, the dominant force subsists and/or, b, whether the person acts autonomously as an adult by being free, informed and deliberate, such that their experiences cannot be unmade. In some cases --

THE COURT OFFICER: [17:39:20] Counsel has two minutes.

MRS GERRY: [17:39:22] Yes, two minutes. Thank you.

In some cases, there can be findings that the person was still compelled, lacked agency or autonomy, and, in others, that they acted according to their own will. In our submission, it doesn't matter whether this is looked at through the prism of dominant force of compulsion or the prism of agency. The point is, to provide a legal framework, not merely policy, as the Prosecution suggest.

International humanitarian law and customary international law on child rights requires the Court to carry out such an assessment, even if it is beyond the arguments of the parties and not confined in the way that the Defence have suggested.

Some will have responsibility. Others will not. For those who do, their past experiences should be acknowledged in mitigation of sentence in the way we have suggested in our written submissions.

For those who do not, the result is exoneration.

On sentencing, Mr Ongwen's childhood was considered per Rule 145 of the International Criminal Court Rules of Procedure and Evidence. In assessing the impact of Mr Ongwen's own victimhood, again, the Trial Chamber did not express any legal principles for evaluating the effect of being a child soldier --

(Overlapping speakers)

PRESIDING JUDGE IBÁÑEZ CARRANZA: [17:40:54] Professor Gerry, please --

MRS GERRY: [17:40:56] -- nor the effects of mental health.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [17:40:56] -- try to conclude.

MS GERRY: [17:40:57] That's the last sentence, Madam President.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [17:40:58] You have 30 minutes.

MRS GERRY: [17:41:00] It's the last sentence. That's my last sentence.

In assessing the impact of Mr Ongwen's own victimhood, the Chamber did not express any legal principles for evaluating the effects of being a child soldier, nor the

effect of mental health issues on sentencing.

So our assistance is designed to enable this Court to develop the legal framework that we suggest.

Madam President, thank you.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [17:41:26] Thank you very much, Mrs Gerry.

Now, Professor Michael Scharf. You have the floor for 10 minutes, starting now, please.

MR SCHARF: [17:41:38] Madam President, your Honours.

Since its establishment 25 years ago, PILPG has provided research assistance to every international criminal tribunal in the world. PILPG is honoured to participate in these proceedings as amici and to lend its expertise and research to the Appeals Chamber's deliberations on an important question of law.

Specifically, my presentation will focus on your first question, regarding the burden of proof and the standards of proof applicable to the defences of insanity and duress in cases before the ICC.

In my presentation, I will explain why the Appeals Chamber should adopt what PILPG characterises as the evidentiary production approach, rather than the free assessment approach applied by the Trial Chamber, or the burden shifting approach advocated by the Common Legal Representatives of the Victims, which I'll refer to as the CLRV.

The Defence brief in response to observations of amici correctly observes that the Trial Chamber used the so-called free-assessment approach to determine whether the accused suffered from a mental disease or defect related to his culpability. Under this approach, the judges call and examine expert witnesses, after which the judges

make a determination on the defence without any presumption in favour of the Prosecution or the accused.

There is some ambiguity in the record, but it is made clear in paragraph 2456 that this was the approach of the Trial Chamber.

THE INTERPRETER: [17:43:21] A request from interpretation. Your Honour, could the speaker slow down a bit.

(Overlapping speakers)

MR SCHARF: [17:43:21] The free assessment approach, however, is unique to the inquisitorial --

PRESIDING JUDGE IBÁÑEZ CARRANZA: [17:43:29] Professor Scharf, please try to speak slowly --

MR SCHARF: [17:43:29] Sorry. Thank you.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [17:43:30] -- for the benefit of the interpreters. Thank you.

MR SCHARF: [17:43:40] The free-assessment approach is unique to the inquisitorial model of civil law jurisdictions, and it is therefore not compatible with Rule 79(1)(b) of the ICC Rules of Procedure and Evidence, which was intended as an adversarial provision in which the Prosecutor would be required to prove the case. Consistent with this, it is noteworthy that neither the Prosecution nor the Defence today are advocating for the free assessment approach. Nor are either the Prosecution or the Defence advocating for an approach that requires the Defence to bear the ultimate burden of proof on Article 31 defences. Rather, you've heard today that both are advocating for what we are calling the evidentiary production approach. Only the CLRV has been advocating today and in its briefs for the adoption of the burden shifting approach -- an approach that PILPG has argued is incompatible with

the ICC Statute and its negotiating history.

And I will summarise the four main points in our brief that explain why this is so important.

