

1 International Criminal Court
2 Appeals Chamber
3 Situation: Republic of Uganda
4 In the case of The Prosecutor v. Dominic Ongwen - ICC-02/04-01/15
5 Presiding Judge Luz del Carmen Ibáñez Carranza, Judge Piotr Hofmański,
6 Judge Solomy Balungi Bossa, Judge Reine Alapini-Gansou and
7 Judge Gocha Lordkipanidze
8 Appeals Hearing - Courtroom 1
9 Tuesday, 15 February 2022
10 (The hearing starts in open session at 10.01 a.m.)
11 THE COURT USHER: [10:01:29] All rise.
12 The International Criminal Court is now in session.
13 Please be seated.
14 PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:02:09] Good morning, everybody.
15 Court officer, please call the case.
16 THE COURT OFFICER: [10:02:18] Good morning, Madam President. Good
17 morning, your Honours.
18 This is the situation in the Republic of Uganda, in the case of The Prosecutor versus
19 Dominic Ongwen, case reference ICC-02/04-01/15.
20 And for the record, we are in open session.
21 PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:02:35] Thank you.
22 We will now take the appearances of the parties and participants, beginning with the
23 Defence team of Mr Ongwen.
24 Please identify yourselves.
25 MR AYENA ODONGO: [10:02:50] Good morning, Madam President and

1 your Honours. Today I'm accompanied by Chief Charles Achaleke Taku and
2 Gordon Kifudde and Madam Morganne. We shall be joined by Beth Lyons, who is
3 in New York, but unfortunately, she, together with Obhof Tom, who will also be
4 joining us distantly, have a problem with their cameras. So they have informed me
5 that the Court should be notified that they will be turning off their cameras from time
6 to time. It's an unfortunate challenge. We thought it was that you are in America,
7 but that's it.

8 PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:03:47] Thank you, and thank you for
9 the information.

10 Now counsel for the Prosecution.

11 Sorry, sorry. Wait a minute. Wait a minute.

12 Yes.

13 MR AYENA ODONGO: [10:03:55] Madam, I didn't introduce myself. I'm Krispus
14 Ayena Odongo, lead counsel.

15 PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:04:02] Thank you. Thank you,
16 Counsel.

17 Now Prosecution, please.

18 MS BRADY: [10:04:06] Good morning, again, your Honours. My name is
19 Helen Brady, and I'm the senior appeals counsel for the Prosecution. Our
20 appearances are the same as yesterday: Ms Meritxell Regué, appeals counsel;

21 Mr Matteo Costi, appeals counsel; Mr Matthew Cross, appeals counsel;

22 Ms Priya Narayanan, appeals counsel. She's joined us in the physical courtroom
23 today. Yesterday she was appearing virtually.

24 And on screen, your Honours, appearing from left to right, we have

25 Mr George Mugwanya, appeals counsel; Ms Nivedha Thiru, associate appeals counsel;

1 and Mr Reinhold Gallmetzer, appeals counsel. Thank you.

2 PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:04:48] Thank you.

3 Now Victims Group 1, please.

4 MR COX: [10:04:53] Good morning, Madam President, your Honours. With me,

5 Mr Joseph Manoba, in the distance, from Kampala; Atto Listowel from Gulu;

6 Mr James Mawira; and myself, Francisco Cox.

7 PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:05:08] Thank you.

8 Victims Group 2, please.

9 MS MASSIDDA: [10:05:11] Good morning, Madam President, your Honours. For

10 the Common Legal Representative team, appearing today, Mr Orchlón Narantsetseg,

11 Ms Caroline Walter, and myself Paolina Massidda.

12 PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:05:22] Thank you.

13 The amici curiae who made oral submissions yesterday and who joins us again today

14 to answer any remaining questions from the Bench regarding the grounds of appeal

15 related to excluding criminal responsibility pursuant to Article 31(1)(a) of the Statute,

16 please introduce yourselves, starting with Madam Felicity Gerry.

17 MS GERRY: [10:05:51] Good morning, Mr President and your Honours. I am

18 appearing this morning. Jennifer Keene-McCann and Anna McNeil are with me, but

19 I will have the speaking role to answer any questions you may have of us.

20 Thank you.

21 PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:06:06] Thank you.

22 Amici from PILPG, Professor Milena, please.

23 MS STERIO: [10:06:14] Good morning, Madam President. On behalf of the Public

24 International Law & Policy Group, I'm appearing today, Milena Sterio, and my

25 colleague, Jonathan Worboys. Thank you.

1 PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:06:27] Thank you.

2 Professor Braakman.

3 MR BRAAKMAN: [10:06:29] Good morning, Madam President, your Honours. My
4 name is Mario Braakman. I am a professor of transcultural forensic psychiatry at the
5 Department of Criminal Law, Tilburg University, The Netherlands.

6 PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:06:46] Thank you.

7 I will also ask the appearances from the amici curiae who join us today to make
8 submissions on sexual and gender-based crimes, which is the next issue that will be
9 discussed later today.

10 In the first stage, remotely, Professor Allain, please.

11 MR ALLAIN: [10:07:09] Madam President, yes, my name is Jean Allain, and I'm
12 joining you late in the evening here in Australia.

13 PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:07:20] Thank you.

14 Professor Oosterveld, et al.

15 MS OOSTERVELD: [10:07:26] Thank you. My name is Valerie Oosterveld, and I
16 will be appearing in person today.

17 I am joined online by Dr Melanie O'Brien, who will also be answering questions
18 during the question and answer portion. On WebEx, but not speaking, are

19 Erin Bainse, Anne-Marie de Brouwer, Annie Bunting, Eefje de Volder,

20 Kathleen Maloney, Osai Ojigho and Indira Rosenthal. Thank you.

21 PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:07:57] Thank you.

22 Dr Rosemary from Global Justice Center, Women's Initiatives for Gender Justice, and
23 Amnesty International, please.

24 MS GREY: [10:08:09] President, my name is Rosemary Grey. I'm from the

25 University of Sidney Law School, and I'm here today to speak about forced marriage

1 with my co-presenter, Ms Akila Radhakrishnan, who is in the court and will be
2 appearing in person. After that, I will be happy to take any questions that the Court
3 may have for our team. And I also welcome our other colleagues from Amnesty
4 International, Women's Initiatives for Gender Justice and the Global Justice Center.
5 Thank you.

6 PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:08:36] Thank you.

7 Professor Meyersfeld from the Southern African Litigation Centre Trust, please.

8 Professor Meyersfeld is not with us?

9 Yes, please. Introduce yourself.

10 MS MEYERSFELD: [10:09:02] Madam President, your Honours, my name is
11 Bonita Meyersfeld. I will be presenting submissions in person, together with my
12 colleague, Dr Kisla, who will be presenting remotely. I will allow Dr Kisla to
13 introduce himself.

14 PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:09:24] Thank you. Please go
15 ahead.

16 MR KISLA: [10:09:27] Madam President, your Honours, my name is Atilla Kisla,
17 and I'm leading the International Justice Programme at the Southern African
18 Litigation Centre. Thank you.

19 PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:09:44] Thank you.

20 The issue related to cumulative convictions will be also discussed later today. As
21 such, I would like the amici who will present their submissions tomorrow on this
22 issue but are present today to introduce themselves for the record.

23 So we would like to start with the National Institute of Military Justice. Please
24 present yourselves.

25 Phil Cave, Professor Phil Cave. You are not in -- you are not in the courtroom so you

1 cannot be -- for the record, Professor Phil Cave is in the gallery. I assume you will be
2 joining us later. Thank you. Thank you.

3 Association of Defence Counsel Practicing before the International Courts, please.

4 Professor Mr Chad Mair. He's the courtroom or remotely? No. Okay. Thank
5 you.

6 We have taken appearances from everyone who is in the courtroom or attending
7 remotely. Thank you very much.

8 If the composition of the different teams were to change during the different sessions
9 of today, I would like to ask the parties and participants to inform this at the
10 beginning of each session.

11 We will now start with the questions from the Bench to the parties and participants
12 and to the amici curiae on grounds for excluding criminal responsibility pursuant to
13 Article 31(1)(a) and (d) of the Statute.

14 Parties and participants and amici curiae will have approximately two minutes to
15 respond to each question posed by the Chamber.

16 I will ask my colleagues, my learned colleagues, if they have questions now.

17 Judge Hofmański? No questions.

18 Judge Bossa? Please, you have the floor.

19 JUDGE BOSSA: [10:12:08] Thank you, Madam President.

20 Good morning, Counsel and amici.

21 My question is directed to the Defence. In your submissions yesterday you
22 suggested that the Appeals Chamber should assess *de novo* the evidence in relation to
23 the grounds excluding criminal responsibility. In light of the Appeals Chamber's
24 standard of review for factual errors which is corrective in nature, on what legal basis
25 would the Appeals Chamber conduct a *de novo* assessment of the factual findings

1 related to mental disease or defect?

2 PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:12:53] Who would like to answer
3 the question?

4 JUDGE BOSSA: [10:13:02] The question is directed to the Defence.

5 PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:13:06] Okay. The Defence has two
6 minutes, please.

7 MR AYENA ODONGO: [10:13:09] Beth Lyons will answer that.

8 PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:13:13] Professor Lyons, you have
9 the floor for two minutes.

10 MS LYONS: [10:13:16] Thank you very much.

11 Thank you for the question, Judge Bossa.

12 Now, there are two -- there are two authorities we're relying on, both under Rule 81.

13 First, it's our position that the assessment was so unfair, was so -- did not look at the

14 evidence to such a severe degree that it reflected in the unfairness and unreliability of

15 the decision. So, basically, this is the last ground under 81 that we're asking the

16 Court to review *de novo*.

17 The second argument I would make is that, in terms of errors of fact, a reasonable

18 conclusion would be reached that the evidence of the Defence experts was reliable.

19 That, in fact, the experts considered all of the factors. They did not blur the line

20 between the forensic expert and the treating physician.

21 The decisions that were made on their unreliability that were made by the Trial

22 Chamber are such that it results in a serious, a grave miscarriage of justice. And a

23 different conclusion would have been reached, number one, if the evidence was

24 looked at for what it was, objective evidence. Number two, the fallacy that no

25 eyewitness testimony, quote, lay testimony was looked at is wrong.

1 The Trial Chamber, for example, did not consider the eyewitness testimony provided
2 in the first report, nor did it consider Joe Kakanyero's evidence, which the Defence
3 provided, which discussed that Mr Ongwen, with whom he was abducted at the
4 same time, was, quote, depressed. This is not present in the trial judgment. It's not
5 present in the Prosecution.

6 Lastly, there's a cultural aspect here that needs to be considered, which is,
7 Professor Ovuga said that in the area from which he lived -- in which he is -- in which
8 he lives and practices in Uganda, people somaticize psychological distress. What I
9 mean -- or what he means by that is psychological distress is expressed as physical
10 illness. This factor needs to be considered when one makes a judgment as to
11 whether lay witnesses, quote, saw anything. The Chamber did not consider this
12 judgment, they rejected the cultural aspect.

13 He made a second point, which is if somebody is acting perhaps irrational in some
14 way, it's often described as spirit possession. Even the DSM-V --

15 PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:16:33] Professor Lyons, I --

16 MS LYONS: [10:16:36] (Overlapping speakers)

17 PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:16:36] Professor Lyons, I will give
18 you a minute to conclude your response. Thank you.

19 MS LYONS: [10:16:40] Okay. Even the DSM-V acknowledges cultural factors.

20 Dr Akena mentioned there's no word for feeling, quote, blue in Acholi so that the
21 mental literacy, the communication of psychological distress within the Acholi culture
22 and the other cultures that exist in Uganda need to be considered when this whole
23 topic of eyewitness testimony, what was observed, what was said, is considered.

24 Lastly, I want to make the argument that -- the question of psychometric testing.

25 Psychometric testing is culturally based. We've submitted evidence on this,

1 including a law review from Professor Ardila.

2 Now, our experts did not oppose it in principle. In fact, they themselves have

3 developed testing, including testing for depression, as we mentioned in Court.

4 However, they made a professional assessment that further testing in terms of

5 malingering, for example, was not necessary.

6 In general, it was our view that the evidence presented by our Defence experts was

7 certainly not taken seriously, was not respected and that some --

8 PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:18:06] Professor Lyons, please

9 conclude. Please conclude.

10 MS LYONS: [10:18:09] (Overlapping speakers) were biased.

11 I'm finished, your Honour. Thank you.

12 PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:18:13] Thank you.

13 Thank you.

14 Judge Alapini-Gansou, do you have questions, please. Thank you. Judge

15 Alapini-Gansou is going to make questions.

16 JUDGE ALAPINI-GANSOU: [10:18:37](Interpretation) Thank you. Thank you,

17 Madam President.

18 I've got two minor concerns, but first I would like to say good morning to everybody.

19 I have two minor concerns. Firstly, is the question -- related to question of education

20 mentioned by the experts and also the Defence, of course. And I have a question on

21 this to these two types of representatives. What would you say about Mr Ongwen as

22 educated and as an educator? What would you say about him where he should

23 have been educated and as he should act as an educator to -- of someone else?

24 That -- what would you like to -- what could you say about him at these two stages in

25 his life? That is my first question.

1 And it's to the Defence and to the experts.

2 PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:20:10] (Overlapping speakers)

3 Defence and the experts. I will give first to the Defence the floor for two minutes,
4 please, to respond to the question.

5 The Defence. Who is going to take the floor, please?

6 MS LYONS: [10:20:29] May I respond, your Honour?

7 PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:20:31] Who is this? Professor
8 Lyons? Okay. You have the floor for two minutes, please.

9 MS LYONS: [10:20:39] Yes, okay. And thank you. I don't mean to correct you.
10 I'm not a Professor, your Honour, I'm just a lawyer.

11 PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:20:46] Thank you, thank you.

12 Thank you.

13 MS LYONS: [10:20:47] Only a trial lawyer. Okay.

14 Thank you for the question, Judge. You know, Mr Ongwen was in a position where
15 at 8 or 9 he had -- you know, he had a little influence from his family, but he was not
16 educated. He did not have the advantage of, quote, going to a formal school and
17 importantly he wasn't educated in how you make judgments about what is going on
18 in the world.

19 As Professor Ovuga pointed out, you know, he's abducted into the LRA, separated
20 from his parents, forced into an extreme coercive environment and anything that
21 was in his head has either been erased or it has -- or the whole playbook of what is
22 right and wrong has been thrown out. Dr Ovuga says this in his testimony. He
23 says it better than I. It's in our appeal brief. So that Mr Ongwen's whole education
24 was within the LRA. It was towards the end of the period as he had a little bit of
25 vision of what was going on inside that I think he realised the situation and what was

1 going on. But even in the beginning there were a number of attempts which are
2 recorded in the -- particularly in the psychiatrists' reports that talk about the fact that
3 Mr Ongwen tried to escape. The first attempt he tried was unsuccessful. It failed
4 because of the spirits. And then there were two or three subsequent attempts,
5 including when he was in sickbay and made a contact with UPDF senior leadership
6 Salim Saleh, and then Mr Ongwen was arrested. So he (Overlapping speakers)

7 PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:22:59] Counsellor, Counsellor,
8 please conclude. You have 20 minutes -- 20 seconds to conclude.

9 MS LYONS: [10:23:04] Okay. In conclusion, Mr Ongwen's education was -- was
10 totally restricted, was totally controlled by the LRA. That was what he learned from
11 the age of 8 or 9. And that was -- that was what shaped his sense of what was going
12 on, how to perceive it and (Overlapping speakers)

13 PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:23:33] Thank you, Counsellor.
14 Thank you, Counsellor.

15 Please, the Prosecution. Would you like to answer? Who is going to take the floor,
16 please? Counsellor, you have the floor.

17 MR CROSS: [10:23:47] Thank you, your Honour.

18 PRESIDING JUDGE IBÁÑEZ CARRANZA: Counsellor Cross, you have the floor.

19 *MR CROSS: [10:23:45] Thank you. Very briefly, just on the point of Mr Ongwen's
20 education and background, we would recall that, for example, Dr Abbo, in her expert
21 report, assessed his level of moral development as high. And that's discussed at
22 paragraphs 288 to 292 of our response brief. She also recalled that Mr Ongwen's
23 childhood experiences before abduction appeared to have been positive, and she
24 discussed signs that there was a type of socialisation in the bush that contributed to
25 his resilience. In general, your Honours, we'd note that Defence counsel in her

1 submissions is addressing many of the factual issues that are raised in their appeal,
2 and that we have fully responded to all of those issues in our response brief at
3 considerable length.

4 Thank you very much, your Honours.

5 PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:24:41] Thank you. Is there any
6 amici that would like to respond or say something about the issue -- the questions
7 posed by --

8 MS GERRY: [10:24:52] Yes, please, Madam President, if I may. It's Felicity Gerry,
9 Queen's counsel. May I speak?

10 PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:24:56] Professor Felicity Gerry, you
11 have two minutes to response. Thank you.

12 MS GERRY: [10:25:00] Thank you. Our response is solely to *de novo* question and
13 we hope to help. We think the simple way to approach it is this --

14 PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:25:13] (Overlapping speakers) Wait.
15 Wait a minute. Please stop. Yes, Judge Alapini --

16 MS GERRY: [10:25:18] May I keep going?

17 PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:25:20] No, no, no. Just stop, please.

18 JUDGE ALAPINI-GANSOU: [10:25:23] I would like to know about Mr Ongwen as
19 an adult, particularly. I haven't had any reply about that. I'd like to know their
20 opinion on Mr Ongwen as an adult who was responsible for educating children in his
21 turn.

22 PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:25:49] Thank you. Thank you,
23 Judge Alapini. It's true. The question is directed to the concrete fact that when
24 Mr Ongwen committed -- allegedly committed those crimes he was already an adult.
25 Please focus your response on this. Thank you.

1 MS GERRY: [10:26:08] Yes, we understand that (Overlapping speakers). The legal
2 framework that we have suggested is -- relates to non-punishment of a former child
3 soldier, so someone who is an adult. The way to approach it, we submit, is this:
4 For this Appeal Court, what you have is the Prosecution and victims groups on one
5 side calling evidence of monstrous conduct; the Defence effectively on the other side
6 calling evidence of severe mental illness caused by monstrous conduct towards him.
7 The trial court did not address the issue of protection of former child soldiers as a
8 question of law at all, and therefore failed to address the international humanitarian
9 law and the international human rights law issues at all that can exonerate someone
10 who is suffering long-term effects from a trafficking experience. To approach that in
11 the legal framework that exists outside of this Court, it is necessary to acknowledge a
12 person's childhood victimhood and to identify at what point he ever had agency, if at
13 all. That point may be as a child or may be as an adult. And here you are
14 considering an adult accused person. So if the framework of law is applied properly,
15 it enables a trial court to identify at what point a person has agency, if ever. And this
16 (Overlapping speakers)

17 PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:27:48] Professor -- Professor Gerry,
18 Professor Gerry, allow me to (Overlapping speakers) --

19 MS GERRY: [10:27:53] I have four more sentences, Madam President.

20 PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:27:56] Wait a minute. I would like
21 to make a follow-up question. I understand your point, but the issue here is -- this is
22 my question. How can a high-ranking commander of LRA be treated until
23 now - because this is what you are claiming - as a child soldier without any agency at
24 the moment he allegedly committed the crimes? How could it be? He was a
25 high-ranking commander. He was in the capacity of giving orders or planning or

1 whatever. Can you tell us something about that? One minute, please. Thank you.

2 MS GERRY: [10:28:36] Yes, I can. The point at which a person has agency, who is a
3 victim of trafficking in their past, might be at a different point in relation to what
4 went on inside their home, for example, compared to what actions they take as a
5 commander of operations outside their home. It depends on the trafficking
6 experience. The way in which this is approached, for example, in appeal courts in
7 England and Wales endorsed in the European Court of Human Rights is, first of all,
8 you look at was that person trafficked. And these were the submissions we made
9 yesterday. Then you can consider whether that trafficking experience is still in
10 existence at the time each separate alleged crime is considered. Now, the appeal
11 courts do this and this appeal court can do that. And then the next question is: Is it
12 still in the public interest to prosecute that person having regard to whether or not
13 they are still being trafficked or still suffering the long-term effects of that trafficking.
14 So what you do is you balance the compulsion as against the criminality. Now, the
15 agency that someone has (Overlapping speakers)

16 PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:29:51] Please, conclude. You've
17 made your point. Please conclude.

18 MS GERRY: [10:29:57] The agency someone has may be more clearly demonstrated
19 if they become a commander, but the trial court failed to apply any law at all when
20 that law exists in international human rights law and international humanitarian law.
21 So this court is not necessarily conducting a *de novo* exercise. We submit that you
22 should apply the framework of law and reassess the evidence. Not in the way the
23 case was put in (Overlapping speakers)

24 PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:30:20] Thank you, Professor Gerry.
25 (Overlapping speakers) You said that yesterday. Thank you. You've made your

1 point.

2 MS GERRY: [10:30:26] Thank you, I've finished.

3 PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:30:29] Thank you. Judge Alapini?

4 Judge Alapini, you have other questions? You have other questions, follow-up
5 questions on this area?

6 JUDGE ALAPINI-GANSOU: [10:30:42](Interpretation) If I may, Madam President,

7 I would like to move on to my second concern, even if I'm not entirely satisfied with
8 the replies I've had to my first question (Overlapping speakers)

9 My second concern also relates to this question of time in this proceedings. I

10 understand that he is being accused of facts which are continuous in time and space

11 in Uganda. It lasted a long period and they were limited to certain areas in the north

12 of Uganda. After his arrest, we spent a lot of time on this and I suppose he was not

13 submitted to a psychiatric examination in the required time. What do the experts

14 think of this, because I did not think that you were going to touch on the question of

15 the delay seen in presenting Mr Ongwen to a psychiatric exam. We are now looking

16 at reports presented here and there on the psychiatric side of things. What would

17 you say about that? And I'm talking here or aiming my question here primarily at

18 the experts. Thank you.

19 PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:32:36] Thank you, Judge Alapini.

20 Please, who of the amici would like to respond?

21 Yes, Dr Braakman, you have the floor for 10 minutes. Thank you.

22 MR BRAAKMAN: [10:32:48] Madam President, your Honours, thank you for the
23 questions.

24 (Interpretation) I don't speak French very well.