The first is that although Article 31 does not contain language on the burdens related to defences, as the CLRV pointed out today, read together, the plain language of Articles 66 and 67(1)(i) of the Rome Statute preclude an approach that places the ultimate burden on the Defence to prove affirmative defences.

Article 66 establishes the presumption of innocence according to which, quote, "everybody must be presumed innocent until proven guilty according to law." End quote.

And Articles 66(2) and (3) establish that the Prosecution bears the burden to prove the guilt of the accused and that the appropriate and sole standard of proof to establish such guilt is beyond reasonable doubt. And most important of all, Article 67(1)(i) provides the right of the accused not to have imposed any reversal on the burden of proof or any onus of rebuttal.

Second, in contrast to what the CLRV told you today, the negotiating record of the ICC Statute does establish that the lack of a specific provision in the Rome Statute stipulating the burden and standard of proof with respect to Article 31 grounds is not a lacuna; rather, the drafters intended the burden on the Prosecution to establish guilt beyond reasonable doubt in Articles 66 and 67(1)(i) to apply equally to affirmative defences.

Let's look at that negotiating record.

In the preparatory committee meeting in 1996, Israel was the first state to propose a provision that would place the burden of proof on the defendant to prove affirmative defences. This text was placed in brackets. The next year, the Working

Group on Procedural Matters adopted and added the text --

(Overlapping speakers)

THE INTERPRETER: [17:46:58] Message from the interpreter: Excessive speed.

MR SCHARF: [17:46:58] -- that would become Article 67(1)(i) --

PRESIDING JUDGE IBÁÑEZ CARRANZA: [17:47:03] Professor, again, again, please, the interpreters are calling for a little bit slowly in your presentation. Thank you.

MR SCHARF: [17:47:09] Yes. I'm sorry.

And that is the provision that says, quote, "No reversal -- no reverse onus or duty of rebuttal shall be imposed on the accused."

At the time, delegations noticed that the two provisions were mutually exclusive. You couldn't have both in the Statute. So in early 1998, the draft statute was adopted on first reading by the Drafting Committee and that statute included Article 67(1)(i) with its prohibition of a reversal of the burden of proof.

At the time, the working group stated that the proposed text placing the burden of proof on the accused for affirmative defences was deleted. And Hakan Friman, a member of the Swedish delegation, who played a prominent role in the drafting of the Rome Statute, has written that the decision of the drafters to delete the text was prompted by South Africa's constitutional constraints as reflected in the case of S v. Zuma, which precluded placing any burden of proof on the accused, even as to affirmative defences.

Thereafter, Article 67(1)(i) was adopted without further debate, indicating overall agreement among the drafters of an approach intended to afford heightened protections to the accused.

Now third, the ICTY's burden shifting approach - which CLRV is trying to get you to

adopt - is inapplicable to the ICC. While the ICC drafters considered the ICTY jurisprudence when drafting some of the provisions of the Rome Statute, Article 67(1)(i), which prohibits the reversal of the burden of proof, has been characterised by commentators as, quote, "a novel provision with no equivalent counterpart in the statute of the ICTY." End quote.

So by adopting Article 66(2) and Article 66(1)(i), the drafters of the Rome Statute intentionally took a different approach to the burden of proof regarding defences that applied at the ICTY or in certain national jurisdictions.

You know, there are other provisions of the ICC Statute that similarly intentionally depart from the ICTY approach, so this is not unique.

Now, how would our approach, the evidentiary production approach, work in practice?

Rule 79 already requires that the accused notify the Prosecutor of his intent to rely on an Article 31 defence and specify and disclose the evidence that the accused intends to rely on to establish that ground sufficiently in advance to enable the Prosecutor to prepare adequately and to respond.

THE COURT OFFICER: [17:50:05] Counsel has two minutes.

MR SCHARF: [17:50:05] If this occurs at trial, Rule 79(2) provides that the Trial Chamber may grant the Prosecutor an adjournment to address the issues raised by the Defence. Thereafter, when the Defence raises the issue at trial - in the words of Judge Eboe-Osuji's separate further opinion of 3 June 2014, in the Ruto and Sang conduct decision at paragraph 80 - the Court should assess whether the Defence has adduced, quote, "evidence that is enough to give an air of realism to the issue aimed by the evidence in question, thus putting the issue beyond a bare assertion or mere conjecture." End quote.

In our brief, we describe this as a prima facie showing. Upon an accused raising prima facie evidence, the Trial Chamber can make a determination that a particular Article 31 claim meets the initial evidentiary threshold such that the Prosecution is then required to establish that the claim does not raise a reasonable doubt. This would work similar to how a Regulation 55 finding relates to changing modes of liability.