25 (Speaks English) Please allow me to go back to the first question, because it was not

1 satisfactory answered. I cannot answer it perfectly because I only have the facts as
2 written down by the Chamber, but if I understand it correctly, Mr Ongwen received
3 education until he was 9 years. He went a few years to school and that's it. After
4 that, the education he received was the ideology of the LRA and military skills. So
5 grow up in that situation means that if he becomes an educator himself he only can
6 give what he received. So the only two things he could educate is military
7 knowledge and things like that, as well as ideological ones conforming to the LRA.
8 That's -- that's the main thing he was educated in and could educate.

9 Your second question was about -- and you're perfectly correct that a forensic
10 psychiatrist always has to look back in time to try to reconstruct the mental state of
11 the accused during the time that bad things happened. And he was accused of 61
12 different things and different events. So in theory, for all those 61 events you should
13 try to reconstruct his mental state of mind, which is of course very difficult. And we
14 start by examining the mental state at this moment, and then we'll try to go back to
15 see whether a certain aspects of his mental state were present years before during the
16 events that took place. And especially in the area of personality disorder there is a
17 high consistency because personality disorders do not change very much in time. So
18 if we see a personality disorder at this moment in time, you can probably see it when
19 you move back in time and that's between the age of 18 and 22 the personality
20 will -- will settle down and stay as it is. All the other things is the art of forensic
21 psychiatry to -- to -- to try to reconstruct the mental state of mind during the events.

22 Thank you.

23 PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:35:39] Thank you,
24 Professor Braakman. Please, please stay. I would like to ask you one follow-up
25 question from yesterday.

1 Can you provide the Bench any further explanation as to what kind of qualifications
2 or experience amount to a transcultural expertise in forensic psychiatry?

3 MR BRAAKMAN: [10:36:05] Yeah, well --

4 PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:36:08] Two minutes, please.

5 MR BRAAKMAN: [10:36:10] Yes. Let me first explain the transcultural expertise.

6 For about 25, 30 years we have developed within psychiatry a lot of methods, cultural
7 formulation, cultural interviews that are aimed at reconstructing the main elements,
8 the main cultural elements that are necessary to construct the context around an
9 individual person. And it includes cultural identity, personality development, but
10 also idioms of distress, the way people express themselves and their mental health
11 problems. So that's transcultural psychiatry. And forensic psychiatry is, of course,
12 the interaction between psychiatry and the law. And regarding what we're talking
13 about here today, a forensic psychiatrist tries to create a picture, a diagnostic picture
14 of the mental state of mind during the events that were taking place at that moment.

15 PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:37:26] Dr Braakman, we understand
16 that, but the question is what kind of qualification or expertise do the experts need to
17 have to evaluate this kind of issues? If you can answer that.

18 MR BRAAKMAN: [10:37:42] Yeah, I understand. Yeah, I'm sorry. So sorry.

19 Yeah, the -- the main qualification is that it should be a forensic psychiatrist who is
20 experienced and knows the methods of transcultural psychiatry. So that's the main
21 issue. So in order to be an expert in this area, you first have to be experienced in the
22 forensic psychiatry field to try to answer questions to the judges in -- in a way that
23 also lawyers can work with that. And in addition to that, someone has to be able to
24 see the difference between weird behaviour in the sense that it -- it is a part of
25 someone's culture and not pathological or weird behaviour or thinking that is not part

1 of the cultural background of the accused but is pathological. And that's
2 transcultural expertise.

3 PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:38:47] Thank you. Thank you very
4 much. Thank you.

5 MS REGUÉ BLASI: [10:38:54] Your Honour -- excuse me, Your Honour.

6 PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:38:52] Yes, yes.

7 MS REGUÉ BLASI: [10:38:52] We would like to answer to the first question of Judge
8 Alapini-Gansou --

9 PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:38:57] Okay. Two minutes, please.
10 Sure.

11 MS REGUÉ BLASI: [10:38:57] The evidence doesn't show any sign that Mr Ongwen
12 acted as an educator of the children that he had with him in the Sinia brigade. There
13 is no evidence. Actually, it's the contrary. He abducted them directly, he had them
14 in his household, he used them as escorts in the four attacks that he participated and
15 that he led. He had children actively participating during those attacks. He
16 contributed to enforce the coercive and harsh environment that children had to live.
17 So there is no sign that he acted as an educator of the children that he had there.
18 And also, your Honour, I wanted to mention that the Trial Chamber also found that
19 there was no link between the experience that he had to suffer, that he had went
20 through as a child, and his mental state at the time of the charges. Therefore, the
21 proposal that Ms Gerry is putting forward, it doesn't operate because no -- there is no
22 link, there is no connection between his situation as an adult and what he had to go
23 through as a child. Therefore, your Honour, we propose that we should apply our
24 legal framework. In this respect, the Defence needs to demonstrate that there has
25 been an error in assessing the evidence and has been unable to do so to demonstrate

1 that no reasonable Trial Chamber could have made the findings that this Chamber
2 made.

3 PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:40:34] Thank you. And for the
4 record, it has been the Counsel for the Prosecution (Overlapping speakers)

5 JUDGE ALAPINI-GANSOU: [10:40:38] (Interpretation) With your permission,
6 Madam (Overlapping speakers)

7 PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:40:43] Judge Alapini, I just -- was
8 putting on the record that it was the response from the counsel from Prosecution.
9 Judge Alapini, you have the floor.

10 JUDGE ALAPINI-GANSOU: [10:40:51] (Interpretation) Thank you, your Honour.
11 Madam, your remarks lead me to specify one thing. I'd like to receive some, some
12 information about Mr Ongwen as a father. He has children, he has a family.
13 Could I have some information and your opinion, actually? What should we expect
14 when we look at Mr Ongwen as a father?

15 PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:41:32] Judge Alapini, this question
16 is for the parties or for the Defence or for whom?

17 JUDGE ALAPINI-GANSOU: [10:41:38] My concern is of interest to all the parties. I
18 realise that my concern is of interest to all parties. While the Prosecution has the
19 floor, they may wish to say something and then we will see the responses from other
20 parties.

21 PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:42:01] Thank you. But I will give
22 first the floor to the Defence because your client has been alluded. Thank you.

23 MR TAKU: [10:42:11] Your Honours, thank you for giving me this time. This is the
24 first case --

25 PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:42:18] You have two minutes,

1 Counsellor.

2 MR TAKU: [10:42:20] This is the first case in history steeped in spiritualism.

3 Professor Kristof calls it the cosmic space steeped in spiritualism. Ongwen grew up

4 in the house of Joseph Kony. And as far as these crimes are concerned, forced

5 marriage, children, Joseph Kony established rules, standing rules. It is these

6 standing rules that abducted Ongwen as the first child soldier in northern Uganda.

7 It is those very rules, the application of those rules that abducted the women.

8 Ongwen was taken to the house of Joseph Kony. He knew no other way. As a

9 father of children, the marriages of Ongwen were an upshot from those rules, and

10 Joseph Kony defined how to keep the wives. Discipline. If you had a problem with

11 the wife, you reported it to Joseph Kony. He's the one who would give the discipline.

12 He's the one who had control. And I will cite, when I get up, many paragraphs of

13 the trial judgment that talk about these rules and said he had absolute control. So as

14 a father of those children, Joseph Kony lived within those rules, he complied to those

15 rules in the upbringing of those children. And I will cite -- I will cite the paragraphs

16 of the judgment that actually discuss them.

17 PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:43:45] Thank you.

18 And now I will give the floor. Victims have nothing to intervene, if they want to

19 intervene. And Mrs Massidda, you have two minutes.

20 MS MASSIDDA: [10:43:58] Thank you, your Honour.

21 I had actually few remarks that I would like to address. First of all, please allow me

22 to make it clear on behalf of the victims that we consider that the issue of trafficking

23 has no legal standing at all before this court. I think someone has to say that our

24 clients are concerned about this kind of arguments. So I would like to state is clearly

25 today.

1 Second, the issue of agency was addressed. Now, I was trying to review the
2 judgment very quickly to find examples of paragraph in which, actually, the issue of
3 agency was addressed by the Chamber. I think I found one paragraph 970. This is
4 an issue that we could look into if the Chamber would like to have more details on
5 that. But the issue of agency was addressed and discussed by the Chamber.
6 In relation to (Interpretation) In relation to the questions put by Judge Alapini, thank
7 you, your Honour, you addressed one point that actually was discussed at length
8 during the discussion amongst the experts during the hearings and I wish to remind
9 you of what we pointed out in our closing brief. This is particularly paragraph 1663
10 of our closing brief and we made reference to a number of elements that had to do
11 with the way in which Mr Ongwen grew up within the Lord's Resistance Army,
12 including some considerations that could answer your questions. Filing 1720,
13 confidential, I'd like to hark back to one remark made by Dr Braakman this morning.
14 He said, and I quote verbatim: (Speaks English) "He only can give what he receives."
15 Now, this quote is contradicted by other experts, including Professor Wessels, who
16 testified on behalf of the accused at trial. And I would like to recall, I think it's the
17 transcript of the hearing 176, starting at page 20.
18 If I have 30 seconds, I could quote, because I think it's interesting.
19 Professor Wessels testified that abducted children remain morally alive and that the
20 majority of former child soldiers do retain ability to tell right from wrong. They
21 know what they did was horrible as they appreciate of value of life which is sacred in
22 the Acholi culture.
23 And this also shows, your Honour, that the cultural aspect was taken into account in
24 these proceedings. Thank you.
25 PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:47:31] Thank you.

1 Victims Group 1, please. Counsel Cox, you have the floor for two minutes.

2 MR COX: [10:47:39] Thank you, your Honour, Madam President. Very briefly, as
3 to how was Ongwen as a father and in his relation with children in the LRA. Maybe
4 he wasn't an educator. But what's interesting here is if you watch the trial, you
5 would see who brought up the most, the kindness, the good sole of Mr Ongwen was
6 the Defence. It was through their questioning that at each witness, both of the
7 Prosecutor and the Defence, they wanted to show how kind Mr Ongwen was with
8 children, was with members from the LRA, was with his own children, as I said
9 yesterday. Many times I said, he even gave them cookies, that he would play with
10 them, that he would play football with them. This shows that he can differentiate
11 good from wrong, that he had the capacity to transmit good values when he wanted
12 to children.

13 So, as I say, even though he wasn't formally an educator, as a role figure for children,
14 the Defence, the Defence illuminated us through their questioning of what a good
15 person Dominic Ongwen could be. Thank you.

16 PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:49:10] Thank you very much.
17 The Prosecution, you would like to add something else. Two minutes please.
18 Thank you.

19 MS REGUÉ BLASI: [10:49:18] Yes, your Honour.

20 The issue of Dominic Ongwen as a father was raised in the sentencing proceedings as
21 a mitigating factor alleged by the Defence. The Trial Chamber considered it, but
22 rejected it and didn't give to it any weight. Because what it noted is in fact that he
23 kept the children and the children of the so-called wives in the bush, in a coerced
24 environment, in a confined environment. He could have escaped together with
25 them, and he didn't let them.

1 And I will quote what the Trial Chamber said. It said that it will be improper and
2 even cynical in the circumstances of the present case to consider his fatherhood as a
3 circumstance somehow warranting mitigating of his sentence. However, the
4 Chamber, as you know, did consider the time the abduction and the early years in the
5 LRA as a circumstance that warranted mitigation.

6 PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:50:12] Thank you very much,
7 counsellor.

8 Judge Alapini, did you finish, or you have still another question, please? Judge
9 Alapini, finished? Thank you.

10 Judge Gocha Lordkipanidze, you have questions, please? Yes, you have the floor.

11 JUDGE LORDKIPANIDZE: [10:50:30] Thank you, Madam President. Good
12 morning.

13 My question actually follows the main stream of issues raised by Judge
14 Alapini-Gansou and goes to amici.

15 The Appeals Chamber must interpret Article 31(1)(a) of the Statute in accordance with
16 the Vienna Convention on the Law of Treaties, that is, based on the ordinary meaning
17 of the terms used in the light of the context and in the light of the object and purpose
18 of the Statute.

19 So my question is: What is the basis of the suggestion made yesterday that the word
20 "destroy" in Article 31(1)(a) of the Statute should be understood as not as complete
21 annihilation but as severely damaged and usually beyond repair.

22 PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:51:39] Judge Lordkipanidze, the
23 question is --

24 JUDGE LORDKIPANIDZE: [10:51:44] To amici.

25 PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:51:47] To amici.

1 Please, who of the amici would like to respond? The question is for the amici. Who
2 would like to respond?

3 Dr Braakman, you have the floor for two minutes. Thank you.

4 MR BRAAKMAN: [10:52:01] Thank you.

5 I hope I understood the question correctly, Madam President, your Honour. The
6 way it is usually interpreted in the Statute is that it's all or nothing. Either something
7 is totally functional or something it completely destroyed.

8 What I talked about yesterday was that that capacity could be severely damaged but
9 not totally lost. So partially it is lost, and that's the way in a lot of countries we think
10 about the mental state of mind of an accused, and that that offers an extra opportunity
11 for the Court to -- to adapt its judgment in that sense.

12 So, in reality, it's very rare that something is completely white or completely black.

13 So I propose the colour grey. Thank you. I hope I did explain a little bit.

14 JUDGE LORDKIPANIDZE: [10:53:13] Thank you.

15 PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:53:14] Judge Lordkipanidze, are
16 you -- yes. You have other questions? No.

17 The Defence. Counsel Lyons, would you like to respond to the question?

18 MS LYONS: [10:53:32] Yes. I want --

19 PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:53:33] You have the floor for two
20 minutes. You have the floor for two minutes. Thank you.

21 MS LYONS: [10:53:37] Thank you, your Honour.

22 I would like to respond a little bit more to Judge Alapini-Gansou's question. I would
23 like to point out that Dr Abbo in her testimony talks about how Mr Ongwen,
24 regardless of his age, did not conceive of the child soldiers as children. He conceived
25 of them as soldiers. And her explanation in the transcript is, because he himself did

1 not have a childhood. He did not experience childhood. So that his perception of
2 child soldiers who were in the LRA, other child soldiers, would not be the perception
3 that someone looking at from the outside would have. His perception was based on
4 his experience.

5 Secondly, in terms of this issue of child versus adult, I think that -- the point is that
6 Mr Ongwen had a child-like perception of himself and acted like a child regardless of
7 his chronological age.

8 The third point I want to make is in regard to Rule 135, which I believe you raised in
9 your question. The Defence asked for a Rule 135 examination prior to the very first
10 hearing in December 2016. The judges went on with the hearing, went through a
11 plea proceeding without that independent assessment of Mr Ongwen's mental state.
12 It was absolutely necessary because Mr Ongwen at the time was in ICC detention
13 centre custody.

14 As Professor de Jong's report that month --

15 PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:55:51] Counsellor, you have 20
16 seconds to conclude, please.

17 MS LYONS: [10:55:53] All right. Thank you.

18 He was being medicated for a mental illness. The Trial Chamber knew this. The
19 reports from the DCC that the Trial Chamber had from the very beginning said, "We
20 are treating Mr Ongwen for PTSD." So that the Trial Chamber knew, yet they didn't
21 issue -- they did not have a Rule 135.

22 Towards the end of the trial --

23 PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:56:21] Thank you. Professor Lyons,
24 thank you. Thank you.

25 Well, a final question from my part to amici curiae Gerry. How could you respond

1 to the LRV's contention that your suggestion, that the non-punishment of Mr Ongwen
2 could be a central approach, that is, they say, a direct affront to justice and
3 accountability, demands of hundreds, of thousands of victims who have abducted,
4 murdered, beaten, raped, forced to become wives or sexual slaves either directly or
5 indirectly at the hands of Dominic Ongwen or his Sinia brigade? How do you
6 reconcile this? Thank you.

7 You have two minutes, Professor Gerry, to respond.

8 MS GERRY: [10:57:16] Thank you.

9 I'm anxious not to repeat myself. We have provided a legal framework. We submit
10 that the Prosecution were wrong a moment ago when they said that the Rome Statute
11 is a separate legal framework. Our written submissions make it plain that the
12 non-punishment principle is directly applicable in the way that we've set out in my
13 team within the Rome Statute -- the provisions in the Rome Statute. Duress is not
14 limited to duress by threat.

15 What we are saying is that the trial court did not provide a legal framework. It may
16 be that if the legal framework were properly applied, agency would still be found and
17 accountability would still be found. But this Court has committed to accountability
18 for the monstrosities, if you like, that are treated -- that child soldiers are treated to.
19 This week, for example, this Court has recognised --

20 PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:58:23] Professor Gerry, we
21 have listened --

22 MS GERRY: [10:58:27] I haven't answered the question.

23 PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:58:28] Professor Gerry, you made
24 this point yesterday. The only question is: How could you reconcile this, both
25 extremes of the situation? You have in one hand the situation of Mr Ongwen as a

1 child soldier, but in the other hand, you have the demands of thousands of victims for
2 the crimes allegedly committed from Mr Ongwen. How could you reconcile both
3 demands? If you have a response --

4 MS GERRY: Yes, this is what --

5 PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:58:56] -- we would be very grateful.
6 Thank you.

7 MS GERRY: [10:59:00] Okay. This is what you have to reconcile. This is what this
8 Court has to reconcile. Not me. This Court has to say --

9 PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:59:07] But your suggestion. Your
10 suggestion.

11 MS GERRY: [10:59:09] -- what could we do -- what do we do when we have those
12 two conflicting problems: The accountability for the terrible things that happened to
13 child soldiers that are long term and the accountability for the terrible things that
14 people do who are former child soldiers? That's exactly what this Court has to
15 resolve, and we have provided the legal framework for you to resolve it. And the
16 trial court did not apply that legal framework. That's all we can say as amici.
17 We're not a party. We're not going to give you the finding. We can --

18 PRESIDING JUDGE IBÁÑEZ CARRANZA: Thank you.

19 MS GERRY: [10:59:46] -- only give you the legal framework.

20 PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:59:47] It's understood, Professor
21 Gerry. Thank you. Thank you.

22 MS GERRY: [10:59:51] Thank you.

23 PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:59:52] Well, it's been a very
24 interesting and fruitful session of questions and responses.

25 Now we are going to go to the submissions on sexual and gender-based crimes.

1 As was done by the parties and participants yesterday, the submissions should be
2 guided by the questions posed by the Appeals Chamber in each directions issued on
3 28 January 2022.

4 The questions are as follows.

5 One: What are the legal elements of and the interests protected by the crimes of
6 forced marriage, rape, sexual slavery and forced pregnancy?

7 Two: In the present case, the Trial Chamber convicted Mr Ongwen for forced
8 marriage as an other inhumane act under Article 7(1)(k) of the Statute. What is the
9 scope of other inhumane acts within the meaning of Article 7(1)(k) of the Statute?
10 Does forced marriage amount to an other inhumane act under this provision?

11 Three: How should Article 7(2)(f) of the Statute be interpreted when it provides the
12 definition of the crime of forced pregnancy "shall not in any way be interpreted as
13 affecting national laws relating to pregnancy"?

14 We're going to start with the Defence.

15 Counsel for Mr Ongwen, you have now the floor for 25 minutes.

16 MR TAKU: [11:01:53] May it please, your Honours. I've been asked to address
17 these questions.

18 Before I address the question, your Honour, permit me to situate the context under
19 which these crimes were committed and which should be called upon to take into
20 consideration when making a determination. And this is important because you are
21 being asked to establish a new jurisprudence based on the facts and the context of this
22 case.

23 First one is that this particular crime, the LRA, as it is, is the first case in history, as I
24 said a while ago, that is steeped in spiritualism.

25 Two, an international court of this nature, part of the duty is also to establish the

1 historical records. In other words, to establish jurisprudence, the context is
2 important, the historical record is important. The historical record is important
3 because if the history, the historical record is distorted, it breeds injustice.
4 Let's look at it squarely. The mitigating circumstances in this case were hidden in
5 the footnotes, and I will point to some. But in the body of the judgment, they were
6 mischaracterised or disregarded.

7 Secondly, as your Honours will find, the rules regarding to marriage, so-called
8 marriage, were established, imposed by Joseph Kony, even before Ongwen was
9 abducted. The rules to child soldiers when Kony established it, Ongwen became the
10 first child soldier to be abducted in northern Uganda. And, therefore, those rules
11 were there. They was standing rules. There was no agency about them because
12 you will find Joseph Kony executing people who violated the rules.

13 The rules about sexuality, when a woman should be given to marriage, some were
14 given to marriage, were established by Joseph Kony. The rules about punishment
15 about wives were established by him.

16 For example, Brigadier Banya, one of the Sinia commander who founded the
17 movement with Kony, he was given a wife. He refused. Kony called everybody
18 and said that he refused because he wanted to escape, and almost executed him. He
19 accepted the wife.

20 Therefore, when you look at this context, your Honour, you will be able to appreciate
21 what the Prosecution and some of the participants call volitional autonomy. In the
22 cultural context, you have parental consent when it comes to traditional forms of
23 marriages. And you have Joseph Kony's consent in which the men and the women
24 had no choice. So the question of volitional autonomy should be looked at in this
25 context.

1 With forced pregnancy, I will address that when I come to that. You have the
2 question of reproductive autonomy, whether in the cultural context is guided by a
3 series -- is guided by a series, profound series, cultural -- certain cultural rights --
4 PRESIDING JUDGE IBÁÑEZ CARRANZA: [11:05:37] Counsel, you requested to sit
5 down. You may. You may sit down, if you want. Thank you.
6 MR TAKU: [11:05:43] Okay, your Honour.
7 Your Honours, with the reproductive autonomy --
8 PRESIDING JUDGE IBÁÑEZ CARRANZA: [11:05:54] Sorry, sorry. The
9 interpreters requested you to speak a little bit slowly.
10 MR TAKU: [11:06:01] Thank you, your Honour.
11 PRESIDING JUDGE IBÁÑEZ CARRANZA: Thank you.
12 MR TAKU: [11:06:02] With regard to the question of reproductive autonomy, you
13 will find that in the context of this case and in the context of many African traditions,
14 the definition of marriage, pregnancy and procreation is governed by a series of
15 traditional cultural rights. It is not looked upon in the context of a woman's
16 reproductive autonomy, and you will also find out it in context of Uganda where you
17 have an abortion law which is opposite with a woman's personal reproductive
18 autonomy, you set the stage for a conflict.
19 This is a brief introduction, but I'm coming to that, your Honours.
20 First question. Forced marriage, your Honours, I can only refer you to the definition
21 that is given by the trial judgment because we do not -- our submission is that it is not
22 a cognizable crime under the Statute. But, nevertheless, the Trial Chamber,
23 paragraph 2743 to 2745, identified some of the elements.
24 "The perpetrator inflicted great suffering, or serious injury to the body or to mental or
25 physical health, by means of an inhumane act. Such act was of a character similar to

1 any other [...] referred to in Article 7 [...]"