And that concludes our observations today. We hope that they have been helpful to the Court. Thank you.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [17:51:36] Thank you, Professor Scharf. Now, Professor Braakman, you have the floor for 10 minutes, starting now, please. Professor Braakman.

MR BRAAKMAN: [17:51:57] Thank you, Madam President, your Honours. I'm grateful to the members of the Appeals Chamber for granting me permission to write a brief and to be allowed to speak to you today regarding the interpretation of Article 31(1)(a) and (d) of the Statute concerning grounds for excluding criminal responsibility and regarding evidentiary issues relating to mental disease or defect. I will not repeat all that I wrote down for the Court, but I emphasise just two points and will explain them in more detail.

The first, is the need within the ICC, at least in my humble opinion, to improve psychiatric assessment and bring it to the level of impartiality, integrity and respect. I'm not a professional who studied law, so please forgive me for my ignorance and -- as far as, well, international criminal law is concerned. I'm a forensic psychiatrist, as well as an ethnologist, specialised in the diagnosis and treatment of patients that have a different cultural background compared to my own. I did not come to this Court today to cause any additional pain to all the victims that might be

listening, nor do I want to take a stance against the Defence or against the Prosecutor. Nor do I want to criticise my colleagues who formulated a diagnostic opinion about Dominic Ongwen since I do not have access to the detailed reports written by them. What I do want to do is to offer my expertise and reflections in order to make a small contribution to the Court so that justice may be done.

In the field of psychiatry, we do not have a golden standard; that is to say that we cannot use a laboratory test. Nor can we use a diagnostic test to discern certain pathological cells under a microscope or we cannot even use a brain X-ray or a scan to establish a diagnosis with 100 per cent certainty. No. We have to rely exclusively on signs and symptoms combined with careful interpretation of biographic and sociocultural data, psychological tests and combine that with scientific evidence-based facts in order to establish a diagnosis.

In the Netherlands, as in many other countries, we do our utmost to write a psychiatric evaluation that is objective and as neutral as possible. We would rather not report at all rather than give the slightest impression of partiality.

What happened in the case of Mr Ongwen is the very opposite: psychiatrists of the Defence wrote a report and psychiatrists engaged by the Prosecutor wrote a report. The result was that one group of psychiatrists concluded that there were several psychiatric disorders present, while the other group denied the presence of any disorder.

It was left to the Chamber to select their preferences. Judges - nor any other professionals of law - should have to bother with what the correct psychiatric diagnosis is of an accused person. It should be clear and without any doubt.

Without psychiatric reports in the past, without adequate professional observational information, it is almost impossible to establish a psychiatric diagnosis and it is even

more unlikely to conclude that there was no psychiatric diagnosis at all, least for all that years ago.

Adequate diagnosis is possible only after a thorough psychiatric evaluation. In a paper about the Stockholm syndrome in which among kidnap victims a positive bond develops with their captors, the authors Namnyak, Tufton and others mention that it is most likely that the impact of captivity earlier in life has a profound effect on future personality development and functioning. All victims had opportunities to escape, a possibility which they did not utilise.

However, based on several arguments, the Chamber was convinced by the expert of the Prosecution, although the one -- no one of them ever talked a word with Mr Ongwen. And if, as the Prosecution stated, Professor Ovuga and Dr Akena had a role as both treating physicians and forensic experts at the same time, then this is a serious problem, giving rise to serious doubts about the neutrality of their findings.

On the other hand, relying more on the conclusion of three experts that were not able to assess the accused in person and relying much less on the conclusions of two psychiatrists who did a thorough personal assessment is questionable as well. Issues like this degrade the value of psychiatric expertise and it is unnecessary.

Indeed, stating that cross-cultural assessment was taken into account because one of the experts lived near the area in which the accused operated is an understandable argument because non-psychiatrists easily confuse cross-cultural assessment with ethnic matching or language matching -- or, in this case, geographic matching.

Living close to one another, however, has little to do with the expertise of cross-cultural assessments that are aimed at reconstruction of the cultural context around a person's signs and symptoms. Psychiatrists should deliver a psychiatric report that is sound and solid in such a way that the evaluation of such a report by

experts in law can only be done.

I want to plea for an effort to increase the reliability of psychiatric research within the Court. This is only possible in teamwork, adopting a neutral position and in trying to reach consensus and offer the conclusion to the Appeals Chamber. The confidence judges in general have in the value of psychiatric reports does not improve when there is a battle in court over details and who has a monopoly on the truth. I propose that the Appeals Chamber issues a thorough *de novo* psychiatric evaluation by independent court-appointed experts independent from the Defence or Prosecution.