2 The protected interest is a violation of the physical integrity.

3 Rape. Rape falls within the broader category of crimes of sexual violence. Rape is

4 defined as "a physical invasion of a sexual nature, committed on a person under

5 circumstances which are coercive" as an attack on the personal sexual autonomy.

6 The elements, your Honours.

7 The perpetrator invaded the body of a person by conduct resulting in penetration,

8 however slight, of any part of the body on the victim or of the perpetrator with a

9 sexual organ, or of the anal or genital opening of the victim with any object or any

10 other part of the body.

11 The invasion was committed by force, or by threat of force or coercion, such that

12 caused fear of violence, duress, detention, psychological oppression or abuse of

13 power against such person or another person, or by taking advantage of a coercive

14 environment.

15 Any by coercive environment here, your Honour, I will stop. That coercive

16 environment that was established by Joseph Kony was the entire LRA. Mr Ongwen

17 did not create another structure outside the LRA. The LRA was a coercive

18 environment to everyone.

19 The conduct was committed as part of a widespread or systematic attack or as a war

20 crime.

21 Protected interest. The protected interest of rape is the violation against physical

22 integrity.

23 Sexual slavery is deprivation of liberty and violence against physical integrity

24 through the crime of sexual slavery. The term is used to describe any kind of

25 violence carried out through sexual means, with a sexual motive, or by targeting

1 sexuality. The perpetrator exercised any or all of the powers attaching to the right of
2 ownership over one or more persons. The perpetrator caused such person or
3 persons to engage in one or more acts of a sexual nature. Sexual slavery also
4 encompasses situations where women and girls are forced into marriage, domestic
5 servitude or other forced labour involving compulsory sexual activity, including rape,
6 by their captors. Any other form of sexual violence of comparable gravity. Sexual
7 violence is a broader term than rape.

8 Forced pregnancy. The perpetrator confined one or more women, forcibly made
9 pregnant, with the intent of affecting the ethnic composition of any population or
10 carrying out other grave violations of international law. The conduct was committed
11 as part of a widespread or systematic attack directed against a civilian population.

12 The perpetrator knew --

13 PRESIDING JUDGE IBÁÑEZ CARRANZA: [11:10:15] Counsellor, again, please,
14 could you slow down for the benefit of the interpreters. Thank you.

15 MR TAKU: [11:10:19] I apologise, please.

16 The conduct was committed as part -- no. The perpetrator knew that the conduct
17 was part of --

18 PRESIDING JUDGE IBÁÑEZ CARRANZA: [11:10:27] Counsellor, also, maybe you
19 can remove your mask so we can listen and the interpreters as well. We can listen
20 better. Thank you. You may continue.

21 MR TAKU: [11:10:37] Now, the interest protected is violence against physical
22 integrity.

23 Conclusion. Focussing on intention, in each case there is only one culpable intention
24 for the indivisible acts that occurred.

25 Additionally, the significant protected interests is the same harm for each pair of

1 counts. For example, the protected interest of rape is the violence against physical
2 integrity; whereas, sexual slavery, it is the violence against physical integrity and the
3 deprivation of liberty. The crime of rape is consumed by the crime of sexual slavery
4 since both crimes overlap in terms of the protected interest. Moreover, there is a
5 single culpable intention.

6 In the case -- in this case, rape is a necessary predicate offence for the commission of
7 the crime of sexual slavery, particularly since the Chamber found that the acts of
8 sexual nature for the crime of sexual slavery were the acts of rape.

9 Based on both the protected interests and the single culpable intention, the crimes of
10 rape and sexual slavery are an impermissible concurrence and convictions for
11 counts 53, 54, 64 and 65 should be reversed.

12 Thus, the Defence urges the Appeals Chamber to reverse the concurrence for war
13 crimes and crimes against humanity based on the same underlying conduct.

14 The second question, your Honours, is the scope of other inhumane acts within the
15 meaning of Article 7(1)(k) of the Statute.

16 Does forced marriage amount to an other inhumane act in this provision?

17 Article 7(1)(k) of the Rome Statute is a residual clause concerning crimes against
18 humanity which were included to accommodate forms of inhumane conduct not
19 otherwise prohibited under Article 7 of the Statute.

20 For an act to qualify as an inhumane act, it must be of a similar nature of acts in
21 Article 7(1)(a) to (j), occasioning suffering, or serious harm to body or to mental or
22 physical health.

23 Conceptually, other inhumane acts may appear to be a catch-all provision.

24 Interpreted broadly, it may provide an opportunity for creative forms of legislative
25 engineering from the bench to accommodate the changing landscape of international

1 criminality.

2 This Court has exercised judicial restraint and for good reasons.

3 Trifterer and Ambos, in the commentary, state that it is necessary to inquire whether
4 the conduct is already subsumed under any other of the other existing inhuman acts,
5 or has at least one materially distinct element that is not adequately reflected in
6 Article 7(1).

7 In this case, other inhumane acts identified by the Chamber in the trial judgment at
8 paragraphs 2743 to 2745 were consumed with the crimes of torture at paragraphs 2836,
9 2797 and 2891 because the crimes were an impermissible concurrence.

10 Does forced marriage amount to an other inhumane act?

11 The appellant submits that forced marriage is not a cognizable form of other
12 inhumane act under Article 7(k) of the Statute. The Defence argues that it is *ultra*
13 *vires* to confirm a charge of forced marriage because it violates Article 119 and 121 of
14 the Rome Statute.

15 Furthermore, neither the Pre-Trial Chamber nor the Trial Chamber has inherent
16 jurisdiction to add new crimes or to interpret the Statute in respect to new crimes, that
17 is, crimes not identified in the Statute.

18 The appellant submits that the conviction of Mr Ongwen for forced marriage as an
19 other inhumane act violates Article 22(1)(2) of the Statute and Article 24 of the Statute.
20 Article 22, your Honours, is *nullum crimen sine lege*.

21 The Defence will respectfully rely on the Defence appeal brief, ground 90,
22 paragraphs 975 to 978 and the amici briefs submitted by amici 1927 and 1934, which
23 the appellant fully endorses on this area.

24 The appellant further submits that the trial finding that forced marriage is a
25 cognizable crime of other inhumane acts is factually and legally unsustainable.

1 Here is the reason why:

2 After careful reading of paragraphs 2098 to 2182 and 2182 to 2247, the Defence

3 submitted at paragraphs 984 to 1000 of the Defence appeal brief that the facts of the

4 case do not support the finding of an other inhumane act of forced marriage in this

5 particular case.

6 The element of exclusivity was never proved beyond reasonable doubt. The

7 evidence established that Joseph Kony established a set of rules on abduction and

8 distribution of women including to Mr Ongwen by Joseph Kony.

9 The Chamber determined at paragraph 2009 inter alia, quote, this is what the

10 Chamber said with regard to forced marriage here: "[...] the facts and circumstances

11 described in the charges (and corresponding legal characterisation) are not identical

12 with respect to all of them. This is primarily due to the Court only having

13 jurisdiction over crimes committed as of 1 July 2002 and the Prosecution electing to

14 bring charges against Dominic Ongwen only for crimes committed until

15 31 December 2005. In accordance with Article 74(2) of the Statute, the Chamber is

16 bound by the text of the charges as confirmed [...]" and the Chamber went on to say

17 they will consider the evidence only for purposes of context.

18 And the Prosecution concurred because at paragraph 160 of the Prosecution closing

19 brief, and the Trial Chamber, they admitted that some of the alleged wives, the

20 evidence fell outside the jurisdiction of -- the temporal jurisdiction of the Court and

21 that it should be considered only for vital context. So you find the judgment

22 criminalising and punishing Ongwen, convicting him for seven wives.

23 Your Honours, at paragraph 3070 the alleged forced marriages, at times where

24 ceremonies were performed to mark the so-called -- sorry, one minute, your Honour.

25 The reasoning -- the reasoning of the Chamber at paragraph 3070 contradicts the

1 finding at 2588 -- 52 in which Mr Ongwen was convicted for alleged marriage as a
2 continuing crime. Why? The confirmed charges did not confirm -- did not confirm
3 marriage as a continuing crime. It is only in the trial judgment at the time of
4 conviction in one paragraph, 2752, that it clearly said forced marriage is a continuing
5 crime. Why? Because they wanted to criminalise actions that happened as far as
6 1995 -- 1998. And as your Honour will ask yourself, Ongwen was not a commander,
7 Ongwen was just at the threshold of 18. One of his wives was 15, the other
8 one -- that's 099 was 15 and 0101 was the age of 16. He was just at the threshold of
9 18.

10 And under the Statute, the principle of non-retroactivity which is cited in the Statute,
11 Article 22 and also 24, that act cannot be criminalised. So the judges now, instead of
12 looking and then -- a conviction, now say it was a continuing crime because they
13 wanted to transform an action that is -- or a conduct which is not criminalised by the
14 Statute and bring it within the Statute in order to convict.

15 Furthermore, the summary of the evidence of the so-called wives established that
16 P-099 was abducted February 1998, paragraph 2011. P-101, August 1966 -- 1996, she
17 was 15. Ongwen was not an officer, as I've said, and was just at the threshold of 18,
18 not an officer. And every time these women were abducted, they were taken to
19 Sudan to Joseph Kony and Joseph Kony made the determination.

20 Now furthermore, your Honours, if the marriages -- if the marriages crystallised for
21 the Prosecutor -- I mean the Chamber determined that the marriages crystallise on the
22 first sexual encounter, if the first sexual encounter of these women occurred in 1995,
23 1996, 1998, therefore the marriage crystallised and the *mens rea* to the corresponding
24 *actus reus* crystallised as of that date, how then could the judges -- could the Chamber
25 punish the conduct between 1 July 2002 to 31 December 2005?

1 THE COURT OFFICER: [11:22:18] Counsel has five minutes.

2 MR TAKU: [11:22:21] Okay. Your Honours, let me move quickly to the last
3 question because my time is almost over.

4 Your Honours, before I move to the other question which is very, very easy to answer,
5 the Chamber and the Prosecution, they rely on Sesay at the Special Court of Sierra
6 Leone. I was lead counsel in that case, your Honours. Some evidence was adduced
7 on the notion of bush wives. In Taylor, the question was about the definition:
8 Were they marriages at all? There was no definition. As I said, your Honours, if
9 they said the jurisprudence on forced marriage is based on the facts of this case, you
10 will criminalise many forms of marriages because this case has not defined what
11 marriage is. In fact, the definition they give was a statutory -- the definition of
12 statutory marriages, ignoring customary marriages in Africa or other places, in the
13 most -- and of other places. You have to look within the context and you have to
14 establish the definition of marriage for the purpose of forced marriages which takes
15 into consideration the wider context of marriages, not just the definition given in this
16 judgment, which is statutory marriage.

17 With regard to the question about forced pregnancy, your Honours, the Chamber set
18 up the interpretation of the judgment in Uganda in a state of conflict, it brings the
19 judgment in the centre of conflict. Two extreme positions, the woman's
20 reproductive autonomy, that includes her right to abortion, and the abortion laws of
21 Uganda and the context of Acholi women, African women. Why did they not also
22 take into consideration that since the right -- or the woman's right to reproductive
23 autonomy, since it is not known or even tolerated in the country of Uganda because
24 abortion laws, why did they not also think about the woman's cultural rights? When
25 it comes to pregnancy, these cultural rights have a whole value, cultural and spiritual

1 value system that implemented and regulated life for the people. So it was
2 unnecessary to add this to the definition of the crime of forced marriage as we know it
3 and accepted by all.
4 Secondly, your Honours, in order to conclude before my time runs off, your Honours
5 will find that at paragraph 2722 the Chamber said: "It is not enough to punish
6 [forced pregnancy] merely as combination of other crimes (e.g., rape and unlawful
7 detention), or subsumed under the generic 'any other form of sexual violence'". Your
8 Honours regrettably, it is precisely what the Trial Chamber did by its decision at
9 paragraph 2717, 2722, 2727 by listing a whole set of crimes without identifying a
10 particular crime that your Honours will evaluate as a specific intent for this particular
11 crime and convicting Mr Ongwen on that.

12 For this purpose, your Honours, I reserve my time and I thank you very much for
13 listening to me.

14 PRESIDING JUDGE IBÁÑEZ CARRANZA: [11:26:15] Thank you very much.

15 Well, I would like now to tell you that we are going for the break. It is 11.25. We'll
16 be back here at 11.55, half an hour.

17 Thank you.

18 THE COURT USHER: [11:26:35] All rise.

19 (Recess taken at 11.26 a.m.)

20 (Upon resuming in open session at 11.59 a.m.)

21 THE COURT USHER: [11:59:20] All rise.

22 Please be seated.

23 PRESIDING JUDGE IBÁÑEZ CARRANZA: [11:59:56] Welcome back.

24 Since we are running a bit behind schedule, and in order to ensure the
25 expeditiousness of the proceedings, the schedule for the remaining of today will be as

1 follows: We will now hear the submissions on issues of sexual and gender-based
2 crimes by the Prosecutor, the Legal Representatives of Victims and the amici. Then
3 the parties and participants, victims will have each five minutes to respond to the
4 submissions of the parties, participants and amici. This slightly amended schedule
5 will allow us to finish by around 17.

6 Now, counsel for the Prosecution, you have the floor for 25 minutes starting now,
7 please.

8 MS NARAYANAN: [12:00:48] Thank you very much, your Honour, and good
9 afternoon.

10 I will address you on the crimes of rape, sexual slavery and other inhumane acts
11 established by forced marriage guided by your questions 7 and 8 of your directions.

12 And then Ms Brady will address you on the crime of forced pregnancy.

13 But before I begin, I'd like to address two points of an evidentiary nature that my
14 learned friend from the Defence raised.

15 The first, the role of Kony is not necessarily incompatible with the role of Ongwen,
16 and the Trial Chamber's findings are very clear on that point. We've addressed the
17 issue in quite some detail in our brief from paragraph 567 onwards and also in the
18 trial judgment.

19 The second point is on the scope of the evidence that was used in this case for the
20 crimes of sexual and gender-based crimes. Now, your Honours, obviously it's hard
21 to parcel out the evidence based on the victimisation in this case, but it is a matter of
22 law and that it's been established that the scope of evidence outside of the temporal
23 scope can be relied on for context as well as for circumstantial evidence. But what is
24 important is that the conviction was based on events from 1 July 2002 until
25 31 December 2005 and they occurred on the territory of Uganda, so they are within

1 the territorial and temporal scope.

2 Turning to your questions, your Honours, the Trial Chamber properly convicted

3 Dominic Ongwen of all 19 counts of sexual and gender-based crimes. These

4 convictions correctly reflect the full scope of Mr Ongwen's overwhelming and

5 heinous criminal conduct as a direct perpetrator and as an indirect co-perpetrator of

6 sexual and gender-based violence.

7 For the seven women and girls who were first abducted from their families and then

8 assigned to Mr Ongwen either as a *ting ting* or a so-called wife or both, Mr Ongwen's

9 crimes altered their lives forever. The oldest of his direct victims, P-0227, was

10 approximately 19 years old and in secondary school when she was abducted and

11 raped. And the youngest, P-0226, was a child, hardly 7 years old when she was

12 abducted and only a few years older when Mr Ongwen raped her.

13 In the words of P-0101, also one of Mr Ongwen's so-called wives, quote: "Dominic

14 was the worst [...] when it came to young girls [...] he still [had] sex with them at a

15 very young age." End quote.

16 Mr Ongwen raped these women and girls and tortured them. He subjected them to

17 repeated sexual violence and forced labour, he reduced them to slaves. He forced

18 them into an exclusive conjugal union with him and for some he even compelled

19 them to beat people held captive to death, which caused them great anguish.

20 Mr Ongwen's criminal actions also go far beyond these seven victims. He, with

21 others, defined and sustained the institutional abuse of women and girls within the

22 LRA. It was only proper, therefore, that he was convicted for the range of crimes

23 that he was; namely, rape, sexual slavery, enslavement, other inhumane acts, as

24 forced marriage, forced pregnancy torture and outrages upon personal dignity.

25 Your Honours, each conviction reflected but a slice of Mr Ongwen's overall

1 culpability, and no single crime or conviction in itself told the full story of his criminal
2 conduct. And as the drafters of the Rome Statute had intended originally and as
3 your Honours have foreseen, each crime has distinct legal elements and protected
4 interests. They are not fungible and they should not be conflated.

5 Turning first to question 7, the Statute, its plain text, its object and purpose, the
6 Elements of the Crimes, Rules of Procedure, read with the drafters' intention are the
7 best guide to determine how various crimes should be legally interpreted and to
8 identify their protected harms and interests. And of course, your Honours, in so
9 determining, Article 21(3) is significant. Any interpretation must be consistent with
10 internationally recognised human rights and without adverse distinction based on
11 any discriminatory ground. And likewise, crimes in the Statute should be
12 interpreted to accord with Article 22 and the principle of *nullum crimen sine lege*.

13 But even more so, any interpretation must give life and concrete meaning to the
14 negotiators' decision at Rome to expressly have a wide range of acts of sexual and
15 gender-based violence in the Statute. And the principle of fair labelling and the rule
16 against surplusage require this. And as your Honours know, including the array of
17 crimes in the Statute, some which were codified for the first time in international law,
18 was no accident. It was a deliberate choice and response to these crimes being
19 traditionally under-prosecuted otherwise. You will find more on this in A.1 on our
20 list of authorities. And the Trial Chamber followed this approach correctly.

21 On the specific crimes that you ask about, your Honours, I will not dwell on their
22 chapeau and mental elements that are common to all crimes, but I will address some
23 of the more unique aspects of these crimes.

24 First, the coercive environment in which the crime of rape takes place is of course
25 expressly recognised as an element of the crime. But the presence of these coercive

1 circumstances may also be relevant as factual matters to establish aspects of other
2 sexual and gender-based crimes, even if they are not part of the legal elements of
3 those crimes. So, for instance, that's the crime of forced pregnancy and the crime of
4 other inhumane acts as forced marriage.

5 For enslavement and sexual slavery, coercion is inherent in the nature of those slavery
6 crimes, but it is not a legal element to be established separately. Your Honours, the
7 Chamber correctly found that the coercive circumstances within the LRA dictated
8 every aspect of * the lives of these women and girls, whether their abduction, their
9 distribution to men, including Mr Ongwen, the control of their labour, their
10 relationships, their sexuality and their reproductive choices. That's at A.2 on our list.

11 Second, on the crime of rape again, the elements of course reflect two key aspects:

12 The physical invasion of the body, and coercion. And as we know, this is a
13 gender-neutral definition and rape can be committed against any gender irrespective
14 of age.

15 Now as for its protected interests, the Trial Chamber assessed in its sentencing
16 judgment that rape is a crime against sexual self-determination and sexual integrity.

17 That's at paragraph 300. We agree, but we note that rape is not purely a sexual crime.

18 It causes physical and psychological harm and social stigma and its criminalisation
19 reflects all these protected interests. You will find more, your Honours, at A.3 and
20 A.4 on our list.

21 Third, on the crime of sexual slavery, this crime is a form of enslavement conceptually.

22 But it was included in the Statute as a standalone crime. And because in the scheme
23 of the Statute, the crimes of enslavement and sexual slavery share the same first
24 element - namely, the exercise of powers attaching to the rights of ownership over a
25 person - they should be interpreted similarly, as we also stated in writing.

1 So the different indicia that have been set out to find the exercise of powers over the
2 right of ownership in, for example, Katanga and Ntaganda, and upheld by the
3 Appeals Chamber, are equally relevant to both crimes. But what distinguishes
4 sexual slavery from other crimes such as rape is its second element, that the
5 perpetrator caused the victim to engage in one or more acts of a sexual nature. And
6 on this point, your Honours, and responding to what my learned friend from other
7 side has said, sexual slavery is broader than rape, it is -- and rape is not consumed by
8 sexual slavery. In law rape is not a necessary predicate offence for sexual slavery.
9 And on the facts as well, the Trial Chamber found that the conduct for rape was not
10 fully consumed by the conduct of sexual slavery and properly entered different
11 convictions for both these crimes.

12 Again on the second element of sexual slavery, while the Katanga Chamber took a
13 more generic approach, more recently the Al Hassan Pre-Trial Chamber developed
14 this concept on the lines of sexual autonomy. And with respect to the second
15 element, it stated that sexual slavery implies a constraint on the victim that deprived
16 them of their ability to decide the conditions of their sexual activity. That's at A.5 on
17 our list.

18 One last point on sexual slavery: As the Chamber correctly found, it is legally
19 distinct from the crime of rape, and it may be that in the circumstances of the case,
20 including this one, the fact that a victim is repeatedly raped is relevant to establish
21 both crimes as a matter of evidence, but still their legal interests and protected
22 interests are different. Sexual slavery derives its prohibition from the *jus cogens*
23 norm against slavery and servitude, which your Honours in its modern day iteration,
24 as the Inter-American Court for Human Rights has said, is not limited to the
25 ownership of persons as property, but it includes the loss of a person's will and

1 autonomy. Again, your Honours, you will find more authorities on this at A.6.
2 So in this sense, in this case, it did not matter what these enslaved women and girls
3 said, thought, felt or did. Mr Ongwen and its co-perpetrators controlled every
4 aspect of their lives. And the harm is best expressed in their voices, in the voices of
5 these victims and survivors. P-0227 said that her whole life was in Mr Ongwen's
6 hands. P-0101 said that Mr Ongwen violated her rights and that there was
7 absolutely nothing she could say about it. And others have described their lives
8 with Mr Ongwen and said that if they did anything perceived to be wrong or
9 disobedient, they were beaten and could even be killed.

10 Fourth, and turning to forced marriage as an inhumane act. Your Honours, there
11 has been some confusion in the briefing in this appeal about this crime or perhaps this
12 is a result of the various shorthand that people use to describe it. But for clarity, we
13 note that forced marriage is not a crime in and of itself under the Statute. But this,
14 contrary to what the Defence has raised, does not make it *ultra vires* of the Statute.
15 The relevant crime under the Statute is other inhumane acts under Article 7(1)(k).
16 And the conduct of forced marriage, like other conduct relevant to Article 7(1)(k), is
17 one of the many ways that this crime can manifest and it is of this crime, the Article
18 7(1)(k) crime, that Mr Ongwen was properly charged and convicted.