The second issue - I will be shorter on that - I want to stress is the importance of imposing treatment upon the accused aimed at re-socialisation and reduction of the risk of recurrence after release.

Pursuant to Article 31(1)(a) of the Statute, a person is not -- "[...] criminally responsible if, at the time of that person's conduct:

[...] The person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct [...]"

But what if the capacity never matured, never fully developed, but got stuck at the age of nine, and after that, deteriorated? You can't lose what you don't have. You can't destroy what has not been built first.

In addition, if destruction of someone's capacity to appreciate the unlawfulness of one's conduct is interpreted by the Appeals Chamber as complete annihilation, then there will never be any disorder that will fit ever in that description, since even Alzheimer's, dementia or severe psychosis is not equivalent to total destruction of someone's capacity.

So Article 31 turns in that way into some kind of window dressing.

THE COURT OFFICER: [18:00:26] Amici has two minutes.

MR BRAAKMAN: [18:00:31] Thank you.

An interpretation in the sense that a capacity can be severely damaged and the destruction results only in partial dysfunction of this capacity opens the possibility of diminished responsibility.

Is penalization about revenge and punishment or is it also about protecting society now and in the future? If we take someone away from society and put him behind bars, some day that person will probably be released again. And then, what happens then? We never gave him some treatment to re-socialise.

Of course, I understand that the chamber of appeal was not constituted to reform the Rome Statute, but I also know that the Appeals Chamber has the opportunity to send out a signal through the present case in which not only the mental health aspects of the accused are much more taken into account, but also to emphasise the mental treatment and socialisation.

In conclusion, to punish someone exclusively on the basis of retaliation and not as well making an attempt to teach him the basic human values is a notion that was already starting to become outdated in the '90s of the last century, when the Statute was prepared.

Today, re-socialisation and treatment goes hand in hand with retaliation.

Imprisonment alone does only lead to a safer society as long as the detention lasts.

So treatment, in addition, would be a great idea if the person suffers from mental disorder. This unfolds the possibility of a combination of imprisonment and treatment or re-socialisation aimed at preventing recidivism.

This might even come close to the --

PRESIDING JUDGE IBÁÑEZ CARRANZA: [18:02:31] Professor Braakman, 30

seconds to conclude, please.

MR BRAAKMAN: [18:02:32] This might even come close to the Acholi traditional justice mechanism like Mato Oput.

Madam President, your Honours, thank you so much for your attention.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [18:02:43] Thank you very much.

Now, Doctor Behrens, you have the floor for 10 minutes, please, starting now.

MR BEHRENS: [18:02:57] Your Honours, with regard to the problem of burden of proof for affirmative defences, it seems to me that many of the difficulties that we encounter in that regard are based ultimately on our traditional understanding of the crime as a coherent whole, albeit divided into the three parts of actus reus, mens rea and defences.

On the substantive part -- side of criminal law, that makes a lot of sense because we can talk about the crime -- about all the elements of crime that constitute liability of the defendant. But the usefulness of this model breaks down when we are talking about the evidentiary side, especially if we consider this coherent whole of the crime as constituting the guilt of the defendant and then imposing a duty on the Prosecution to prove all three elements of the crime. Because what that ultimately means is that we are imposing a very bizarre duty on the Prosecution, including the duty to make the case for that third stage for defences, which ultimately go towards the innocence of the defendant.

The Prosecution in the instant case makes the suggestion that it does have the burden of proof for affirmative defences, but it then says that it does not have the burden to lead on the defence. And it does also say that it does not have the burden to refute just about any argument that the Defence makes that might be vague.

Your Honours, I suggest there's a much simpler way of looking at these things, and

that is to say, the Prosecution always, always has the burden to prove the guilt of the accused. The accused always has the burden of proof where elements concerning innocence is concerned. And these elements concern both the negation of actus reus and mens rea, but also affirmative defences.

The question gains particular significance when we are talking about the standard of proof. Because there we have heard some voices in the literature say that the standard of proof for the Defence should be a different one where affirmative defences are concerned. It should be the standard on the balance of the probabilities. That is, in my view, a problematic proposition because we have ultimately certain elements that go both to actus reus and mens rea and to affirmative defences. Consent or the absence of consent, for instance, turns up on both sides. Mistake of fact may be an affirmative defence, but may also be a point that negates the mens rea. To impose a double standard here so that the Defence would have to prove the very same element, at one stage, on the balance of the probabilities; on the other stage, just by raising -- by establishing that reasonable doubt exists, that seems ultimately bizarre to me and, indeed, an untenable position.