19 So naturally, therefore, the legal elements that are relevant are those that are set out in
20 Article 7(1)(k), namely that the conduct causes great suffering or serious injury to
21 body or to mental or physical health.

22 While it is not a legal element under Article 7(1)(k), the key aspect of the conduct of
23 forced marriage is the imposition of a forced and exclusive conjugal union on the
24 victim. And this is what distinguishes this conduct from other sexual and
25 gender-based crimes. For instance, the ECCC distinguished legally between forced

1 marriage as an inhumane act and the rape and sexual violence that happened in that
2 context, even though the latter may very well be an integral part of this imposed
3 conjugal union. And I'd refer to A.8 on our list.

4 But, your Honours, this does not make the inhumane act of forced marriage a
5 non-sexual crime. It simply recognises that the harm it causes is distinct from others,
6 even if some conduct may overlap with other crimes. And this is what the Trial
7 Chamber was properly alert to. So in the instance of P-0099, who was another one of
8 Mr Ongwen's so-called wives, the Chamber correctly found that she was a victim of
9 this inhumane act from July 2002 until September 2002, a time when Mr Ongwen was
10 not physically present with her and did not subject her to rape.

11 The protected interests for this inhumane act derives from international human rights
12 law and the right to marry freely and consensually. And on this point we agree with
13 the written submissions of Professor Oosterveld and Professor Meyersfeld on the
14 different harm caused by this conduct.

15 Your Honours, some of the conduct associated with forced marriage has at times been
16 described * as conjugal slavery or as a form of sexual slavery. But the question
17 before your Honours is not * an abstract or an academic one. You must determine
18 which provision under our Statute in this case best captures this unique harm of an
19 imposed conjugal exclusive union. And respectfully, the answer is an inhumane act
20 Article 7(1)(k). That would also align with the precise charges that the Prosecution
21 brought in this case.

22 And it is our respectful view that at this time the Appeals Chamber need not decide if
23 the conduct of forced marriage may constitute some other crime under the Statute.
24 This brings me to question 8, where you ask us about the scope of other inhumane
25 acts and whether forced marriage constitutes one such act.

1 The scope of conduct under Article 7(1)(k), or similar provisions at the ad hoc
2 tribunals, has varied. And examples include serious physical and mental injuries,
3 sexual violence, sexual mutilation, forced public nudity, and other conduct causing
4 humiliation. But in the context of our Statute, Article 7(1)(k) is a residual provision,
5 it excludes enumerated acts under Article 7(1). But yet as the Chamber found
6 correctly, it still includes acts which are similar in nature and gravity to those
7 enumerated acts. So it is in this sense that Article 7(1)(k) also includes the conduct of
8 forced marriage.

9 And finally, your Honours, in the written submissions one of the amici,
10 Professor Allain, contested the Chamber's interpretation on the grounds of gravity
11 and the principle of legality. We respectfully disagree.

12 Firstly, the voices of the victims through their testimony and the Chamber's findings
13 undeniably convey the gravity of this conduct. And while Professor Allain appears
14 to limit the scope of forced marriage to three instances under the 1956 Supplementary
15 Slavery Convention, namely, the sale of a bride, the transfer of a wife, and the
16 inheritance of a widow, this interpretation, though true to the 1956 Convention, is not
17 true to the Statute or its object and purpose.

18 And secondly, the underlying conduct of forced marriage or indeed any Article 7(1)(k)
19 conduct does not need to be expressly criminalised to accord with the principle of
20 legality and there is ample support in customary international law for the crime that
21 is charged in this case, namely the category of other inhumane acts. And even
22 Article 22(2) of the Statute, which * the Defence referred to and requires the crimes to
23 be defined strictly, allows a controlled analogy for the purposes of Article 7(1)(k).

24 Your Honours, any other meaning would make this provision meaningless.

25 This concludes my submission. And with that, I will hand over to Ms Brady for our

1 submissions on the crime of forced pregnancy.

2 Thank you very much, your Honours.

3 PRESIDING JUDGE IBÁÑEZ CARRANZA: [12:20:00] Thank you.

4 Mrs Brady, you have the floor. You have the floor for the remaining time.

5 Thank you.

6 MS BRADY: [12:20:18] Your Honours, in the time remaining, I'll speak about the
7 crime of forced pregnancy addressing its legal elements and the interests protected by
8 the crime, that is question 7, and about the meaning of Article 7(2)(f) of the Statute,
9 which provides that the definition of the crime of forced pregnancy "shall", quote,
10 "not in any way be interpreted as affecting national laws relating to pregnancy."

11 That's question 9.

12 Leaving aside the contextual and common mental elements, the legal elements of this
13 crime are: One, the unlawful confinement of, two, a woman who has been forcibly
14 made pregnant, and three, with either the intent to affect the ethnic composition of
15 any population which was not relevant on the facts of this case, or --

16 THE COURT OFFICER: [12:21:26] Counsel has five minutes.

17 MS BRADY: [12:21:28] Thank you. Or with the intent of carrying out other grave
18 violations of international law.

19 And the Trial Chamber found this second intent, this second special intent established
20 in this case because Dominic Ongwen had confined the victims whom he had made
21 forcibly -- whom he had forcibly made pregnant with the intent of continuing the
22 commission of forced marriage, torture, rape and sexual slavery.

23 But we do agree with the amici who say that this should be interpreted broadly to
24 include violations of international human rights law and not merely restricted to
25 violations of international law amounting to crimes under the Statute.

1 In terms of the interests protected by the crime, we endorse the Trial Chamber's view
2 that the crime is, as they said, grounded in a woman's right to personal and
3 reproductive autonomy and right to family. The crime protects and criminalises
4 conduct that harms reproductive autonomy and health, interests distinguishable from
5 other harms. The key distinctive aspect of the crime is the violation of the
6 woman's -- a woman's reproductive autonomy and health. These are
7 interdependent and interrelated rights covering the capacity and possibility to freely
8 make informed decisions about one's reproductive choices, including whether, how
9 and under what circumstances to reproduce and the capability to do so in a safe and
10 healthy environment. In other words, it's not only about denying a woman her right
11 to be pregnant or not, it's also about denying her the right to determine the way in
12 which she may choose to be pregnant. The physical, psychological and social harms
13 from this crime may stem from the pregnancy itself, the childbirth, the forced
14 maternity and including potential stigma upon return * of the victim and child to
15 their community. It's this focus on reproductive autonomy and health which
16 distinguishes forced pregnancy from the crimes of imprisonment and rape and sexual
17 slavery and forced marriage as an inhumane act, which the victims in this case also
18 endured.

19 Now turning directly to the question 9 as to how the second sentence of Article 7(2)(f)
20 should be interpreted. And this necessitates an understanding of the drafting
21 history behind this crime. I can say that the negotiations at the Rome Conference
22 were, to put it mildly, as I can personally attest to, they were very intense. And this
23 led to the delicate compromise that we see in the Statute so that the crime would not
24 be seen as affecting national laws on pregnancy and abortion.

25 Specifically, the concern of some delegations at Rome was to ensure that their

1 national laws prohibiting or restricting termination of pregnancies would not be
2 criminalised under the Statute. So the compromise reached led to the present and,
3 some might say, narrow definition of the crime and to then doubly reassure certain
4 States that the inclusion of the crime would not interfere with States' rights to regulate
5 nationally on pregnancy - that is anti-abortion laws - the second sentence was added.
6 But this second sentence does not add a new element to the crime. And that explains
7 why there's no reference to it in the Elements of Crimes paper. What it does, all it
8 does is reaffirm that the crime does not affect or void or nullify national legislation.
9 It cannot restrict the Court's interpretation of the crime but was inserted to reassure
10 concerned States that its enumeration would not invalidate restrictions of abortion
11 under national law.

12 Mr Ongwen's arguments that the Trial Chamber erred by failing to consider Ugandan
13 national laws on abortion and indeed Acholi cultural sensitivities, but the Trial
14 Chamber would have erred by doing so. In fact, those arguments would lead to the
15 crime having potentially different definitions or outcomes depending on the
16 particular laws in the situation country. And this of course is something that cannot
17 be countenanced under the Statute and its non-discrimination principle in Article
18 21(3).

19 Your Honours, this concludes --

20 PRESIDING JUDGE IBÁÑEZ CARRANZA: Counsellor -- oh, thank you.

21 MS BRADY: [12:26:48] -- my brief submissions in answer to your questions on the
22 crime of forced pregnancy.

23 Thank you.

24 PRESIDING JUDGE IBÁÑEZ CARRANZA: [12:27:00] Thank you.

25 Victims Group 1, please, you have the floor for 15 minutes starting now.

1 MR COX: [12:27:09] Thank you, your Honour, Madam President.
2 Once again, the OTP has made my job easier for their excellent oral presentation so I'll
3 try to be brief. I won't promise I won't use all the time because every time a lawyer
4 says that it won't use all the time, we remain liars so -- but I'll try.
5 Your Honours, first I would like to address the issue of my learned friend from the
6 Defence saying that the rules were imposed by Joseph Kony and everybody had to
7 obey by them. I would just recall that in one of the most important issues as to who
8 would get which wife, P-0226 said that he refused to give her two escorts sent by
9 Joseph Kony because he wanted to keep her for himself. So those rules seems that
10 were in place, but Mr Ongwen had such power that -- or felt had such power that he
11 could disobey them with regard to the will of Mr Kony.
12 Another thing that I have to mention because I've been hearing this theme of cultural
13 relativism since the '90s about human rights and that they are not universal, that
14 there's cultural relativity. It has always, since the 1990s, surprised me that this
15 argument is usually raised by those in power and by male. It's hardly raised by
16 victims, women victims, or people that are under oppression. That's something that
17 I had as to say.
18 Another thing that's interesting, your Honour, from some of the allegations that the
19 Defence has, that it seems that it turns around the principle of *concursum delictum*. It
20 seems that if they share -- in their view, if a crime shares some protected interests,
21 then they will absorb, when the principle is exactly the opposite. If not all interests
22 are in the crimes and there's some that are left out of another crime, then the will of
23 the legislator nationally and the drafters internationally is that that extra protected
24 value must be punished. It cannot go unpunished.
25 Therefore, the fact that some interests are shared by some of these crimes does not

1 make it or does not solve the problem if you have the power to convict somebody for
2 the other crimes.

3 And in this I would address directly the question number 7. Your Honour, forced
4 marriage has in my view -- not my view, but in what has been even said by the Trial
5 Chamber, what is protecting is liberty because it needs confinement and the -- sorry,
6 sorry, the forced marriage is the autonomy to choose one's partner. And it's
7 important to take into consideration the harm that has been suffered, and this was
8 vividly explained by witnesses that gave testimony through this trial, of what -- the
9 stigma they would reach when they went back to their communities, that they would
10 be set aside. The impact that they themselves suffered in terms of inheritance and
11 their children suffered in terms of inheritance. So it's that that is being protected.
12 The autonomy to choose one's partner and the harm that is being protected or
13 covered is all this.

14 As to rape, of course it's sexual indemnity. Forced pregnancy is not the right to
15 terminate your pregnancy what is being protected. It's the liberty, confinement,
16 that's the slavery -- sorry, the forced pregnancy and the autonomy to choose when
17 you reproduce and how you reproduce. So it's different from the other ones. And
18 sexual slavery and confinement and an act of a sexual nature.

19 And if you want to see how the Trial Chamber determined these elements, you can
20 see paragraph 3083 and 3084.

21 I would like to address now the issue of the *sine lege* principle. And this is
22 interesting because at first site you might agree that *clausus apertus* is incompatible
23 with this principle. However, the Trial Chamber dealt with, and I would call your
24 attention to footnote 7200 that has ample quotations from both the European Court of
25 Human Rights and the Inter-American Court of Human Rights of how this norm is

1 compatible with the standard of *sine lege*. And one reason is of course because it
2 respects and it is even more explicit in about -- about its elements than, for example,
3 Common Article 3 of the Geneva Convention. It says adopting legislative or drafting
4 in the Statute, it codifies the principle of *ejusdem generis*, those of a similar kind. And
5 what's interesting here is that it says, it gives element to those similar kind, it says
6 what kind of nature.

7 And it's interesting, your Honour, in the sense that if you compare other humane acts,
8 that the Prosecutor and the Trial Chamber took the position that it was under 7(1)(k)
9 and not 7(1)(g) which says other forms of sexual violence. So forced marriage has a
10 different connotation. And in the principle *nullum crimen sine lege* there is no
11 problem.

12 Let me just refer to two cases that are mentioned in the footnote that I just said. And
13 this is the Del Rio Prada v. Spain in paragraph 93 and it says: "The role of
14 adjudication vested in the courts is precisely to dissipate such interpretational
15 doubts as remain. The progressive development of criminal law through judicial
16 law-making is a well-entrenched and necessary part of the legal tradition in the
17 Conventional States."

18 The Inter-American Court in the Gelman case in paragraph 97 says: "In this regard,
19 it is important to note that, in relation to norms that refer to ... domestic or
20 international criminalisation of a specific conduct, the Court has established that such
21 a norm must be appropriately accessible and predictable. In other words, the
22 perpetrator must be conscious of the unlawful nature of his conduct and must
23 understand that he will have to answer for it."

24 What does it require? It requires somebody to know and be able to submit their
25 conduct to the expected conduct by the drafters. And this is something that 7(1)(k)

1 respects. Anyone would know that forcing somebody to marry would be -- would
2 cause this extra and similar characteristic of affection of the dignity. I think this is
3 not disputable. It does respect the purpose of the principle of *nulla -- sine lege nulla*
4 *crimen*.

5 Finally, your Honour, with regards on how should the Article 7(2)(f) of the Statute be
6 interpreted when it provides that definition of a crime in relation with determination
7 of a law of abortion. I would say, as has been said, that it does not -- forced
8 pregnancy does not necessarily protect the right to terminate a pregnancy but the
9 right to determine when, how a woman gets pregnant. So it's not incompatible.
10 And the flip side of the reasoning would be that those women in countries that have
11 abortion laws are not protected from forced pregnancy. So you could rape a woman,
12 make her pregnant and it would go unpunished, that extra element, that extra
13 disvalue would be unpunished in a country that has abortion law. That makes no
14 sense and it defies the object and purpose of the Statute.

15 Thank you, your Honour.

16 PRESIDING JUDGE IBÁÑEZ CARRANZA: [12:37:33] Thank you, Counsellor.

17 Now Victims Group 2, Mrs Paolina Massidda you have the floor for 15 minutes
18 starting now.

19 MS MASSIDDA: [12:37:42] Thank you, Madam President.

20 Madam President, your Honours, the judgment at paragraph 2109 recognises the
21 abuse of women and girls in the LRA to be, I quote, "truly systemic and institutional".
22 The Prosecution and my colleague Mr Cox have already developed the issue of the
23 types of crimes, the difference between the crimes, and the elements and the protected
24 different interests. Professor Meyersfeld also provided elements on that. Therefore,
25 I will limit my submission today on forced marriage and forced pregnancy,

1 particularly in light of the fact that I represent a specific category of victims affected
2 by these crimes.

3 First of all, I would like to address the correctness of the qualification by the Trial
4 Chamber of the crime of forced marriage. As already stated today, forced marriage
5 is prohibited by many human rights instruments providing that no marriage shall be
6 entered into without the free and full consent of the intending spouses.

7 So the crucial element of the crime is the mental and moral trauma resulting from the
8 imposition, by threat or force arising from the perpetrator's words or conduct, of a
9 forced conjugal association and a relationship of exclusivity between the so-called
10 couple.

11 The use of the label "wife" causes a unique psychological suffering which leads to
12 stigmatisation and rejection of the victims by their families and communities.

13 Forced marriage also inflicts grave physical injury and results in long-term moral and
14 psychological suffering for the victims.

15 And turning incidentally to the argument in relation to culture which was brought
16 before the Chamber earlier this morning by my learned colleague of the Defence,

17 I would like to recall what does it mean, forced marriage, in the Acholi society with
18 the words of Professor Wessels, one of the experts called by the victims. And I quote:

19 "By definition, the so-called relationship that was were assigned, forced inside the
20 LRA were illegitimate relations as viewed [in the] Acholi society, so ... they did not
21 count as a legitimate marriage [...] And it basically means that the girl cannot
22 become married, nor can she become a mother in the context of a legitimate marriage
23 and that is what it takes to become a full woman. So this is exquisitely painful for
24 girls in Acholi society. It means that they are trapped in a liminal space where they
25 [...] are not a girl anymore, but they are not a full woman." End the quote.

1 Transcript 176, pages 27, 28 trial proceedings.

2 And victims of this case have indicated that their condition of wife had and still have
3 serious repercussions on their possibility of restoring what they call a normal relation
4 with men, and that even if they are reintegrated in the community, they feel that said
5 reintegration is not - to use their words - full and sometimes only dictated by social
6 conventions more than by a genuine will to help them in rebuilding their lives.

7 It is precisely, your Honour, what Professor Meyersfeld describes in her Amicus as
8 the internal and external component of the harm of forced marriage, qualifying the
9 first one as "devastating" because the victims faces constant dehumanisation.

10 In our submission, your Honour, the Trial Chamber correctly convicted Mr Ongwen
11 of forced marriage as another inhuman act under Article 7(1)(k) of the Statute,
12 recognising that forcing another person to serve as a conjugal partner may, per se,
13 amount to an act of similar character to the ones enumerated by Article 7(1) of the
14 Statute, intentionally causing great suffering or serious injury to body or to mental or
15 physical health, and that the crime of forced marriage is not subsumed by the crime of
16 sexual slavery.

17 Paragraph 2748 and 2749 of the judgment clearly expressed this concept. And I
18 quote:

19 "The central element, and underlying act of forced marriage is the imposition of this
20 status on the victim [...] regardless of the will of the victim of duties associated with
21 marriage - including in terms of exclusivity [and] (forced) conjugal union imposed on
22 the victim - as well as the consequent social stigma."

23 And the Trial Chamber went even another step forward as regards the definition and
24 the notion of coercion. While both the Extraordinary Chamber in the Courts of
25 Cambodia reference three in our list of authorities and the Special Court of Sierra

1 Leone reference four, considered as forced marriage the situation where a victim is
2 forced to marry under the threat or use or physical violence. In this case the Trial
3 Chamber also recognised mental abuse may only constitute a way of taking
4 advantage of a coercive environment and equally amounts to coercion.

5 We submit, your Honour, that the full interpretation of the law by the Trial Chamber
6 should be upheld by this Chamber for two reasons.

7 First, the interpretation recognises the specific elements of the crimes, restriction of
8 freedom of movement, repeated sexual abuses, forced pregnancies, forced labour, in
9 particular, forced performance of domestic duties, and the central element of a crime,
10 imposition of marriage on the victims against their will with the consequent social
11 stigma.

12 Second, in upholding the interpretation of the Trial Chamber, this Chamber will also
13 conclusively establish that victims of forced marriages suffer separate and additional
14 harm distinct for the one of the crime of sexual slavery or other gender crimes.

15 Finally, your Honour, on the question related to the interpretation of Article 7(2)(f),
16 our submission is that national laws are irrelevant to the interpretation of a crime of
17 forced pregnancy.

18 In this regard, we concur with Dr Grey which indicated in their amici that the
19 definition shall not in any way be interpreted -- sorry, that the sentence, "the
20 definition shall not in any way be interpreted as affecting national laws related to
21 pregnancy" is merely stating the obvious. The ICC has no authority to directly
22 influence national legislation in the matter.

23 The amici also underline - and we also concur on that and the Prosecution also gave
24 some elements on that this morning - this reading of that sentence is confirmed by the
25 preparatory works of the Statute.

1 Very briefly, the inclusion of forced pregnancy as a crime under the Statute was first
2 recommended by Women's Caucus for Gender Justice at the meetings of the
3 Preparatory Committee in 1997. And you can read the full proposal, your Honour,
4 as reference 5 in our list.

5 The proposal was included by the Preparatory Committee in the draft because there
6 was at the time unanimous agreement in the matter.

7 Subsequently, the United States - reference 9 on our list - and Bosnia/Herzegovina
8 proposed to include forced pregnancy in the list of crimes against humanity.

9 Bosnia/Herzegovina in particular - reference 10 of our list - provided a paper
10 indicating inter alia, and I quote: "The crime of enforced pregnancy given its
11 particular purpose, does not depend on whether or not women have access to
12 abortion. While women under the national laws of Bosnia and Herzegovina had and
13 have legally available to them the full range of options, it is our experience that
14 recognition of the legal status of victims of such crimes would not encourage
15 termination of pregnancy but to the contrary." End of quote.

16 It is at that stage of the negotiations that it appears that the issue turned into abortion
17 debate. And I refer to reference 11 on our list.

18 The question of whether to include enforced pregnancy, International Criminal Court,
19 I quote "is shaping up into a classic battle between pro-abortion and anti-abortion
20 camps, but some diplomats feel such a division is misguided." End of quote.

21 Women's Caucus, who first pushed for the inclusion of the crime, expressed concern
22 at that time in these terms. I quote: "With the efforts of some groups to insert the
23 issue of abortion into [the] negotiations through attacking the inclusion of forced
24 pregnancy in the Statute," we express our concern. "The effort to link the crime of
25 forced pregnancy to the issue of abortion ignores that forced pregnancy is a violent

1 crime, committed with a violent intent, and it causes extreme suffering for the
2 victims." End of quote.

3 The entire quote can be read I believe at point 12 of our list.

4 Because of these pressures and because of these debates between States, the drafters
5 arrived at the current wording in Article 7(2)(f).

6 In conclusion, your Honour, the drafting history shows --

7 THE COURT OFFICER: [12:50:55] Counsel has two minutes.

8 MS MASSIDDA: [12:50:58] Thank you.

9 In conclusion, your Honour, the drafting history shows that the purpose of the second
10 sentence of Article 7(2)(f) was not to restrict the Court's interpretation of the term
11 "forced pregnancy", but rather, to reassure concerned States that the enumeration of
12 forced pregnancy as a crime against humanity and war crime in the Statute does not
13 invalidate restrictions on abortion under national law.

14 Thank you.

15 PRESIDING JUDGE IBÁÑEZ CARRANZA: [12:51:31] Thank you.

16 Thank you, Counsellor.

17 Well, now we will hear the submissions of the amici curiae in relation to the questions
18 I read earlier today regarding sexual and gender-based crimes and that were included
19 in the directions on the conduct of the hearing.

20 The order will be as follows: First, Professor Allain; second, Professor
21 Valerie Oosterveld representing a group of amici; third, Dr Grey and Akila
22 representing a larger group of amici; and fourth, Professor Meyersfeld from Southern
23 African Litigation Centre Trust. Each of you will have the floor for 10 minutes.

24 Now, Professor Allain, you have the floor for 10 minutes. Professor Allain, are you
25 with us?

1 MR ALLAIN: [12:52:31] Thank you, Madam President.

2 PRESIDING JUDGE IBÁÑEZ CARRANZA: [12:52:33] Thank you.

3 MR ALLAIN: [12:52:33] I wish to thank the Court of its willingness to allow me to
4 participate in this hearing as amicus wherein I'm guided exclusively by the first
5 question under the heading of sexual and gender-based crimes which reads: What
6 are the legal elements of and interests protected by the crimes of forced marriage,
7 rape, sexual slavery and forced pregnancy, where I will consider in the main sexual
8 slavery but also forced marriage.

9 In my written submission, number 1972, I use the metaphor of Russian nesting dolls
10 to unpack an understanding of sexual slavery within the legal framework of the
11 International Criminal Court.

12 The first of these layers is the definition of "slavery" as established in public
13 international law. For nearly a century that definition of --

14 THE INTERPRETER: [12:53:17] Your Honour, could counsel speak slowly a bit.

15 PRESIDING JUDGE IBÁÑEZ CARRANZA: [12:53:22] Amici, please, can you slow
16 down a bit for the benefit of the interpreters. Thank you.

17 MR ALLAIN: [12:53:29] Cheers.

18 The first of these layers is the definition of "slavery" as established in public
19 international law. For nearly a century, that definition of slavery resided in a type of
20 shadowland of disuse. This was so because the definition of slavery established in
21 1926 was the end product of an abolitionist campaign which stretched back to its
22 origins in the late 18th century.

23 Yet, as Court will know, to abolish in law is to repeal legislation. And this is
24 precisely what transpired. Where States had laws on the books allowing for slavery,
25 these were abolished. Just as torture has been abolished during the 18th century, so

1 too was slavery abolished by the early 20th century.

2 And yet it would be trite to say that torture does not exist today. It certainly does.

3 But it does so in a *de facto* manner rather than in a *de jure* manner, for legal torture is
4 prohibited

5 However, the residual from the abolitionist campaign around slavery was that
6 slavery was generally recognised as legal ownership, and all laws allowing for
7 slavery ownership had been repealed, slavery itself was thus effectively legislated out
8 of existence.

9 However, from the 1948 Universal Declaration of Human Rights, as customary law,
10 through the 1956 Supplementary Convention and the 1966 UN International
11 Covenant on Civil and Political Rights, the obligations related to slavery are not to
12 abolish but to prohibit, and thus there is an obligation on States to prohibit by law the
13 enslaving of one person by another.

14 Flowing from this is recognition that, like torture, *de jure* enslavement no longer exists.
15 However, the prohibition of *de facto* slavery does exist and the definition of slavery
16 allows for it.

17 Considering, however, how slavery/enslavement is currently being interpreted. The
18 example of torture is instructive. In international law we have a definition of torture,
19 yet in interpreting what constitutes torture, international and domestic courts do not
20 bypass that definition and instead look for the indications of torture.

21 Yet, because of this large shadow cast by the abolitionist campaigns against slavery,
22 international courts have until recently failed to engage with that definition of slavery
23 and instead found instances of slavery/enslavement by reference to the indications of
24 slavery without providing the legal certainty of setting out a core legal understanding
25 of the normative concept of slavery/enslavement. Instead, one could say, where

1 slavery is concerned, such determinations have been based, although, wrapped in
2 more sophisticated language, on one of the most infamous lines to have come out of
3 the United States Supreme Court. That is: "I know it when I see it."

4 That should not be. As I have outlined in my amicus brief, in 2016 the
5 Inter-American Court of Human Rights did provide a conceptualisation of slavery. I
6 enjoin this Court to follow --

7 THE INTERPRETER: [12:56:51] Your Honour, could the speaker slow down. We
8 are not able to follow.

9 PRESIDING JUDGE IBÁÑEZ CARRANZA: [12:56:56] Amici, the interpreters are
10 not able to follow you. Please slow down. Thank you.

11 MR ALLAIN: [12:57:03] Apologies, Madam President.

12 As I have outlined in my amicus brief, in 2016, the Inter-American Court of Human
13 Rights did provide a conceptualisation of slavery. I enjoin the Court to follow the
14 Inter-American Court's lead, and the more so because the principle of legality and the
15 right of the accused requires no less.

16 Turning now to this Court's elements of the crimes, the Court will recognise that
17 common element one of the crimes of sexual slavery has attached to it a common
18 footnote which sets out that in certain circumstances forced labour, human trafficking,
19 and for our purposes, servile status found in the 1956 Supplementary Convention will
20 be germane where deprivations of liberty are at play.

21 I have demonstrated in my brief that those circumstances are when any of these
22 practices reach the legal threshold of slavery/enslavement whereby control
23 tantamount to possession is exercised. And in the case we are considering today,
24 that such control was manifest, fundamentally, through sexual violence visited upon
25 girls and women.

1 Amongst the four servile statuses mentioned as crimes in the 1956 Supplementary
2 Convention is one setting out the various forms of servitude related to marriage,
3 which itself is reinforced by provisions of Article 2 of that convention, which seeks to
4 protect the interest of consent to marriage.

5 Beyond this, the Court will recognise any case law emanating from the other courts,
6 whether domestic or international, is at best persuasive. Yet, the

7 Inter-America -- sorry. Yet, the International Criminal Court must in the first
8 instance function within its own legal framework, which includes that framework of
9 legality.

10 If the Appeals Chamber was to confirm the Trial Chamber's determination in regards
11 to forced marriage as other inhumane acts, it appears that it must overcome the
12 following hurdles:

13 First, navigate the fact that States negotiating at the Rome Conference specifically
14 assign forms of forced marriage which are at play in this case as falling within the
15 purview of the crimes of sexual slavery.

16 Second, to put aside the will of States Parties and accept that it is -- that in this case
17 forced marriage is distinct and goes beyond the provisions of the 1956 Supplementary
18 Convention.

19 And I would add, third, that the Appeals Chamber would need to engage with the
20 distinction between the treatment of those the appellant termed as "wives" and those
21 he called *ting tings*. In substance, though not in form, these two categories appear to
22 have been treated the same by the appellant. His actions in this regard was the
23 exception that proves the rule. Either these girls and women were all enslaved with
24 sexual violence the means of transferring communal Lord's Resistance Army
25 ownership to ownership vested exclusively with the appellant, and thus sexual

1 slavery, or those in both categories were all wives subject to forced marriages.

2 Now, by way of conclusion, as I noticed -- as I noted in my amicus brief, as a distinct
3 form of sexual slavery in this case the Court may wish to ascribe a name to this
4 practice of conjugal enslavement. The enslavement which --

5 THE COURT OFFICER: [13:01:07] Two minutes left.

6 MR ALLAIN: [13:01:10] -- did transpire was of a sexual nature and used the
7 foundational power attaching to the right of
8 Ownership, not of purchasing or selling, lending or bartering, but rather of possession,
9 the exercising of control tantamount to possession which deprived these girls and
10 women of their liberty through sexual violence.

11 In this manner, and returning to the question put by the Chamber as to what are the
12 legal elements of and interests protected by, specifically the crime of sexual slavery,
13 they are inter alia:

14 One, the principle of legality and the right of the accused to know the charges against
15 them;

16 And two, by confirming the acts which the appellant has been found guilty of at trial
17 of the other inhumane acts of forced marriage is to rob future girls and women, future
18 survivors of the protection - and I have called it in my brief super-normative
19 armour - that is the protection which is inherent in the crimes of sexual slavery.

20 These are:

21 First, while slavery/enslavement - and thus, sexual slavery - is, as a right,
22 non-derogable, the protection afforded to forced marriage as other inhumane acts
23 could be derogated from by states and times of emergency, including war.

24 Second, unlike slavery/enslavement - and thus, unlike sexual slavery - which is a
25 *jus cogens* norm, the protection afforded by Articles 53, 64 and 71 of the 1969 Vienna

1 Convention on the Law of Treaties, which relates to the invalidation of treaties would
2 not be available to situations of forced marriage as other inhumane acts.

3 And third, in a like manner, the protection afforded to slavery/enslavement - and thus
4 sexual slavery - would not be available to forced marriage as other inhumane acts in
5 regard to the regime of the State responsibility, as detailed in the 2001 Articles on
6 State Responsibility. This includes --

7 PRESIDING JUDGE IBÁÑEZ CARRANZA: [13:03:32] Professor, you have 30
8 seconds to conclude, please.

9 MR ALLAIN: [13:03:36] This includes three things: Article 26 related to the
10 circumstances precluding wrongfulness; Part Two, Chapter III, which sets out the
11 manner in which obligations *erga omnes* comes into play in situations of serious
12 breaches of the obligations under peremptory norms of general international law; and
13 it might be added here that such protection, it may be said, is currently being invoked
14 by the Gambia in regard to genocide before the International Court of Justice; and
15 finally, the protection afforded by Article 50(d) wherein *jus cogens* obligations are not
16 to be affected by countermeasures.

17 These are the legal elements of and interests protected by the crimes of sexual slavery.
18 Thank you.

19 PRESIDING JUDGE IBÁÑEZ CARRANZA: [13:04:23] Thank you. Thank you.
20 Now Professor Oosterveld. Professor Oosterveld, you have 10 minutes starting now,
21 please.

22 MS OOSTERVELD: [13:04:37] Your Honours, my name is Valerie Oosterveld. I'm a
23 Canadian professor of international law and I am appearing before you today on
24 behalf of a group of amici, all of whom are experts in gender-based crimes. I'm
25 commenting solely on the topic of forced marriage, and in our observations I will

1 address two questions you asked of the amici in turn.

2 The first question is: Does forced marriage amount to an other inhumane act under
3 Article 7(1)(k) of the Rome Statute?

4 And the answer is yes. The category of other inhumane acts has been part of
5 international criminal law since the post-World War II trials, leading the Special
6 Court for Sierra Leone's Appeals Chamber to determine that the category of other
7 inhumane acts has crystallised into customary international law.

8 The category of other inhumane acts was deliberately designed from the outset to be a
9 residual category, a clause meant to catch inhumane wrongdoing that does not fit
10 within the enumerated crimes categories. And a residual category was needed
11 because drafters could not possibly list every inhumane act. And forced marriage is
12 an inhumane act falling within the residual category of other inhumane acts. It has
13 been accepted as such for 14 years by the Special Court for Sierra Leone, the
14 Extraordinary Chambers in the Courts of Cambodia and this Court, covering a time
15 span of more than 40 years, given the longstanding legal recognition of other
16 inhumane acts as a residual category of crimes against humanity in this and other
17 courts and the recognition of forced marriage as an other inhumane act. With
18 respect, the Defence's assertion that forced marriage violates the principle of legality
19 is incorrect in our view.

20 The second question you asked was: What are the legal elements of forced
21 marriage?

22 And to answer this I will discuss the elements of other inhumane acts, how forced
23 marriage satisfies those elements, and how forced marriage is different from the
24 enumerated crimes against humanity in Article 7(1).

25 Forced marriage is not a standalone crime, and therefore, the only elements of crimes

1 that must be proven by the Prosecutor are those for other inhumane acts set out in the
2 ICC's Elements of Crime. So I will turn to those elements.

3 The first aspect that the Prosecutor must prove is that forced marriage is an inhumane
4 act. And compelling a person by force, threat of force or coercion to serve as a
5 conjugal partner in the context of war or mass atrocity is inhumane. And this has
6 been convincingly established by the Special Court for Sierra Leone and the
7 Cambodia tribunal.

8 The second aspect the Prosecutor must prove is that forced marriage inflicts great
9 suffering or serious injury to body or to mental or physical health. And forced
10 marriage fulfils at least one of these and usually all of these.

11 The wide range of serious physical and mental harms and their long-running effects
12 to the victims of forced marriage was correctly summarised in the Ongwen trial
13 judgment and has also been enumerated by the courts I have mentioned.

14 The third aspect the Prosecutor must prove is that forced marriage is of a character
15 similar to any other act referred to in Article 7(1). And it is. In this case the Trial
16 Chamber identified the imposition of unwanted and unconsented spousal status,
17 including on very young victims and brutal forms of violence, physical and
18 psychological injury and long-lasting stigmatising harms to victims and their children.

19 The nature and gravity of this conduct and these harms is similar to the nature and
20 gravity of conduct and harms associated with other Article 7(1) acts. And the
21 Special Court for Sierra Leone made a similar determination in 2008.

22 The final consideration is whether and how forced marriage can be distinguished
23 from the other Article 7(1) acts.

24 And forced marriage is different from the enumerated acts listed in Article 7(1)
25 because it is distinctly composed of two types of harm. First, the violation of the

1 victim's relational autonomy and, secondly, myriad rights violations. The violation
2 of relational autonomy was correctly described in the Ongwen trial judgment and
3 other jurisprudence as the imposition regardless of the will of the victim of a forced
4 conjugal union in which the victim is exclusively attached to the other member of the
5 union. And this is the central defining aspect of forced marriage.
6 This conduct is not present in any of the other enumerated acts and it leads to distinct
7 and serious long-lasting harms such as the deprivation of the victim's fundamental
8 human right to choose a spouse or conjugal relationship, the inability to leave this
9 relationship without fear of violent and deadly retribution, the infliction of physical
10 and psychological trauma and severe and long-lasting social and cultural
11 stigmatisation of the victims and their children.
12 And the denial of relational autonomy is accompanied by a constellation of rights
13 violations and these rights violations can differ from situation to situation. And in
14 this case, the Trial Chamber has noted a broad range of violations.
15 The Trial Chamber described the situation of Mr Ongwen's so-called wives as a
16 specific microcosm of the coercive environment all women and girls faced in the LRA.
17 The microcosm of forced marriage contains distinct conduct and distinct harms and
18 its recognition protects distinct interests, particularly, but not only, the individual's
19 basic right to consensually marry and establish a family.
20 Given these distinguishing factors, forced marriage is not the same as sexual
21 slavery --
22 THE COURT OFFICER: [13:12:56] You have two minutes left.
23 MS OOSTERVELD: [13:12:59] Thank you. As the Defence and Professor Allain
24 assert. And Professor Allain is incorrect. Forced marriage was not discussed by the
25 delegates in Rome in drafting the Rome Statute and was not deemed to be a part of

1 sexual slavery. And I can say this from personal experience.

2 Thank you and I look forward to any questions you may have regarding our
3 submissions.

4 PRESIDING JUDGE IBÁÑEZ CARRANZA: [13:13:26] Thank you, Professor.

5 Now we will go for a break, lunch break. We will reconvene by 14 hours.

6 THE COURT USHER: [13:13:42] All rise.

7 (Recess taken at 1.13 p.m.)

8 (Upon resuming in open session at 2.07 p.m.)

9 THE COURT USHER: [14:07:15] All rise.

10 Please be seated.

11 PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:07:55] Thank you. Welcome back.

12 Dr Grey and Mrs Radhakrishnan, you have the floor for ten minutes. I hope I have
13 pronounced well your name. Please, ten minutes, starting now.

14 MS RADHAKRISHNAN: [14:08:11] Thank you.

15 Madam President, your Honours, I'm Akila Radhakrishnan, the President of the
16 Global Justice Center, presenting on behalf of the Global Justice Center, Women's
17 Initiatives for Gender Justice, Amnesty International and Dr Rosemary Grey.

18 THE INTERPRETER: [14:08:24] Your Honour, could you please ask the speaker to
19 slow down.

20 PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:08:27] I have a message from the
21 interpreters. Please slow down for the benefit of them.

22 MS RADHAKRISHNAN: [14:08:34] Today, in answering your questions, I will focus
23 on three aspects of forced pregnancy: First, the legal interest behind the crime;
24 second, some key elements of the crime; and third, the relationship to national laws
25 relating to pregnancy.

1 To the first point, on the legal interest behind the crime: The criminalisation of
2 forced pregnancy protects the right of every individual to exercise agency over their
3 body, their fertility and their sexuality. As such, the legal interests protected by the
4 crime are personal, sexual and reproductive autonomy, values central to the
5 protection of physical integrity and human dignity, which are at the core of both
6 international human rights and humanitarian law.

7 The protection of reproductive autonomy was the rationale for the inclusion of the
8 crime in the Rome Statute, distinct from related crimes, such as rape or unlawful
9 confinement.

10 As noted by the CLRV, when the Women's Caucus for Gender Justice, now the
11 Women's Initiatives for Gender Justice, an amici here, first proposed that forced
12 pregnancy be recognised as a crime in the Rome Statute, the offence was described in
13 terms of attacks on reproductive integrity.

14 Further, during Rome Statute negotiations, it was proposed that the Statute refer to
15 forced impregnation, instead of forced pregnancy, but this was rejected. States
16 understood that forced pregnancy involved more than making a person forcibly
17 pregnant. It also involved restricting the victim's ability to decide whether and
18 under what conditions to proceed with that pregnancy.

19 Your Honours, this distinct legal interest is aptly expressed by the Trial Chamber
20 phrase "personal and reproductive autonomy," a concept now widely embedded in
21 international human rights law. We are not alone in supporting this interpretation
22 by the Trial Chamber. The Prosecutor and both victims' legal representatives agree.
23 There are suggestions that the concept of reproductive autonomy is too political to
24 discuss in this Court or should be viewed in light of cultural considerations, but such
25 political and cultural considerations are irrelevant in this Court. Further, the notion

1 enjoy substantial support.

2 As our brief demonstrated, international and regional instruments explicitly protect
3 these rights as recognised by a range of human rights mechanisms and courts. In
4 addition, the majority of countries allow access to abortion, particularly in the context
5 of rape.

6 For these reasons, reproductive autonomy is the appropriate legal interest behind the
7 crime of forced pregnancy.

8 THE INTERPRETER: [14:11:35] Your Honour, could the speaker please slow down.

9 PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:11:41] Please slow down, again. I
10 have another message from the interpreters.

11 MS RADHAKRISHNAN: [14:11:46] I will now turn to the second point of our
12 submission today: The elements of forced pregnancy. I'm going to focus on just
13 two, noting that all parties agree that the Trial Chamber correctly identified the legal
14 elements of the crime.

15 Let me start by addressing the definition of unlawfully confinement. Confinement is
16 unlawful when it violates domestic or international law or procedure.

17 We note, your Honours, that the Rome Statute does not define the term

18 "confinement." In accordance with Article 21(3), confinement must include all
19 violations of the right to liberty in international human rights law, which, according
20 to the Human Rights Committee, concerns freedom from confinement of the body.

21 This human rights analysis indicates the confinement should not be understood
22 narrowly to require internment under lock and key, but as restrictions that, in practice,
23 mean a person cannot leave.

24 The ICTY Kunarac case is helpful here. There, the Trial Chamber held that women
25 had been held captive in a house, even though they may have had a key, because they

1 had nowhere to go. They were surrounded by enemy territory. They had no place
2 to hide.

3 A person is deprived of their liberty even though they are theoretically able to leave
4 the place of confinement if they cannot go anywhere.

5 We submit that this analysis gives proper meaning to the right to liberty and can
6 guide this Chamber's interpretation of the term "confinement."

7 The drafting history of the Elements of Crimes also show that States rejected a
8 proposal to require imprisonment within a confined area for forced pregnancy,
9 preferring to leave the term to be decided on the facts of the case.

10 I now turn to the specific intent for forced pregnancy. The Trial Chamber correctly
11 found on the facts that the specific intent to carry out other grave violations of
12 international law had been met. It held that there was intent to continue committing
13 certain Rome Statute crimes.

14 We submit, and the Prosecutor agrees, that the phrase "other grave violations of
15 international law" is not limited to Rome Statute crimes. It must include, in line with
16 Article 21(3), serious violations of internationally recognised human rights, including
17 the rights to life, to be free from torture or other forms of cruel, inhuman or degrading
18 treatment, and to be free from discrimination on the basis of sex or gender.

19 In that respect, given the precedential nature of this case, we believe it would be
20 useful for the Appeals Chamber to express its views on the intended scope of the
21 phrase "other grave violations of international law."

22 I will now turn to the issue of the relevance of national abortion laws.

23 The second sentence in Article 7(2)(f) states that the definition of forced pregnancy
24 "shall not in any way be interpreted" --

25 THE INTERPRETER: [14:15:12] Could the speaker please slow down.

1 PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:15:16] Please, please, again, can you
2 go a little bit slowly. Thank you.

3 MS RADHAKRISHNAN: [14:15:21] -- "as affecting national laws relating to
4 pregnancy." This sentence is merely stating the obvious: The ICC has no authority
5 to directly amend, nullify or void national legislation.

6 The purpose of this sentence was not to add a new element to the crime, nor was it to
7 restrict the ICC's interpretation. Rather, as has been said today, its sole purpose was
8 to confirm that including "forced pregnancy" in the Rome Statute does not in itself
9 invalidate national abortion restrictions.

10 This position seems to be shared by all but the Defence who claim in its appeals brief
11 that the Trial Chamber failed to inquire about the effect its interpretation would have
12 on the national law of Uganda on abortion.

13 This claim raises a question as to if the ICC should modify its interpretation of the
14 legal elements of a crime depending on the content of a national law. The answer is
15 clearly no. Interpreting the definition of forced pregnancy as being contingent on
16 national abortion laws is erroneous. It is at odds with the drafting history, would
17 lead to legal uncertainty, and would result in discriminatory outcomes in violation of
18 Article 21(3).

19 First, the relationship between national abortion laws and forced pregnancy was the
20 subject of extensive debate at the Rome Conference, as the Prosecutor and the CLRV
21 have detailed today.

22 As correctly noted by the Trial Chamber, the final sentence in Article 7(2)(f) resolved
23 this debate by allaying the concern that criminalising forced pregnancy may be seen
24 as legalising abortion. Second, adopting the Defence's approach would also lead to
25 legal uncertainty.

1 Your Honours, it cannot be that an international crime has a chameleon character
2 whereby its interpretation is influenced by the national laws of the state in which that
3 crime occurred.

4 THE COURT OFFICER: [14:17:36] You have one minute remaining.

5 MS RADHAKRISHNAN: [14:17:38] The outcome would be impractical, lead to
6 unequal protection for victims and legal uncertainty for prospective defendants.

7 We additionally submit that Article 72(f) cannot be interpreted as exempting criminal
8 liability under the Rome Statute to those who perpetrate forced pregnancy pursuant
9 to national laws. Indeed, it is the fundamental practice provided in Nuremberg
10 Principle II that, although an act may be legal under national law, this does not relieve
11 individual criminal responsibility under international law.