With regard to the question of duress, a very contentious issue arises where the question of imminence of the threat is concerned. It is not a question that is only arising in the context of international criminal law. National jurisdictions have dealt with that as well in the context, for instance, of the so-called battered woman syndrome and other cases where victims have been exposed to longstanding physical or psychological terror.

Now, it is interesting here to note that some states that have a very strict wording - where the temporal connection of the harm is concerned - in their own statute books still take a far more generous line where their case law is concerned.

So German criminal law, for instance, has this very strict phrase of the present danger, the present danger that marks the situation of duress. Yet in its case law it has become famous for noting -- for introducing the phrase of the "Dauergefahr", of the permanent danger that should also be accepted, i.e., a danger that is hanging over the head of the accused.

English criminal law interestingly enough uses a phrasing that is quite similar to the Rome Statute because it talks about imminence, about an imminent harm that is threatening. But it says at the same time -- the Court of Appeal said that in a case, that imminence does not need to mean immediate harm; so it makes that distinction here.

Interesting enough again, the European Court of Human Rights, when it discussed the positive duty of states to protect life, established a seemingly quite strict standard and said there had to be a real or immediate danger, risk that the life of the relevant person would be affected.

So "immediate" turns up here. And, yet, in a recent case, in the Tkhelidze case against Georgia in 2021, the European Court of Human Rights interpreted this word "immediate" as also incorporating imminent. So it opts for the wider status.

It goes even further and says that a lasting situation would be considered.

In the particular case that I was referring to, this was a case of a woman who had been abused by her partner and had received several severe threats by her partner, and the Court said in that case that it would not consider the threats as single episodes, but it would look at the lasting situation.

The woman was, unfortunately, killed in the end by her partner. And on the very day in which the killing took place, there was actually no threat against the woman because her partner proceeded by deceiving her. He turned up at her place of

work --

MR AYENA ODONGO: [18:08:56] Pardon me.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [18:09:02] Please stop.

Yes. Yes, Counsellor?

MR AYENA ODONGO: [18:09:06] Unfortunately, the appellant is not following. The Acholi translation I think has gone kaput.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [18:09:17] Please, let me see what is happening.

THE COURT OFFICER: [18:09:32] With apologies to your Honour. Could the English booth kindly confirm whether the Acholi booth is interpreting this at the moment. Thank you.

THE INTERPRETER: [18:09:43] Message from the English booth: The Acholi booth seems to be working. Perhaps there's a problem with the channel. We will check.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [18:09:51] Yes, it appears that there's a problem with the channel.

Can you set the channel for Mr Ongwen, please.

Mr Ongwen, someone can help.

MR AYENA ODONGO: [18:10:03] No. I think he's okay with it now. He's okay.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [18:10:06] Thank you very much. Now it is okay.

How -- minutes left we have, Wilfred?

THE COURT OFFICER: [18:10:10] Three more minutes, your Honour.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [18:10:12] Three minutes? Okay.

We have three minutes left, Professor Behrens.

MR BEHRENS: [18:10:17] I make it four minutes, actually, but yes.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [18:10:20] Thank you.

MR BEHRENS: [18:10:21] I was talking about the case brought before the European Court of Human Rights where, in fact, a threat had not taken place on the day of the killing because what happened was, the partner turned up at the office of his victim and said he wanted to speak to her. She left the office. He killed her.

On the question of mens rea -- sorry. Perhaps one other point on the question of duress and that is the question of the assessment of the relevant situation because we have heard several standards proposed in that regard.

I believe the Prosecution may have mischaracterised my submission. I did not, in fact, say that it needs to be an entirely subjective standard that has to be adopted. I can see that can lead to extreme results if it is only the defendant who believes in the threat but nobody else.

At the same time, I can see that an entirely objective standards leads to very extreme results as well. Because in that case, we might not accept the existence of a threat if everybody believes in that, including everybody in this courtroom would believe it, but based on a scientific basis, the threat could simply not be proven.

The counsel for victims, Ms Massidda, was referring to a standard that would talk about the perspective of a reasonable observer from the social circle of the acting person with the benefit of the special knowledge of the defendant, and she said the Trial Chamber had referred to that.

In fact, the Trial Chamber has done no such thing. I wish they had done that because, otherwise, if they had done that, I would not have had to refer to that in my own submission. I don't want to claim credit for that. The credit goes to Mr Schaffstein who was a German scholar.

But the point is that an increasing number of jurisdictions are prepared to take both

objective and subjective standards into account in assessing the situation of duress, and that is the standard that I would invite the Court to consider as well.