12 The second sentence of Article 7(2)(f) has been given --

13 PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:18:18] Please, you have 30 seconds
14 to conclude.

15 MS RADHAKRISHNAN: [14:18:21] -- its proper meaning in this case. The ICC's
16 interpretation of forced pregnancy has no direct impact on the national laws of the
17 state, here, Uganda. And conversely, the national laws of a state do not impact the
18 ICC's interpretation of that crime. Thank you.

19 PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:18:41] Thank you.

20 Now, Professor Meyersfeld and Dr Kisla, you have the floor for ten minutes.

21 Professor Meyersfeld.

22 MS MEYERSFELD: [14:18:51] Madam President, your Honours, I will present,
23 together with my colleague, Dr Kisla, who will focus on the distinct material elements
24 of the respective crimes. I will thereafter address issues of evidence relevant to
25 cumulative convictions.

1 MR KISLA: [14:19:11] Madam President, your Honours, forced marriage constitutes
2 a cognizable distinctive crime under Article 7(1)(k) of the Rome Statute.

3 MS MASSIDDA: [14:19:27] Microphone. Madam President, there is no microphone
4 on. Sorry.

5 PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:19:36] There is no microphone on,
6 please.

7 Okay. You can start again. Your ten minutes are running since now, please.

8 Okay. Thank you.

9 MR KISLA: [14:19:11] Madam President, your Honours, forced marriage constitutes
10 a cognizable distinctive crime under Article 7(1)(k) of the Rome Statutes.

11 The distinctive harm of forced marriage lies on the element of forced conjugality. It
12 is the unique harm that qualifies forced marriage as an other inhumane act in terms of
13 Article 7(1)(k), and that it distinguishes it from sexual slavery.

14 The gravity requirement inherent in an other inhumane act is met by internal harm
15 that impacts the body and mind of the victim, as well as external harm in the form of
16 communal exclusion after the victim is released.

17 The unique harm of forced marriage is devastating, and it is not only about enduring
18 sexual assault and performing domestic duties. The harm to the victim also derives
19 from the need for a constant theatrical pretense. This is dehumanising. It
20 annihilates the victim's identity and autonomy, constituting an internal harm that
21 prevents that victim from expressing feelings of fear, shame, hatred and pain.

22 Probably one of the most insidious parts of the crime of forced marriage is that
23 victims are often regarded as complicit in their situation and, therefore, committing
24 an act of betrayal. The mental trauma that victims suffer through isolation that
25 extends beyond the forced marriage, impacts their reintegration into society and,

1 therefore, prolonging their mental trauma.

2 It is in this way that the crime of forced marriage satisfies the gravity threshold of
3 Article 7(1)(k) and that distinguishes it from sexual slavery.

4 I now turn to the crime of forced pregnancy. Forced pregnancy is not simply about
5 the right to an abortion. It is about the removal of choice as to if, when, and how to
6 be pregnant. The violation of a victim's reproductive autonomy is the key element
7 that distinguishes forced marriage -- forced pregnancy from other sexual and
8 gender-based crimes.

9 The assertion by the Defence that a finding of forced pregnancy will improperly
10 impact Ugandan law and that it is incompatible with national law has no basis. Both,
11 the Rome Statute and the Maputo Protocol, which Uganda has ratified, protect the
12 legal interest of reproductive autonomy.

13 This is not about abortion. This is about the spectrum of reproductive health. It is,
14 therefore, entirely incorrect that a finding of forced pregnancy will compromise
15 Uganda's legislative autonomy.

16 Your Honours, our submission is clear. Forced marriage, sexual slavery and forced
17 pregnancy are separate crimes. Each one of these -- those crimes protects distinct
18 interests. These crimes are not about sex.

19 The notion that women are reducible to sex only and that any violation that touches
20 on that amounts to the same crime is outdated and patriarchal.

21 Thank you, your Honours.

22 PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:23:18] Thank you.

23 Now to continue --

24 MS MEYERSFELD: [14:23:22] Madam President, your Honour, your Honours.

25 In order to allow cumulative charges to become cumulative convictions, evidence of

1 the distinct elements of these crimes must be understood as unique, and this is
2 because sexual and gender-based crimes themselves are unique. They occur in
3 private. They are deeply personal and intimate.
4 Unlike the crimes of murder or torture, there is little, if any, forensic evidence. There
5 is no mass grave on earth. There is no torture chamber to examine. There are only
6 the words of the victims, and these words are not easy to speak.
7 They describe acts that replicate society in times of peace; marriage, pregnancy, sex.
8 In most cultures, such topics are not discussed openly. And yet the criminal justice
9 system demands that victims discuss these intimate and violent experiences in the
10 most public of fora, and they must do so in the presence of the perpetrator. This
11 intimacy renders invisible the material elements that distinguish each crime. And
12 this is exacerbated by pre-existing patriarchy.
13 Victims must give their evidence in the context of social conditioning that demeans
14 women and their sexuality; that views women as untrustworthy and unreliable; and
15 that all too often blames women for the violence wrought upon them.
16 In addition, the neurological response to sexual and gender-based crimes results in a
17 cerebral suppression of memory, leading to scattered and delayed testimony. This is
18 anathema to the legal process, which links certainty and detail to believability. In
19 the case of sexual and gender-based crimes the inverse is true.
20 It is for these reasons that render the distinctive elements of the crimes invisible that
21 we propose three approaches to evidence.
22 The first relates to victim demeanour. Victim witnesses may use language that is
23 euphemistic or vague. They may seem uncertain and perhaps contradictory. Such
24 demeanour must not prejudice a victim witness nor denude the reliability of her
25 testimony.

1 The second principle is that evidence of third parties should be admissible to
2 corroborate the testimony of the victim. Third parties include victims of crimes
3 perpetrated by the accused, by those under his command or by those of the armed
4 forces, more generally.

5 Of course, the further removed the third party is from the victim, the less weight is
6 attached to the testimony, but such testimony has probative, contextual value in
7 proving all the distinct elements of the crime necessarily to allow cumulative
8 convictions.

9 The third and last principle is that evidence of crimes committed outside this
10 temporal or geographical scope of the crime and its charges must have by admissible.
11 This is because gendered crimes usually operate on a continuum. There is often no
12 discernible beginning or end.

13 THE COURT OFFICER: [14:28:05] You have two minutes.

14 MS MEYERSFELD: [14:28:07] Thank you.

15 Excluding evidence outside the scope of the charges would really be an artificial
16 amputation of information that is necessary to know in order to assess the distinct
17 material elements of each crimes -- each of the crimes.

18 In conclusion, the unique nature of sexual and gender-based crimes demands that
19 courts hear third-party testimony, admit evidence beyond the scope of the charges,
20 and understand the way in which fear and trauma affect the witness. The failure to
21 do so may have the effect of silencing victims of these crimes, as they have been
22 silenced for decades.

23 PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:29:14] Thank you. Thank you.

24 Now we are going to the response to submissions on sexual and gender-based crimes
25 by the parties. The responses could be to the amici or to the other intervention of

1 other parties. You will have five minutes, each of you.

2 Counsel for Mr Ongwen, you may now respond to the submissions made by the
3 Prosecutor, the participating victims and the amici. You have the floor for five
4 minutes, starting now.

5 MR TAKU: [14:29:46] May it please your Honours.

6 Responding to the amici who has just spoken, to criminalise conduct outside the
7 temporal scope of the charges violates the statutory framework of the Court. It talks
8 about Article 22 and 24, which clearly says it cannot. And also, it is inconsistent with
9 the judgment.

10 The Prosecutor, in paragraph 160 of the Prosecution trial brief, says that this should
11 be for context, the judges -- the judgments says it should be for context. The
12 surprising thing is that, in spite of that, they went ahead to convict him.

13 Now, your Honour, we had the --

14 PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:30:38] Counsellor, could you
15 remove your mask, please.

16 MR TAKU: [14:30:48] Oh, I'm sorry.

17 PRESIDING JUDGE IBÁÑEZ CARRANZA: Remove your mask, please so
18 (Overlapping speakers)

19 MR TAKU: [14:30:52] I'm so sorry, your Honours. COVID has taken everyone
20 hostage.

21 PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:30:52] Yes, go ahead, please.

22 MR TAKU: [14:30:53] Yes. They cited Prosecutor v. Brima and Prosecutor v. Sesay.
23 And, as I said, I was lead counsel in the case of Prosecutor v. Sesay, and the notion of
24 bush wife was highly debated and evidence adduced. And the judges compared it
25 with other forms of marriages in Sierra Leone and came to that conclusion that it did.

1 But in Taylor, the Appeals Chamber said no, because the definition of marriage as it is,
2 that was given, they disagreed because they said there was no definition. You
3 cannot establish international jurisprudence on epithets. The Trial Chamber's
4 so-called marriage, so-called unions, so-called -- it lacked definition.
5 And in any case, in this case, you look at footnote 7211. Concerning the facts of this
6 case, footnote 7211, the definition of marriage given by the Trial Chamber at the time
7 they established the jurisprudence, you ask yourself whether it totally reflects the
8 reality of this case, the reality of the Acholi culture.
9 You have been called to establish jurisprudence based on the facts of a particular case,
10 not on abstract principles and assertions. We say at this point in time, based on the
11 facts of this case, if you cannot establish jurisprudence that will be binding on the
12 international community, on everyone of all cultures on the facts of this case and the
13 determinations that were made by the judges.
14 And even, your Honours, in the case of Brima, even after they found that forced
15 marriage was a cognizable crime, they also went to say -- they said they did not allow
16 a conviction for forced marriage as a war crime or outrages upon personal dignity,
17 finding that a conviction for a crime against humanity of other inhumane acts on the
18 basis of same the facts, suffice to express or cite the disapproval of the forceful
19 abduction and use of women and girls as forced conjugal partners. So it was still
20 consumed when they look at it.
21 And what was that? Based on the fact-based analysis, the principle of speciality,
22 they applied it in this particular case. This is not what the judges did in this case,
23 your Honour.
24 Your Honours, Mr Ongwen was charged as a commander for sex and gender-based
25 crimes and for child soldiers from 1 July 2002 to 31 December 2005. But your

1 Honours will find that Mr Ongwen did not become the commander of Sinia until 4
2 March 2004. So he's being charged as a commander of Sinia when he wasn't.
3 And your Honours will find also that, even when he was arrested and taken to
4 Control Altar for wanting to escape - I'm talking about Salim Saleh - even then,
5 because Tabuley was killed, he was promoted as assistant commander of Sinia, but
6 for this, Sankoh -- oh, no, sorry. I'm confusing the Special Court, Joseph Kony and
7 Otti Vincent decided that he cannot get command because he was wounded, even
8 though he was in Control Altar as a punishment. Your Honours, you will look at,
9 first of all, Buk Abudema footnote 2150, and you also look at footnote 2140, 2141.

10 THE COURT OFFICER: [14:34:49] Counsel's time is up.

11 MR TAKU: [14:34:52] Your Honours, just to complete. Your Honours, just to
12 complete.

13 PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:34:53] You have 30 seconds to
14 conclude.

15 MR TAKU: [14:34:56] Yes, your Honour.

16 And to say the least, your Honours, they said that Mr Ongwen had free will. Your
17 Honours will consult the intelligence reports of the UPDF, UGA-OTP-0255 to 0948 at
18 0945, where they said Ongwen was under surveillance and Joseph Kony wanted to
19 execute him. The judges disallowed it because they said they didn't know the source.
20 The source is right there on the document. It was from Lira.

21 Thanks, your Honour.

22 PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:35:27] Thank you.

23 Counsel for the Prosecution, you have the floor for five minutes. Do you have any
24 response?

25 MS BRADY: [14:35:37] Thank you, your Honours. Very briefly on forced

1 pregnancy, the Prosecution agrees and aligns itself with the very eloquent
2 submissions that we've heard from the two victim groups, as well as Mr Kisla and
3 Professor Oosterveld and Ms Radhakrishnan. We agree with what they've said, and
4 I don't need to add anything further on that point.

5 But Ms Priya Narayanan, will continue on some points in relation to forced marriage.
6 Thank you.

7 PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:36:07] Thank you. You have the
8 floor for the remaining time.

9 MS NARAYANAN: [14:36:10] Thank you very much, your Honour.

10 On forced marriage as an other inhumane act, coming back to the elements and the
11 footnotes 11 and 18 that were mentioned and the reference to the 1956 Supplementary
12 Slavery Convention, your Honour, from the plain text of the footnote, the footnote is
13 meant to explain, to clarify and to assist, but it's not meant to limit conduct. And it's
14 also not meant to be exhaustive because there's a very clear use of the word "may" in
15 that same footnote.

16 Second, in this case and at this Court, the controlling documents are the Statute and
17 the Elements of the Crimes under Article 21. It is not the Supplementary Slavery
18 Convention, which might assist, but it doesn't control.

19 Third, the question here is how do we interpret Article 7(1)(k). And the answer,
20 your Honours, must be broadly.

21 And I must recall what, for example, the Kupreskic Trial Chamber said, of course in a
22 slightly different context, but it's equally relevant for other inhumane acts. And it
23 said that crimes, like residual crimes, should be interpreted broadly to keep up with
24 the imagination of future torturers and their bestial instincts. This same logic stands
25 for other inhumane acts as well. And for this we would also align ourselves with the

1 logic expressed by the Appeals Chamber in the AFRC or the Brima et al. case in the
2 Special Court of Sierra Leone, which is correct in our view.

3 And contrary to what the Defence just said, the Appeals Chamber in that case did not
4 find that there was a bar to cumulative convictions in relation to forced marriage. In
5 fact, it found that there was no bar. But in the facts of the case, it did not enter a
6 conviction on the appeal. That might be because of reservations that judges may
7 have had to entering convictions on appeal, but that's a separate issue here.

8 Fourth, we don't need to take an either/or approach to forced marriage as other
9 inhumane act and sexual slavery. The evidence in this case is multi-dimensional. It
10 supports all the crimes charged.

11 And fifth, when we talk about forced marriage as an other inhumane act, there might
12 be some instances which may feature overt sexual violence and there may be others
13 which don't feature overt sexual violence. But there is always an aspect of control of
14 sexuality in terms of why that exclusive relationship is imposed on the victim. But
15 even more so, what it always has is a gendered harm, your Honour, which is
16 essentially the imposition of a gendered understanding or a gendered role of a wife
17 on a victim. And it is the use of the word "wife" and the status of wife that is
18 imposed, that is -- almost amounts to a sort of manipulation in the circumstances.

19 And finally, your Honours, just to respond to the Defence, for a Chamber to find
20 forced marriage as an other inhumane act, we do not need that the formalities of
21 marriage, per se, as they may be understood in different societies, they need not be
22 fulfilled. It can even occur even without that.

23 Thank you very much, your Honour.

24 PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:39:30] Thank you.

25 Now Victims' Group 1. Counsellor.

1 MR COX: [14:39:36] Thank you, your Honour. Very --

2 PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:39:36] Five minutes, please.

3 MR COX: [14:39:36] Very, very briefly. I won't -- this time I can promise that I
4 won't take the five minutes. And I would just like to answer an assertion made by
5 Amici Allain. He said, "And I would add, third, that the Appeals Chamber would
6 need to engage with the distinction between the treatment of those the appellant
7 termed as 'wife' and those he called *ting tings*. In substance, but not in form, these
8 two categories appear to have been treated the same by the appellant."

9 This is not true. And you can ask -- I mean, you can find that this is not true in
10 paragraph 3086, the last sentence, said, "[...] the Chamber nevertheless considers that
11 there existed, systematically, a sub-category of abducted girls in the LRA who were
12 not sexually enslaved, but enslaved. It is to this specific category that the Chamber's
13 affirmative conclusions under [...] 68 are limited."

14 So it does make a distinction. They were treated differently. Some *ting tings* were
15 not submitted to sexual acts; therefore, they were not under sexual slavery. Thank
16 you.

17 PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:40:55] Thank you. Now, Victims'
18 Group 2.

19 Mrs Paolina Massidda, five minutes.

20 MS MASSIDDA: [14:40:59] Thank you very much, Your Honours. We have
21 already shared our agreement with Professor Oosterveld, Meyersfeld and Grey, and
22 our disagreement with Dr Allain. So we stick simply to our response to the amici in
23 our written submissions. Thank you.

24 PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:41:19] Thank you.

25 Well, now, we will proceed to receive questions from the Bench on sexual and

1 gender-based crimes. Before I give the floor to my learned colleagues, in case they
2 have questions, I would like to remind the parties, participants and the amici curiae,
3 that you have approximately two minutes to respond each question posed by the
4 Bench.

5 Judge Hofmański, you have questions?

6 JUDGE HOFMAŃSKI: [14:41:58] Thank you, Madam President. I have no
7 questions at this stage.

8 PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:42:03] Thank you, Thank you.
9 Judge Bossa, you have questions?

10 JUDGE BOSSA: [14:42:05] Thank you, Madam President. I have no questions.
11 Thank you.

12 PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:42:10] Judge Alapini-Gansou, you
13 have questions, please?

14 JUDGE ALAPINI-GANSOU: [14:42:13](Interpretation) Your Honour, I'm tempted to
15 ask one question.

16 PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:42:20] Yes, you may proceed,
17 please.

18 JUDGE ALAPINI-GANSOU: [14:42:26] (Interpretation) Madam President, I would
19 like to raise one notion which came from the Defence, from the amici, but also from
20 the victims' representation, if I've understood them correctly.

21 Could you, from the Defence side, please tell me what you think about the culture
22 and human rights. In -- is it possible to violate human rights in the name of a
23 particular culture?

24 PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:43:18] Yes, please. You may
25 respond. Two minutes.

1 MR TAKU: [14:43:19] Yes, absolutely. I will answer within the context of this case
2 and the specific problem we are talking about. The native laws and customs,
3 because -- sorry.
4 Probably -- probably they indirectly will have customary courts on matters of
5 marriages, matters of this, and they give the final rules on native laws and customs.
6 And it is within that traditional concept that they look at the culture to see whether
7 they shock the conscience of humanity, whether they are -- whether these customs are
8 bad or wrong.
9 In this particular case, we have parental consent for marriages in Africa, bride price,
10 dowries, which are not in other cultures. They're not necessarily a violation of
11 human rights. Generally, yes, the culture does not condone -- does not condone a
12 human rights violation. But the human rights themselves respect cultural rights of
13 different communities in order to -- depending on your culture to regulate the offence.
14 And I think that is what operates in the Acholiland and it should be taken into
15 consideration.
16 I merely said that in forced pregnancy, the question of a woman's autonomy was too
17 restrictive because there were other values that could be appointed to include a
18 woman's cultural rights. We have parental consent. It's not necessarily the woman
19 herself, but it is parental consent, the community and also the right of procreation. It
20 is articulated by a set of values, spiritual values and others which we all -- we all
21 respect. In my tradition, as a traditional ruler, I respect these and I do not consider it
22 a violation of human rights as long as, as long as it was done for the good of society.
23 And there are age-old traditions and common law, with respect to establishing
24 native -- native courts for cases involving native law and customs, whereas the
25 ordinary court, the higher court order look at statutory marriage. The definition of

1 marriage here is statutory in respect of a cultural context, which was not taken into
2 consideration. And that is my problem.

3 Otherwise, most of us, we're bastard. Are we bastardised? When -- when my
4 mother was married, it was considered -- so they are married, there was no statutory
5 marriage. There has never been any. And there are still many others, but it's
6 considered a marriage nevertheless.

7 We merely wanted the court to inquire into Acholi culture. What is it? What
8 interests, what culture values are being -- or harm has been caused? That evidence
9 was never produced. It's not on the record.

10 PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:46:06] Thank you.

11 Dr Alapini, are you satisfied with the response?

12 JUDGE ALAPINI-GANSOU: [14:46:14](Interpretation) Madam President, I simply
13 wanted to hear from counsel whether yes or no, one could violate human rights on
14 behalf of a culture. But I understand from him that it is not the case, one should not
15 do so.

16 PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:46:39] Before you go ahead on
17 this -- (Overlapping speakers)

18 MR TAKU: Your Honour, if I --

19 PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:46:38] I would like a clarification.

20 MR TAKU: [14:46:41] Yes, your Honour.

21 PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:46:43] Unless you would like to first
22 respond to this question.

23 MR TAKU: Yes, your Honour.

24 PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:46:45] Okay. Go ahead, then.

25 MR TAKU: [14:46:46] There is one recurrent issue in this case: The perversion of

1 the Acholi culture by Joseph Kony. We have parental rights. Joseph Kony now
2 separate the children and separate parents and was giving these rights. The men
3 and women had no choice. He defined the rules. Those rules are adopted on
4 Ongwen and other women. And I've said this --

5 PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:47:14] Just, Counsellor, because my
6 question goes to this point as a follow-up question to that asked by Judge Alapini.
7 You are saying that according to the Acholi culture, what matters is the parental
8 consent for marriage and also for forced -- for pregnancy, you say; is it?

9 MR TAKU: [14:47:32] No.

10 PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:47:33] No? Then what is it? What
11 is the definition of marriage?

12 MR TAKU: [14:47:37] What I'm saying, your Honour, is that marriage in the cultural
13 setting is governed by a set of cultural values. The men -- the man and the woman
14 marry, but is it the parental consent that is of the well-being, and also society interest.

15 PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:47:53] Understood. But are you in
16 the position to give us at least one view of these -- of these requisites for Acholi
17 marriage under the culture of Acholis, what are the requisites for marriage or the
18 definition of marriage, please.

19 MR TAKU: [14:48:14] I will let Honourable Ayena respond to that quickly, but that's
20 why you pay a dowry. Let's say you pay one or two cows, that way you have
21 traditional rights that must be celebrated. That's why the woman and the man, they
22 are initiations rights before and you prepare them for this. Honourable Ayena, who
23 comes from the (indiscernible) practices will respond to that question more
24 appropriately.

25 PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:48:38] Okay. You will respond

1 about the requisites of marriage and the Acholi culture? Yes? Okay. Go ahead.
2 You have the floor for two minutes, please.

3 MR AYENA ODONGO: [14:48:49] Thank you very much, Madam President.
4 I will, first of all, begin with the definition of marriage. In the reception clause of our
5 law in Uganda it's -- they recognise customary laws provided they are not repugnant
6 to good conscience. And in this case the definition of marriage, even in the Acholi
7 culture, is that it is a union between man and woman to the exclusion of the whole
8 world. Now, the requisite -- or the requirements of traditional marriage in Acholi is
9 that, first of all, after the boy and the girl have identified each other and they have
10 given their consent, there is a ritual, there is a ceremony under which -- I mean,
11 through which they must go, the payment of dowry and the receipt of the same. But
12 these are symbolic to recognise that the boy and the girl have now become man and
13 wife.

14 Now, the emphasis my colleague was giving is that, whereas, under the Acholi
15 traditional marriage system, it is the parents that must ultimately give the consent.
16 In the bush, it was Kony who replaced this for both the boy and the girl. He gave
17 consent to the boy by giving him -- distributing the girl to him, and secondly, giving
18 consent to the girl, I mean, so to speak, to now go into marriage with this boy.
19 So, you see, it is a contradiction in terms. On the one hand, the national -- I mean,
20 the requirement of exchange of gifts is not done, and then at the same
21 time -- somebody was talking about conditions under which these people lived and he
22 was ascribing it only to the girl. You know, the acts of the conjugal performance, the
23 condition of sexual, you know, activities of the girl being conditioned and the
24 circumstances she has no control over,
25 My Lord, this is the same thing --

1 PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:51:25] One question, please.

2 MR AYENA ODONGO: [14:51:28] Yes, please.

3 PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:51:29] So, as we understand, you are
4 saying that, even under the Acholi tradition, it should be the consent of the parents.
5 In the case that we have at stake, it was Kony who gave the consent on behalf, for say
6 something, of the parties.

7 But my question is this: First, how can Mr Kony give consent? Because he was not
8 the father or the mother of the girl and, let alone, of the boys, first. And second, so
9 you are now claiming not only the traditional Acholi culture but the rules that were
10 ruling, for say something, in or within the LRA. Because the power of Kony was a
11 political and military power, but how can he have the power to give consent for
12 marriage?

13 Okay. Please, if you can elaborate on this, you have two minutes. Thank you.

14 MR AYENA ODONGO: [14:52:40] Madam President, you know, the answer is in
15 the context of the characterisation of this union as forced marriage. The answer to
16 your question is that, ultimately, we say there was actually no marriage, because the
17 requirements of marriage as such was absent.

18 If there was any -- what Kony did was a mere pretense, which is not recognised under
19 the Acholi custom. And, therefore, what this leads to is that the union, which
20 mercifully the Trial Chamber also recognises, is just so-called marriage. The
21 so-called marriage, the so-called wives, and so on and so forth, what that union is in
22 real terms was mere cohabitation. And in the Acholi culture, there is a way those
23 matters are handled where there is cohabitation. Because the requirements of
24 marriage have not been gone through, there is a way they handled it. And that is
25 why some of the returnees, the girls who returned from the bush have actually been

1 joined in matrimony. And the trial Court recognised this in the case of Dominic

2 Ongwen.

3 One of the girls who had been in the bush with Ongwen as his wife, after Ongwen
4 consented from here, was traditionally married by his parents. She came here, and
5 the Court recognised that. As a matter of fact, to the pleasure of those of us who
6 think it should be that way. When they made -- when they went into private visit,
7 she got pregnant again. Is that a bastard?

8 So, Madam President --

9 PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:54:39] Thank you. Thank you.

10 MR AYENA ODONGO: [14:54:40] Thank you.

11 MS MASSIDDA: [14:54:43] Madam President, with your indulgence --

12 PRESIDING JUDGE IBÁÑEZ CARRANZA: Yes, Ms Paolina --

13 MS MASSIDDA: -- on this point.

14 PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:54:46] I was going -- about to give
15 the floor to all the parties. Thank you.

16 JUDGE ALAPINI-GANSOU: [14:55:02](Interpretation) Mr Ongwen's counsel talked
17 of cohabitation. In what -- he's talking about that cohabitation rather than marriage.
18 I would also like to know whether, even if there was cohabitation, does that also not
19 require the consent of the cohabiting parties?

20 PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:55:36] Briefly, the Defence, please.
21 Briefly. Two minutes.

22 JUDGE ALAPINI-GANSOU: [14:55:41](Interpretation) I just need a "yes" or "no."
23 That's all. That's just a "yes" or "no."

24 PRESIDING JUDGE IBÁÑEZ CARRANZA: (Overlapping speakers)

25 THE INTERPRETER: [14:55:47] Overlapping speakers.

1 PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:55:48] Wait a minute.

2 The Defence. Counsel, you have the floor for two minutes. If you can respond
3 directly "yes" or "no," it will be better. Anyway, you have two minutes, please.

4 MR TAKU: [14:55:59] In a normal context, the people, they will call it (indiscernible)
5 in my own culture. But in this one, where neither the man nor the woman had any
6 say, had no -- Kony -- oh, sorry. They took it in the context of Kony's rules, which he
7 defines, even before Ongwen came and the women. And the judgment says, Kony
8 at times issued rules, no abduction, everybody obey. There are also times that Kony
9 meted punishment. He withdrew the wives from the people if the wife complained.
10 The wife of his chief intelligence officer, secretary of Ongwen, complained about
11 being with Ongwen. Kony executed him. He meted punishment. He defined the
12 rules even in the home.

13 So, therefore, yes, in the normal context in our communities, cohabitation is a way of
14 the parties.

15 Honourable, should take over the answer (Microphone not activated)

16 PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:57:08] One minute, Counsellor, just
17 to complement.

18 MR AYENA ODONGO: [14:57:16] Madam President, this is a fundamental point
19 that we must sink in. You know, the whole thing is that the marriage, the so-called
20 marriage, the conditions that brought the two people together was a force on both
21 parties. The boy did not necessarily have to accept it. And certainly, the
22 girl -- certainly, the girl was abducted and forced on demand. So, at that point, we
23 should understand it from the point of view that both of them were actually forced.
24 And, you know, when you now come to the consideration of whether somebody had
25 a choice to refuse, there is evidence on record that a very senior person, an old person

1 who was actually a brigadier in the national army, that is Joseph Banya, was given a
2 wife -- a so-called wife. He declined to take the little girl, but he was told that -- he
3 was told that that is now a recipe for death, because if you refuse, that would appear
4 like you are saying you are preparing -- you are preparing to escape. Ultimately, he
5 was forced to do it.

6 And what were the interests of the institution of LRA? One of the reasons why
7 Joseph Kony forced these children into this union was that he wanted production of a
8 new generation of army men for him. So it was not about -- so he needed both -- he
9 needed both a man and a woman. So the force was mutual. The force was mutual
10 on both the girl and the boy.

11 Thank you.

12 PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:59:49] Thank you, Counsellor.

13 You've made your point.

14 Ms Paolina Massidda, please, you have the floor. Two minutes.

15 MS MASSIDDA: [14:59:54] Thank you, Madam President.

16 I wanted simply to draw the attention of the Chamber on this issue of marriage and
17 marriage under Acholi culture. One Ugandan expert testified at trial, Professor
18 Musisi, actually providing also information in relation to this specific point. The
19 relevant evidence is UGA-PCV-0003-0046, which is the expert report, pages 21 and 22.
20 The relevant parts of the report, which include how in the Acholi culture you arrive at
21 marriage, is also included in our final submissions, document 1720, paragraph 88.
22 And second -- and why I'm underlining this, your Honour, is because this goes
23 directly to what I was referring today as the fact that the marriage as forced marriage
24 in the LRA was not a legitimate marriage in accordance with the Acholi society.
25 And this goes, of course, to that argument, and the way in which women and girls

1 lived their forced marriage, which is important also on the cultural point of view.

2 (Interpretation) Secondly, Judge Alapini, I must say that I was intrigued by your
3 question. And I say, no. But I did want to draw the judge's attention to one aspect
4 that was stressed by one expert in Acholi culture. And I will read out this part in
5 English. I apologise for that. And this is in the report that I mentioned, paragraph
6 17, and I quote:

7 (Speaks English) I quote:

8 "All cultures strive to maintain peace and social order in their communities. They
9 preserve and protect their communities to ensure their propagation for generations to
10 come. Cultural traditions dictate what is acceptable and not acceptable in and of
11 people's lives such as views, politics, beliefs, values, mores, loyalties and relationships.
12 They do this to mitigate worries and fears instill a sense of security and hope. Acholi
13 culture is no different. Some of the actions perpetrated by Kony's LRA may be
14 interpreted as adding cultural roots. However, the extremes they went to were out
15 of bounds of normal human behaviour and certainly not sanctioned by Acholi
16 culture." End of quote.

17 Thank you, Madam President.

18 PRESIDING JUDGE IBÁÑEZ CARRANZA: [15:03:24] Thank you.

19 Any other of the parties, would you like to respond?

20 MS GREY: [15:03:29] Thank you, Madam President. It's Rosemary Grey here.

21 May I please respond?

22 PRESIDING JUDGE IBÁÑEZ CARRANZA: [15:03:39] Sorry. Sorry. Who is it?

23 MS GREY: [15:03:40] It's Dr Rosemary Grey, one of the amici, Madam President.

24 PRESIDING JUDGE IBÁÑEZ CARRANZA: [15:03:41] Okay. Thank you. You
25 have two minutes. Thank you.

1 MS GREY: [15:03:45] Thank you, Madam President.
2 I'd like to just very briefly respond on the question about the relationship between
3 cultural sensitivities and internationally recognised human rights.
4 Now, I acknowledge that that question was posed mainly about forced marriage, but
5 we do want to respond in relation to pregnancy and reproductive rights.
6 We submit that assertions and claims about cultural concerns and how they could
7 curtail or even override internationally recognised reproductive rights must be
8 dismissed for the reasons that we explain in our brief. Such claims about cultural
9 sensitivities rarely acknowledge the reality of many different views within a given
10 culture. Some more progressive views; some regressive views. But, in any case,
11 these cultural sensitivities have no weight in this Court. This is a Court that is
12 applying the Rome Statute and that has to interpret that Statute in accordance with
13 internationally recognised human rights pursuant to Article 21(3).
14 The special rapporteur on freedom of religion has correctly noted, as recently as 2020,
15 that the claim that religious beliefs can be invoked as a legitimate justification for
16 violence or discrimination against women and girls must be dismissed, and has
17 further affirmed that traditional historical religious or cultural attitudes must not be
18 used to justify violations of human rights. And we submit to your Honours that this
19 analysis is relevant in relation to reproductive freedoms and forced pregnancy, as
20 well as to forced marriage. Thank you.

21 PRESIDING JUDGE IBÁÑEZ CARRANZA: [15:05:28] Thank you.
22 Any other of the parties? Prosecution?
23 Counsel, you have two minutes, please.

24 * MS NARAYANAN: [15:05:36] Thank you, your Honour.
25 Just on the point of Acholi culture and the parenting rules, whatever we call the

1 situation, whether a forced marriage or cohabitation, as Judge Alapini-Gansou said,
2 the coercive circumstances have clearly vitiated the ability to consent in any normal
3 way. This is a situation of abduction, of distribution, of assignment of women and
4 girls against their will.

5 And on this point, I'd like to recall Rule 70 of our rules of procedure on the principles
6 of evidence on sexual and gender-based crimes, and it lists out a variety of situations
7 in which consent cannot be inferred. And this is one of them.

8 Also, again, on the cultural sensitivities point, of course, we agree with what the
9 victims said, as well as Dr Grey, but I'd also like to recall the opinion of Judge
10 Sebutinde in the Brima et al. Trial Chamber, where she distinguished between what
11 are known as arranged marriages in some cultures, recognised that there could be
12 delegation of decision-making in some cultures, perhaps along the lines of what the
13 Defence may be saying, but that such arranged marriages could also amount to a
14 violation of human rights; again, depending on the facts. But notwithstanding, that
15 is very different from the situation of forced marriage in a conflict situation, which is
16 exactly what the facts of this case are, where the so-called marriage is accompanied or
17 used to instrumentalise the commission of more crimes. So there is that distinction
18 as well.

19 Thank you, your Honour.

20 PRESIDING JUDGE IBÁÑEZ CARRANZA: [15:07:21] Thank you. Thank you.

21 Judge Alapini, are you satisfied? Thank you.

22 Judge Gocha Lordkipanidze, do you have questions? No.

23 JUDGE LORDKIPANIDZE: [15:07:28] Thank you, Madam President. I have no
24 questions at this stage.

25 PRESIDING JUDGE IBÁÑEZ CARRANZA: [15:07:33] Thank you.

- 1 Well, I have one last question --
- 2 MS O'BRIEN: [15:07:44] Your Honour, may I speak?
- 3 PRESIDING JUDGE IBÁÑEZ CARRANZA: [15:07:45] Yes. Sorry.
- 4 MS O'BRIEN: [15:07:46] I'm Dr Melanie O'Brien, an amici.
- 5 PRESIDING JUDGE IBÁÑEZ CARRANZA: [15:07:47] Who is this, please? Sorry,
- 6 who is this? Who would like to take the floor?
- 7 MS MEYERSFELD: [15:07:56] If I may?
- 8 PRESIDING JUDGE IBÁÑEZ CARRANZA: [15:07:57] Yes, please. On the same
- 9 point?
- 10 MS MEYERSFELD: [15:08:00] On the point relating to cultural relativity.
- 11 PRESIDING JUDGE IBÁÑEZ CARRANZA: [15:08:02] Yes.
- 12 MS MEYERSFELD: [15:08:03] Thank you.
- 13 PRESIDING JUDGE IBÁÑEZ CARRANZA: [15:08:04] You have to floor for two
- 14 minutes.
- 15 MS MEYERSFELD: [15:08:06] Thank you.
- 16 Your Honours, I think it's important to note that the perennial critique of human
- 17 rights law from the perspective of cultural autonomy oscillates around the question of
- 18 discrimination against women.
- 19 PRESIDING JUDGE IBÁÑEZ CARRANZA: [15:08:24] Your microphone should be
- 20 out.
- 21 THE COURT OFFICER: [15:08:25] Your Honours, the microphone is on. It's the
- 22 English booth that we need to confirm.
- 23 PRESIDING JUDGE IBÁÑEZ CARRANZA: [15:08:27] Please, maybe your -- you
- 24 cannot listen?
- 25 THE INTERPRETER: [15:08:39] Apologies from the English booth. The interpreter

1 inadvertently left his microphone on, blocking the channel.

2 PRESIDING JUDGE IBÁÑEZ CARRANZA: [15:08:47] Professor, please try again.

3 It seems there was a problem here with the microphone, or yours. Please try again.

4 Restart, please.

5 MS MEYERSFELD: [15:08:56] Thank you, Madam President.

6 Madam President, your Honours, the discussion about cultural autonomy and

7 relativity in relation to international human rights law tends to oscillate around the

8 question of discrimination against women, and yet we would not tolerate the same

9 discussion that would justify oppression based on race or religion.

10 If I may use as an example the case of South Africa under apartheid. The South

11 African Nationalist government, and those it represented, justified apartheid on the

12 basis that it was their culture to have a distinction between white and black. The

13 former being superior, the latter inferior.

14 Why is it that the international community correctly abhors and rejects such a

15 justification for non-compliance with international human rights law? But still we

16 ask the question: Should such cultural autonomy trump the rights of women? I

17 would argue not.

18 PRESIDING JUDGE IBÁÑEZ CARRANZA: [15:10:15] Thank you.

19 Anybody else on the same issue? Well, no.

20 MS O'BRIEN: [15:10:19] Yes.

21 PRESIDING JUDGE IBÁÑEZ CARRANZA: [15:10:20] Yes, please.

22 MS O'BRIEN: [15:10:22] Your Honour, may I speak? Thank you.

23 Dr Melanie O'Brien, an amici.

24 PRESIDING JUDGE IBÁÑEZ CARRANZA: [15:10:27] Okay. You have the floor

25 for two minutes.

1 MS O'BRIEN: [15:10:30] Thank you, your Honour.

2 I would like to briefly address three issues that the Defence has raised. The first
3 being the discussion of the need for statutory marriage to be a part of the definition,
4 and I would draw attention to the fact that this Court has noted that legal marriage is
5 not a requirement of forced marriage, but that what matters is the so-called marriage
6 is factually imposed on the victim with the consequent social stigma. And that is
7 from Al Hassan confirmation of charges and Ongwen as well.

8 I would also like to point out that in the Defence's categorisation of forced marriage,
9 they have ignored the coercive circumstances of armed conflict and atrocity within
10 which the forced marriages took place. They have also ignored the fact that the girls
11 and women were, in fact, abducted, so, therefore, there was no consent to have
12 Joseph Kony as a replacement for their parents.

13 And, finally, with regards to the argument that both males and females were forced
14 into the marriage, this was not true. Studies have found that there were some
15 younger members of the LRA who did not want to enter into marriage, but generally,
16 the males had more choice. They were able to reject a particular wife. They were
17 able to not enter into a marriage. And they were also not, when they were in a
18 forced marriage, subject to the same violence, such as rape and beatings, that the girls
19 and women were. So the situation was certainly not gender neutral with regards to
20 the forced marriages. Thank you.

21 PRESIDING JUDGE IBÁÑEZ CARRANZA: [15:12:19] Thank you.

22 Well, a last question that --

23 MR COX: [15:12:20] Your Honour, sorry. May I just briefly --

24 PRESIDING JUDGE IBÁÑEZ CARRANZA: [15:12:24] Who? Dr Cox for Victims'
25 Group 1.

1 MR COX: [15:12:26] Just briefly, your Honour.

2 I would like to call the attention of the --

3 PRESIDING JUDGE IBÁÑEZ CARRANZA: [15:12:29] Two minutes.

4 MR COX: [15:12:30] -- Appeal Chamber that many of the assertions done by my
5 learned friend from the Defence have no evidence. They have produced no evidence.

6 It's the first time I hear of a new generation of army men.

7 We had this before with the trafficking. We had never heard of trafficking in this
8 trial before. So I would just like to point to this fact. Thank you.

9 PRESIDING JUDGE IBÁÑEZ CARRANZA: [15:12:53] Thank you, Counsellor.

10 MR TAKU: [15:12:58] Your Honours, just one correction.

11 PRESIDING JUDGE IBÁÑEZ CARRANZA: [15:13:03] Go ahead. One minute.

12 MR TAKU: [15:13:05] My colleague can make assertion in the judgment you find
13 trafficking in the footnote. I earlier told your Honours that there's a lot, lot of
14 evidence hidden in the footnotes, including exculpatory evidence, but the judges
15 never made a single finding of reasonable doubt throughout the whole judgment of
16 1,077 pages. But you look at footnote -- if you look at the findings, check the
17 footnotes.

18 PRESIDING JUDGE IBÁÑEZ CARRANZA: [15:13:26] Thank you.

19 MR TAKU: [15:13:27] And you'll find out.

20 PRESIDING JUDGE IBÁÑEZ CARRANZA: [15:13:29] Thank you. Thank you.

21 Thank you.

22 As I said, one last question for the parties, participants and amici, if you would like to
23 elaborate on this.

24 Please, could the parties, participants and amici elaborate further on the notions of
25 conjugal union or conjugal association, and whether and in what way these notions

1 impact on the definition of the crime of forced marriage.

2 Who would like to take the floor, please?

3 Yes, you have the floor, Professor -- your microphone, please.

4 MS OOSTERVELD: [15:14:20] Thank you, your Honour.

5 The definition of conjugal is simply the same as that of marriage or the socially
6 constructed norms that go along with marriage. So when one says "conjugal union,"
7 it means the same thing as taking the socially constructed norms of marriage, in this
8 case in a perverted way, and applying them to the victims. So there's nothing
9 particularly special about the word "conjugal" as opposed to the word "marriage" in
10 this particular circumstance, except that it's all part and parcel of the expectations of
11 marriage in the forced marriage. Thank you.

12 PRESIDING JUDGE IBÁÑEZ CARRANZA: [15:15:09] Thank you.

13 Any other intervention?

14 Yes, counsellor for the Defence, have you two minutes.

15 MR TAKU: [15:15:14] Your Honours, I earlier said that this use of epithets, for
16 example, conjugal unions, so-called marriage, and a different word, violate the
17 principle of fair labelling. It's a principle of international law and criminal law. I
18 mean criminal law everywhere, to be able to use the appropriate language to identify
19 to the criminalised conduct, it is an aspect of fair trial so the accused knows exactly,
20 he has the facts, the cause and circumstances of the conduct for which he's standing
21 trial. But when you use several languages to describe the same conduct, it's a
22 violation of the principle of fair labelling. That's what I can I say at this point,
23 your Honour.

24 PRESIDING JUDGE IBÁÑEZ CARRANZA: [15:16:07] Thank you.

25 Yes, Counsellor, you have two minutes.

1 MR AYENA ODONGO: [15:16:08] May I add something?

2 PRESIDING JUDGE IBÁÑEZ CARRANZA: [15:16:09] Yes.

3 MR AYENA ODONGO: [15:16:10] In the context of this case, when you talk about
4 conjugal rights, we don't dispute that it might amount -- be the same thing with
5 marriage. But when you juxtapose this to the context of forced marriage -- first of all,
6 there is one thing that should be understood. Forced marriage, if it is, you know,
7 akin to sexual slavery, because it has elements of sexual slavery which includes
8 exclusive ownership -- we have already -- my colleague has already said, in the case
9 of LRA, the question of having the woman exclusive to yourself was not there,
10 because the so-called wives were held at the behest of Kony and he had the power to
11 remove a lady that has been assigned to you any time.

12 A typical example was that of one of his own bodyguards. That was, I think, the
13 latest so far. He decided to send him for medical treatment to Nairobi, and he took
14 over his wife. By the time he came, the boy had to beg and come and -- to thank him
15 for being so benevolent to take away the lady.

16 And then there was this -- and these are all in the evidence, on court record.

17 Sometime -- this is in terms of context. In 2001, Kony arrested 29 officers of his for
18 attempting to escape. He removed all their wives and distributed them to other
19 people.

20 So, you know, in the context of LRA and in the context of this case, the question of
21 exclusivity was not there. Ownership was not there. You held -- actually, all the
22 ladies were properties of the institution, the LRA institution, and not the person who
23 held them. You were lucky if you stayed with them for a long time. But quite often,
24 they were removed away from you. Thank you.

25 PRESIDING JUDGE IBÁÑEZ CARRANZA: [15:18:27] Thank you.

1 Any other of the parties?

2 Mrs Paolina Massidda, you have the floor. Two minutes, please.

3 MS MASSIDDA: [15:18:32] Thank you, your Honour.

4 Simply on the term "conjugal", if I can refer the Chamber to footnote 83 of our
5 response to the amici document 1951, in which we make a comment on that,
6 indicating that the use of the term "conjugal" may come from the first recognition of
7 the crime of forced marriage as an other inhuman act by the Appeals Chamber of the
8 Special Court of Sierra Leone. And this is the Brima et al. case, appeal judgment, at
9 paragraph 202.