On mental disease or defect, I'm quite sceptical of attempts to include diminished responsibility here as well. If the drafters had intended that, it would have been open to them. But I also see an argument to be made from the legal structure of the particular ground, because it is this element of the destruction of the particular capacity that gives a particular threshold to the crime. We can't see that threshold really, in the mental disease or defect itself because that does not need to be even a medically recognised condition. It does not even have to be a permanent condition. Then entire threshold significance rests with this element of the destruction of the capacity.

Finally, the point of the non-punishment of former child soldiers is an interesting point. I would, however, apart from certain concerns that I have about the legal authority that the relevant instruments carry, I also have difficulties where the interpretation is concerned. I do believe we have to go by an interpretation that takes the context into account, as well as the intention -- presumed intentions of the parties. And, your Honours, it cannot have been the intention of the parties --

PRESIDING JUDGE IBÁÑEZ CARRANZA: [18:13:42] Professor Behrens, I will give you 30 seconds to finalise.

MR BEHRENS: [18:13:44] Yes.

-- the intention of the parties to impose absolute impunity, including impunity 10 years after abduction, and impunity for people who will then proceed to recruit even more child soldiers. I suggest that such an interpretation will not help child soldiers. It will help to create more child soldiers because warlords will see the advantage in employing child soldiers that will then be out with the reach of the law. It is for that

reason that I'm afraid I'm unable to follow my colleagues on this point. Thank you.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [18:14:22] Thank you very much, Doctor Behrens.

Now, I will give the floor to the parties and Legal Representatives of Victims for any observations they may have in response to the parties' observations, participants and amici curiae submissions we just heard.

Counsel for Mr Ongwen, you have the floor for five minutes for your response or observations.

MR AYENA ODONGO: [18:14:51] Madam President and your Honours, I think Beth Lyons is standing in for us, for the Defence.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [18:15:03] Sorry. Well, you have the floor, Doctor --

MS LYONS: [18:15:16] Thank you.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [18:15:16] Yes. I cannot see you, but you have the floor for five minutes, please, starting now.

MS LYONS: [18:15:20] Okay. Thank you.

One quick question, your Honour, Madam President. May I respond to the victims? We didn't get a chance to do that?

PRESIDING JUDGE IBÁÑEZ CARRANZA: [18:15:29] Yes, of course. It's the time, yes.

MS LYONS: [18:15:32] Okay. All right. Okay. Let's -- I'll try to do -- I have to do this fast, okay.

In terms of the victims' presentation, I think that Counsel Massidda talked about * fictions in the trial judgment, and I just want to make the quick point that the * fictions that we see existing there are the trial judgment's attempt to carve out an

Ongwen exception in terms of duress and in terms of, particularly, duress and the issue of spiritualism.

For example, everyone in the LRA is affected to some degree by spiritualism or the mis- -- abuse of spiritualism, but the position for Mr Ongwen, who is the exception, is, it is not an element or factor to be considered in his duress.

This is wrong. There's a similar kind of Ongwen exceptionalism in -- also in response to the issue of threats. As the Trial Chamber noted, the second in command, Vincent Otti, was killed on Mr Kony's orders because he -- he defied Mr Kony. Paragraph 2613.

Yet, the Trial Chamber goes ahead and says, Mr Ongwen is somehow, quote, immunised from all of these threats because of his role in the later years in different positions of leadership. Here, is another false Ongwen exception.

The second thing I want to clarify is that when the Defence talks about the burden of proof, we talk about some evidence. This is not in my understanding exactly the same thing as raising a reasonable doubt. Some evidence is a prima facie standard. I think one of the amici talked about this.

The issue of reasonable doubt already invokes a higher standard, which is higher than that which is necessary for an affirmative defence.

In terms of the first presentation by Counsel Gerry, generally the perspective is important to us because of non-punishment of child soldiers and the connection to victims. And I think that we certainly agree with her that the Trial Chamber did not express or articulate the legal principles for evaluating the effect on -- of child soldiering on mental health or on the issues of duress. This is a problem. The Trial Chamber does not articulate legal standards as we've said.

Number two, in terms of the -- Professor Scharf, generally we agree with how he has

expressed the evidentiary production... I'm sorry, my mind has gone. EPA, evidentiary production... EPA. I'm sorry. I can't -- I can't -- I just -- I've lost -- I've lost the initials.

Basically, we agree with his perspective in terms of the burden -- the burden.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [18:19:15] Counsellor, 30 seconds to conclude, please.

MS LYONS: [18:19:20] Yeah, okay.

Now, in terms of Professor Braakman, the point that we think is important here is that he emphasised the issue of mental capacity and what happens to mental capacity in a situation such as that of Mr Ongwen in terms of his abduction, indoctrination and brainwashing. So on that point I think that we would -- we would find agreement.

And I also agree that the concept of disease or defect requiring utter destruction, referring back to Eser's warning, is -- is not -- is not a -- is not a concept to which we adhere.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [18:20:10] Counsel for the Prosecution, please, you have the floor for five minutes.

MS REGUÉ BLASI: [18:20:18] Thank you. I wanted to respond to three points. It's not completely correct that the Defence didn't have notice about the burden and the standard.

As I mentioned before in the decision 1494, the Trial Chamber already provided guidance, and that was before the Defence experts. They testified later that year in November 2019. And, in any event, the standard and the burden that the Chamber adopted is the one that the Defence proposed, which is the most favourable to them, and also they had all opportunities to present evidence and provide submissions. So there was no prejudice at all.

The second point I wanted to mention, it was the issue of the rebuttal evidence of Prosecution expert P-447. We didn't formally ask for a rebuttal, but in our filing, 1596, we said that inevitably we will ask for one, but we didn't do it yet because we didn't know when the Defence experts will testify. And in order to arrange the rebuttal testimony of our expert, we need -- we had to know that. And we then proposed a detailed timeline on how to proceed with reports and testimonies and the Chamber, rightly so, in order to ensure the efficient conduct of the proceedings, already organised the testimony of the rebuttal expert with an expert report testimony and also a rejoinder -- a rejoinder. So the Defence was also able to have their expert to testify as a -- in a rejoinder.

And finally, the last point I wanted to make, it was about whether a Trial Chamber adopted the evidentiary approach or the free assessment approach. We do believe that the Chamber adopted the evidentiary approach. If you look at the procedural background, that's what we read into it. In the decision 1494, you can see how the Chamber acknowledges that the Defence has the evidential burden; that they had satisfied, actually, the evidential burden because they had already indicated -- they had provided evidence in support of the ground that they had alleged.

And, also, Mr Scharf has referred to paragraph 2456, I believe, of the trial judgment, but in that paragraph the trial judgment simply said: I'm going to consider all the relevant evidence that I have before me, Prosecution and Defence, and then I'm going to make my determination.

So I don't think that we can infer that the Chamber took a different approach because of that paragraph.

And then I will pass on to my colleague, Mr Costi.

MR COSTI: [18:23:03] Yeah, your Honour. I would like just to make two very brief

points. One, addressing Ms Gerry's submission. We answered extensively in our written submission to her point. Today, I understand correctly, she said that if an adult progresses in position of authority a Chamber must establish either whether a dominant force persists and/or whether a person acts autonomously.

In our submission, precisely under the existing legal framework of the Court, Article 31(1)(d), this is what the Chamber found, finding that there wasn't a threat and that Ongwen was acting autonomously and independently.

The second small comment in relation to what Professor Behrens mentioned today, in relation to the imminent or constant threat, we shouldn't -- maybe -- maybe I wasn't clear in my submission. We don't deny the possibility that a threat is imminent or constant or -- or a constant threat that remains in place. The point is, is whether the actual harm is imminent as a result of that behaviour. So the threat might remain there. It might even be implicit, depending on the evidence, I'm not talking about this case, I'm talking in general.

But the question is, is the harm an imminent result of the potential conduct? And the answer, your Honour, in this case, certainly it wasn't. Thank you.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [18:24:32] Thank you.

Now, victims' group 1. Counsellor for victims' group 1, you have five minutes starting now, please.

MR COX: [18:24:43] Thank you, your Honour, Madam President. I'll be brief.

With regard with Ms Gerry, I would say -- Gerry, sorry -- I would say that still no legal norm, article, statute has been mentioned in this presentation before you. Therefore, it's not binding in any way. I would also argue that they are requesting from you something that is clearly not the role of an Appeals Chamber. They're asking for a consultative opinion. There are jurisdictions that have consultative

opinions, but this is not the stage or the procedural stage because the ICC does not have that role of a consultative opinion. It has to deal with legal interpretation relating with the facts of the case. None of this happens in this case.

And Mr Braakman seems an abolitionist. It seems he does not believe in the criminal system. That is a legitimate position, but it's not this place. And another thing, I completely disagree with him that it should be in the hands of psychiatrists and not in the hands of lawyers to determine the concurrence of 31(a). It is exactly the role of lawyers and judges to determine if these concur or not -- if there was a destruction or not of the person's capacity to understand unlawful issues exactly.

And I think it's even contradictory with his own reasoning since he said that there is no golden rule or golden statute to understand when somebody has a determinate disease, a psychiatric disease. It's an opinion. There's different opinions and this is legitimate. That is why context is so important in a case like this, and therefore, none of this applies to Mr Ongwen.

It's really surprising, also, that he mentions Mato Oput. So to me that's -- that ...

And finally with regards to Ms Lyons, I would just say that the Trial Chamber did deal with the killing of commanders, and, what they answered was, that it was because they challenged the political power of Joseph Kony.

Completely different -- so the differentiation between the killing of commanders and Mr Ongwen is explained. And respecting the standards of the Trial Chamber and respecting the evidentiary standards, so there is no exception created, especially for Mr Ongwen, there's an exception in reality, because he was never threatened or was not under duress. Thank you, your Honour.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [18:27:53] Thank you.

Now, victims' group 2. Mrs Massidda, you have the floor for five minutes, starting

now.

MS MASSIDDA: [18:28:00] Thank you. Apologies, I was overlapping. My apologies for that.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [18:28:06] It's okay. Starting now I said. Thank you.

MS MASSIDDA: [18:28:08] Thank you, Madam President. I will only have one brief comment in relation to what Mr Scharf was arguing because for the rest, all the arguments we presented have been dealt with in our response to the amici. And I wanted simply to be clear on my submissions today. When we talk about the defences presented by an accused person, then it's absolutely clear to me that someone has to have a burden of proof and it's not an issue of reversal of the burden of proof. It's an issue that you present to the court something that you bear the burden of showing that you are right on that issue. This was my point today, and I would refer to the list of authorities that I sent this morning by email to the Chamber. Point 2, 3 and 4, you will see a different author dealing exactly with this -- with this point in exactly this matter.

When the amici is saying that because there is a lack in the preparatory works, we can to some extent - if I understand it correctly - establish an absolute prohibition on any reversal of a burden of proof.

Well, what I'm saying is that the fact that the drafter of the Statute finally decided to remain silent, rather points to the absence of a marked intention, and, therefore, we cannot infer from the preparatory works the conclusion that the amici is inferring today.

And this was the reason why I was referring to Article 21 of the Statute because when we do not have a solution, then under Article 21, the judges can go and check other

similar sources like the one I quoted today, the ICTY Appeals Chamber in Celebici, which was on the point on the insanity defence, and which is reference 6 in my list of authorities.

Thank you very much.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [18:30:16] Thank you. Thank you, Mrs Paolina Massidda.

We have now reached the end for the first day of hearing. I thank to everybody, parties, participants and amici.

We will reconvene tomorrow at 10 a.m.

The hearing is now adjourned, until then.

Thank you.

THE COURT USHER: [18:30:39] All rise.

(The hearing ends in open session at 6.30 p.m.)

CORRECTIONS REPORT

The following corrections, marked with an asterisk and included in the audio-visual recording of the hearing, are brought into the transcript:

Page 13 line 11

"paragraphs 42, 61-72" is corrected to "paragraphs 4,261 to 4,272"

Page 17 line 13

"*ajakwa*" is corrected to "*ajwaka*"

Page 46 line 7:

"Dr Avuga"is corrected to "Dr Ovuga"

Page 55 lines 6-13:

"In general for Commonwealth States --

(Overlapping speakers)

THE INTERPRETER: [16:06:02] Your Honour, the speed is too high. Could the speaker please slow down?

PRESIDING JUDGE IBÁÑEZ CARRANZA: [16:06:07] Please, please. Counsellor, the interpreters are working so hard. Please, I beg you, go slowly. And you can please go a little bit --

MR CROSS: [16:06:17] And I apologise to the interpreters. "

Is corrected to

"In general for Commonwealth States –

(Overlapping speakers)

THE INTERPRETER: [16:06:02] Your Honour, the speed is too high. Could the speaker slow down?

(Overlapping speakers)

MR CROSS: [16:06:02] -- as Professor Yeo has observed, "a substantial impairment will not" –

(Overlapping speakers)

PRESIDING JUDGE IBÁÑEZ CARRANZA: [16:06:07] Please –

(Overlapping speakers)

MR CROSS: [16:06:07] -- "suffice".

(Overlapping speakers)

PRESIDING JUDGE IBÁÑEZ CARRANZA: [16:06:07] -- please. Counsellor, the interpreters are working so hard. Please, I beg you, go slowly. And you can please go a little bit –

MR CROSS: [16:06:17] And I apologise to the interpreters. "

Page 60 line 21:

"did"

Page 60 line 25:

"or whether" is corrected to "However,"

Page 94 lines 24-25:

"depictions" is corrected to "fictions"