10 And later on the term used again by the Trial Chamber of the Special Court of Sierra
11 Leone in the RUF, Sesay et al. case, trial judgment, at paragraph 1295, in which the
12 Chamber identified the *actus reus* of forced marriage as, I quote, "The imposition of
13 forced conjugal association." End of quote.

14 PRESIDING JUDGE IBÁÑEZ CARRANZA: [15:19:36] Thank you. Thank you.

15 Any other of the parties?

16 Yes, OTP. Counsellor, you have two minutes.

17 MR NARAYANAN: [15:19:41] Thank you, your Honour.

18 We have very little to add to what Professor Oosterveld and Ms Massidda have just
19 said. But yes, the phrase "conjugal union," or association, it means something more
20 than just any other association. There's a reason for that. Because it comes with
21 expectations, it's a violation of dignity. It also comes with demands * on loyalty
22 which, as the facts of this case will show, were then followed by punishment either by
23 beatings or sometimes even death.

24 As Professor Oosterveld said, yes, it is a socially constructed harm, which is
25 somewhat perverted in this instance, but we would also add that it is an imposition

1 and a perversion of a socially constructed role, and that is one of a spouse or a wife.

2 And this is why the label of spouse or wife is so unique to this particular conduct.

3 And it goes to the heart of the right to freely marry with dignity and with choice and,

4 of course, without any coercion.

5 Thank you, your Honour.

6 PRESIDING JUDGE IBÁÑEZ CARRANZA: [15:20:54] Thank you. Any other --

7 MR AYENA ODONGO: [15:20:53] Could I add one thing for the benefit of the

8 Court.

9 PRESIDING JUDGE IBÁÑEZ CARRANZA: [15:20:53] Wait a minute, please. I'm
10 asking -- I'm asking responses from other parties, if there is any other amici.

11 Okay. The Defence has been given a lot of time, but I will allow one minute more.

12 Counsellor, you have one minute to complement. Thank you.

13 MR AYENA ODONGO: [15:21:08] I may not take all the one minute.

14 Madam President, I just want to add one thing. Should the Court finally find from

15 our submission and the arguments we have held here about whether there was

16 marriage or there was no marriage, should the Court find that what actually took

17 place in the LRA arrangement was nothing but a mere cohabitation or something like

18 that, then it should come to the conclusion that there cannot be forced marriage when

19 there is no marriage. Marriage can only be forced when there is marriage.

20 PRESIDING JUDGE IBÁÑEZ CARRANZA: [15:21:45] You have already made that
21 point earlier. Thank you. Thank you.

22 Well, now we are going to take a break, please, for half an hour. We will reconvene
23 by 15.50. Thank you.

24 THE COURT USHER: [15:22:03] All rise.

25 (Recess taken at 3.22 p.m.)

1 (Upon resuming in open session at 3.51 p.m.)

2 THE COURT USHER: [15:51:40] All rise.

3 Please be seated.

4 PRESIDING JUDGE IBÁÑEZ CARRANZA: [15:52:19] Welcome back.

5 We will now turn to submissions on the grounds of appeal concerning cumulative
6 convictions. The questions posed by the Appeals Chamber in its order issued on
7 28 January 2022, are as follows.

8 One: What is the scope and purpose of cumulative convictions within the legal
9 framework of the Rome Statute considering, in particular, Article 78(3) of the Statute
10 and what is the relevance, if any, of the following factors: (a) the interest protected
11 by each crime; (b) the principle of fair labelling; (c) the concepts of consumption and
12 subsidiarity.

13 Question number two: Could the general principle of *ne bis in idem* under
14 international law guide the consideration of the question of the concurrence of crimes?
15 How would the application of this principle affect the test for cumulative convictions?
16 Counsel for Mr Ongwen, you have the floor now for 20 minutes.

17 MR TAKU: [15:53:43] Thank you so much, your Honours.

18 I welcome the opportunity to talk about this so many years after we were last on it,
19 and one of the principles we applied in a bijural legal system, the *principe du non*
20 *cumul des peines*, it's a basic principle applicable every time.

21 The doctrine of cumulative conviction guarantees a verdict that protects an accused
22 from excessive and unnecessary charges and convictions. Starting from this
23 principle, the verdict in this case exceeded this threshold, was unjust and defeats the
24 aims of justice.

25 Convictions should accurately identify criminal acts and the accused's participation in

1 them without imposing a duplicative stigma and consequence.

2 The purpose and scope of cumulative convictions was thoughtfully articulated by

3 Judge Pavel Dolenc in his dissenting opinion in Prosecutor v. Laurent Semanza,

4 ICTR-97-20, May 15, 2003 in which I was lead counsel in that case.

5 He stated that multiple convictions for the same conduct runs contrary to elementary

6 principles of justice and may prejudice the accused unfairly and stigmatises an

7 accused and may have adverse collateral consequences, such as increasing the

8 sentence or diminishing the accused's eligibility for parole. Paragraph 20.

9 The Court has asked for our position on several aspects of cumulative convictions.

10 We will address all of the Court's questions in the following categories: One, a

11 summary of our position; two, the relationship of *ne bis in idem* to a cumulative

12 conviction analysis; three, the concepts of consumption and subsidiarity that also

13 include an assessment of the interest protected by each crime; and four, the principle

14 of fair labelling; and five, sentencing considerations including Article 78(3).

15 Summary. The Defence in the Dominic Ongwen trial vigorously argued against the

16 permissibility of concurrence of certain multiple crimes on the same facts.

17 Paragraphs 2792-2797, TJ.

18 The Defence submits -- the Defence submissions were consistent with the statutory

19 intent of Article 20 on *ne bis in idem*, general principles of fair trial on fair labelling,

20 Article 78(3), which envisages a single sentence that reflects the totality of the harm

21 caused by the criminal conduct.

22 The Defence raised the concurrence objections -- the Defence raised the concurrence

23 objections at trial and proposed the principle of *non bis in idem*, Article 20 of the Statute,

24 and the fact-based test of speciality, consumption and subsidiarity to determine the

25 ideal concurrence of the charged crimes in order to obtain the objective and purpose

1 of a verdict which would be the totality of Mr Ongwen's guilty conduct as opposed to
2 an exponential inflation of charges based on contextual circumstances over which
3 Mr Ongwen had no control.

4 The historical record, your Honours, established by this case shows that the
5 contextual circumstances were imposed by the reprehensible conduct of Joseph Kony,
6 the LRA which was founded by Joseph Kony and its coercive organisational rules
7 imposed by him and him alone; the UPDF and historical wrongs and injustices whose
8 ghost is still hovering over the destiny of the people of Northern Uganda as we sit in
9 judgment over Mr Ongwen here today.

10 The Trial Chamber examined the conduct-based tests suggested by the Defence and
11 acceded to the Defence submissions, paragraphs 2835 and 2837, and dismissed some
12 charges which were found to be impermissibly concurrent but failed to apply the
13 principle comprehensively causing prejudice as the Defence will demonstrate soon.

14 The appellant respectfully submitted that the Appeals Chamber should endorse a
15 conduct-based test in its interpretation of the Rome Statute and apply it in the
16 determination of the Ongwen appeal against his conviction and sentencing.

17 The second question. We urge the Court to find that *ne bis in idem* is a foundation for
18 assessing multiple convictions within a trial. The same principle and reasoning
19 applies in both situations. It is logical that a multiple prosecutions are prohibited for
20 crimes based on the same conduct, then multiple convictions within a trial should
21 also be prohibited when based on the same conduct. The same principles of fairness
22 to the accused in facing charges against him underlies both multiple prosecutions and
23 multiple charges within a trial.

24 The Trial Chamber found that the situation envisaged by Article 20 is entirely
25 different from one involving the concurrence of crimes in a single criminal proceeding

1 before the court and concluded that Article 20 is not even guiding law for
2 determining multiple convictions within one case.

3 Although literally applying to multiple prosecutions, the Defence submits that the
4 principle of *ne bis in idem* is a foundation for assessing concurrence issues arising
5 within a single trial. Cases found in national law support (Overlapping speakers)

6 THE INTERPRETER: [16:00:54] Message from the interpretation: Could counsel be
7 reminded to speak a little more slowly?

8 MR TAKU: [16:01:05] (Overlapping speakers) *Ne bis in idem* is commonly viewed as
9 the basis for concurrence issues in various common law countries, such as the United
10 States.

11 PRESIDING JUDGE IBÁÑEZ CARRANZA: [16:01:09] Counsellor, could you slow
12 down a bit, please.

13 MR TAKU: [16:01:13] Thank you, your Honour.

14 PRESIDING JUDGE IBÁÑEZ CARRANZA: [16:01:18] Thank you.

15 MR TAKU: [16:01:18] *Ne bis in idem* is commonly viewed as a basis for concurrence
16 issues in various common law countries, such as the United States, and civil law
17 countries such as France and Spain. We have an example. The decision of 26
18 October, 2016, the French *Cour de cassation* held, on the principle *ne bis in idem*, that
19 facts which proceed inseparably from a single action with a single culpable intention
20 cannot give rise to two criminal convictions against the same accused if they are
21 concomitant. In particular, the *Cour de cassation* found that based on *ne bis in idem*,
22 the offences of sexual harassment -- the offences of sexual harassment and sexual
23 aggression are impermissible concurrences because of the same facts, conversations
24 and acts proceeded from a single culpable intention.

25 Similarly, the Spanish Tribunal Supremo held that impermissible concurrences

1 controlling the principle *ne bis in idem*, on the basis of the principle of *ne bis in idem*,
2 the crimes of laundering and trafficking of narcotics were an impermissible
3 concurrence as would lead to the punishment for the same conduct.
4 In addition -- in addition, your Honours, the ICTY and ICTR implicitly accepted a
5 *ne bis in idem* foundation for cumulative convictions when they adopted the so-called
6 Blockburger test, which is from a double jeopardy case in the US Supreme Court.
7 The ICC version in Article 20, however, is different from the ICTY and ICTR statutes.
8 It prohibits multiple prosecutions in the ICC for the same conduct, conduct that was
9 previously prosecuted at a national level or in the ICC, rather than the same crime.
10 This was a deliberate change by the drafters of the Rome Statute from crime to
11 conduct.
12 The application of this principle affects the test of cumulative convictions by
13 mandating a conduct-based test to assess multiple convictions within one trial.
14 Whether calling it a conduct-based test or using civil law principles of *concursum*
15 *delictorum*, an analysis of cumulative convictions based on conduct will result in more
16 impermissible concurrences than with an elements-only or Blockburger test.
17 Even without a *ne bis in idem* foundation, we agree -- we agree with the Trial Chamber
18 approach that relied on a *concursum delictorum* analysis of speciality, consumption and
19 subsidiarity, which I will discuss next.
20 And I move to the next question.
21 *Concursum delictorum*: Speciality, consumption, and subsidiarity.
22 We would like to respond to the Court's questions on consumption and subsidiarity
23 and the interest protected by each crime together. The primary relevance of the
24 interest protected by each crime is an analysis of consumption or a similar concept.
25 The protected interest will again be relevant in regard to sentencing, which we will

1 address later. It is our contention, your Honours, that with the *concursum delictorum*
2 test used by the Trial Chamber more counts should have been dismissed as
3 impermissible concurrences. There was no appeal against that decision adopting
4 this test. This includes either the war crime or the crime against humanity that are
5 based on the identical conduct, sexual slavery and rape, and sexual slavery and
6 forced marriage.

7 A conduct-based analysis, specifically using principles of speciality, consumption and
8 subsidiarity is supported by the language in the Appeal Chamber's Bemba et al.
9 decision. While there are variations in the analysis of these principles in national
10 systems, the basic approach of analysing the underlying conduct or facts remains the
11 same. And I happen, again, to have been lead counsel in this case.

12 Before reaching consumption of subsidiarity, the first step in the *concursum delictorum*
13 analysis considers the elements, speciality. If the elements of one crime are
14 contained in the other then there can only be one conviction. This is the same as the
15 elements or the Blockburger test used in the ICTR -- ICTY and ICTR.

16 Using only the elements of speciality test, the Trial Chamber properly found that
17 there could only be one conviction with: A, war crimes of torture and cruel
18 treatment; B, sexual slavery and enslavement.

19 With a *concursum delictorum* approach, the analysis does not stop at the
20 elements/speciality assessment as it did in the ICTY.

21 Consumption.

22 The principle of consumption arises where two offences protect the same interests.
23 In that situation, there is an impermissible concurrence and the result is a conviction
24 of a single offence.

25 In French jurisprudence, the emphasis is on whether there is a single culpable

1 intention. Nonetheless, the protection of the same social interests also remains
2 relevant.

3 The Defence contends that the Chamber erroneously found that war crimes and
4 crimes against humanity based on the same underlying conduct are permissible
5 concurrences.

6 Under a consumption analysis, war crimes and crimes against humanity, based on the
7 same underlying conduct, are impermissible concurrences because there's a complete
8 overlap based on the facts in the present case and the protected interests are the same
9 for each pair of crimes.

10 As articulated by ICTR Judge Dolenc, in a situation where the same underlying facts
11 existed for multiple crimes, "virtually every criminal act could be classified as a
12 violation, virtually every criminal act could be classified as a violation [...] different
13 contextual provisions" and "such results are not consistent with basic principles of
14 law". It is fundamentally unfair to impose multiple convictions for the identical
15 conduct and harm.

16 Although the Defence continues to maintain that the contextual elements for war
17 crimes and crimes against humanity should not be considered in the specialty
18 analysis, under consumption analysis the pairs of crimes based on the same conduct
19 protect the same interest and, as such, are impermissible concurrences. In this case,
20 the contextual elements of war crimes and crimes against humanity have the same
21 factual origin, arise simultaneously from the same attacks against the same civilian
22 population who were not taking active part in the war, each attack occurring during a
23 one-day period lasting relatively short periods of time of less than two hours each
24 during a period of intense systematic bombardment by the UPDF during the
25 operation Iron First.

1 These factors greatly limited the ability of LRA to conduct widespread and systematic
2 attacks in Northern Uganda blurring the factual significance between war crimes and
3 crimes against humanity marking them insignificant.

4 Moreover, in each case, the real protected interest is reflected in the harm inflicted by
5 the crime, whether murder, torture, or any other overlapping war crime and crime
6 against humanity. The protected interest --

7 THE COURT OFFICER: [16:11:51] Counsel has two minutes.

8 MR TAKU: [16:11:54] Oh, my goodness. Your Honours, if I may have at least four
9 minutes. Thank you so much, your Honour. Thank you.

10 PRESIDING JUDGE IBÁÑEZ CARRANZA: [16:11:59] You are allowed, but four
11 minutes.

12 MR TAKU: [16:12:01] Yes. Thank you, your Honour.

13 The protected interests are underlying harm and not the contextual elements. The
14 Trial Chamber found that the interests are different because victims are protected
15 during armed conflict in one situation and from a widespread or systematic attack.
16 In the abstract, there may be different protections, but when there is complete overlap,
17 in other words, a widespread or systematic attack in an armed conflict, the interests
18 merge.

19 Your Honours, let me move quickly to subsidiarity.

20 The principle of subsidiarity is another part of the analysis. It arises when a single
21 act appears to violate two offences, yet one of the offences "describes a less intensive
22 form [...] of the same type of criminal conduct".

23 The Trial Chamber correctly found that the crime against humanity of other
24 inhumane acts is subsidiary against to the crime against humanity of torture. It
25 failed, however, to analyse whether the crime against humanity of forced marriage as

1 an other inhumane act is subsidiary to the crime against humanity of sexual slavery.
2 In addition, since the acts of sexual slavery, for the crime of sexual slavery, are solely
3 based on the acts of rape, the Defence contends that sexual slavery in this case is a
4 more intensive form of rape.

5 Therefore, concurrence of these crimes is impermissible and convictions on counts of
6 rape and forced marriage should be dismissed where they overlap with sexual
7 slavery.

8 The principle of failure being, your Honours, of course, it is a human rights principle
9 that the court applies to all stages of a criminal trial right to judgment. As a fair trial
10 principle, it must identify the conduct with precision, because if the
11 conduct -- criminal conduct is not identified, then there is no notice and the trial
12 cannot be fair. And we've also stated clearly in the conduct of this case that there's a
13 problem of fair labelling at all stages of the crime. It is when the conduct is fairly
14 labelled, you attribute the right level to the appropriate conduct so you can determine
15 other contours of the particular crime, course of conduct, circumstances and elements
16 and the modes of liability. In this particular case, your Honour, we submit, very
17 respectfully, that there was no fair labelling and that's why as we found earlier, you
18 found the crime invariably called forced marriage, conjugal unions, so-called
19 marriages. In the International Criminal Court, the fair labelling is one of the factors
20 of fairness, Article 14 of the International Covenant on Political and Civil Rights, in
21 particular, is supported by the ICC statutory architecture.

22 Thank you, your Honours.

23 PRESIDING JUDGE IBÁÑEZ CARRANZA: [16:15:36] Thank you, Counsellor.

24 Thank you.

25 Now, counsel for the Prosecution, you have the floor for 20 minutes starting now,

1 please.

2 MS BRADY: [16:15:48] Thank you, your Honour, your Honours. And I'll turn
3 directly to address you on cumulative convictions and questions 10 and 11.

4 Mr Ongwen is challenging the Trial Chamber's approach to cumulative convictions
5 and argues, essentially, that the Trial Chamber erred by convicting him for the

6 pairings of crimes, war crimes and crimes against humanity, for analogous crimes

7 and rape and sexual slavery and sexual slavery and forced marriage, as crimes

8 against humanity. And he's asking that this Chamber abandon the materially

9 different elements test. This is the test which was pronounced by the majority in the

10 Delalic et al. case, commonly known as the Celebici test. And he says that instead,

11 this court should take what he calls a conduct-based approach. And some of the

12 amici, such as the Association of Defence Counsel, supported that as well.

13 Your Honours, as we've made very clearly in our written submissions, we strongly

14 urge you to maintain the materially different elements Celebici test for cumulative

15 convictions with no additional principles. It's been properly and fairly applied in all

16 international tribunals and courts these past 20 years and by the Appeals Chamber

17 and Trial Chambers in several cases at the court, and we say that it best suits that

18 ICC's framework and its aims.

19 So coming now directly to question 10 on the scope and purpose of cumulative

20 convictions within the Statute's legal framework and considering, in particular,

21 Article 78(3) and the relevance of the interest protected by each crime, the principle of

22 fair labelling and the concepts of subsidiarity and consumption.

23 In a nutshell, concurrent or cumulative convictions should be entered where an

24 accused has by his criminal conduct committed more than one crime in terms of being

25 genuinely distinct crimes. The scope and purpose of cumulative convictions, when

1 it's based on the same conduct, is to describe the accused's full culpability. In other
2 words, to give a complete picture of his criminality and then needed in order to reflect
3 the different interests protected by each crime and to accord with the principle of fair
4 labelling.

5 What a legal system must do - and different systems do different techniques - is to
6 strike a fair balance between ensuring that all crimes, which the accused has
7 committed by his conduct, are properly and fairly represented in the convictions, but
8 while also simultaneously ensuring that the accused is not overly convicted for crimes
9 based on the same conduct or act. And in our view, Celebici test best achieves this
10 balance within the ICC regime, and there's no need to incorporate the additional
11 * concepts of consumption and subsidiarity. Cumulative convictions may be, indeed
12 must be, entered where the crimes have materially distinct elements from each other.
13 And this is in the sense that each crime, each element requires proof -- each crime,
14 sorry, requires proof of a fact not required by the other. And if they don't meet that
15 test, if they don't require that proof of the fact not required by the other, then the
16 conviction should be for the more specific crime with the lesser included crime being
17 subsumed. Essentially, this test is the same as the reciprocal speciality doctrine
18 known in civil law systems, and it ensures that only sufficiently distinct crimes will
19 justify multiple convictions. And the test applies to legal elements of the crimes only,
20 and considers both the elements of the underlying acts and the contextual elements.

21 By focusing on materially * distinct elements, each of which protects certain harms, it
22 properly recognises the distinct interest protected by each crime and fairly labels the
23 accused's criminal conduct. And this is important both for victims and the
24 international community, and it's something that the ECCC recognised in the Duch
25 appeal judgment, also known as the Kang case. And they underscored that the test,

1 quote, "serves the interest of justice by ensuring that convictions entered against an
2 accused reflect accurately and in full the extent of his or her criminal culpability," end
3 of quote. That's at paragraph 295.

4 Now, the Statute itself contains no express mention of cumulative convictions or
5 when they'll be allowed, but they are envisaged in the elements paper. If you look at
6 paragraph 9, it says that a particular conduct may constitute one or more crimes.
7 And in our submission, Article 78(3) also supports the application of the current test.
8 As you know, it says that, when a person has been convicted of more than one crime,
9 the court shall pronounce the sentence for each crime. And the joint sentence
10 specifying the total prison, a period of imprisonment. And in our submission, its
11 reference to crime rather than criminal conduct supports the materially distinct
12 elements test.

13 Now, Mr Ongwen, also the ADC, have said -- have argued that the test is too
14 formalistic and it prejudices the accused, and they call for these other principles to be
15 used.

16 We also note that *obiter dictum*, the Bemba Appeals Chamber, in the Article 70, Bemba
17 case, also noted that these principles could be useful to bar multiple convictions even
18 where the offences have different elements. Although, it saw no need to do so in
19 that case. And the Ongwen Trial Chamber itself did go beyond Celebici and
20 consider them.

21 But in our submission, your Honours, this was -- is not only unnecessary, it's incorrect.
22 Any risk of prejudice from cumulative convictions is addressed by correct application
23 of the Celebici test and a proper approach to sentencing. So let's look at the risks
24 that have been identified or mentioned.

25 As for the risks that come from this test, I should say, as for this alleged risk that an

1 accused may face, increased blame or stigma from multiple convictions, this
2 argument only resonates if the offences are not genuinely distinct.

3 As the major -- a major scholar in this area, Professor Carl-Friedrich Stuckenberg - this
4 is referenced in our response brief at footnotes 307 to 308 - he has said, and I'm
5 quoting, "It's not unfair because the accused gets exactly what his deed deserves.
6 Why should he, who manages to break two provisions at once, be treated the same
7 way as he who breaks only one law?" End of quote.

8 And the Appeals Chamber, the ECCC Appeals Chamber, said something similar in
9 Duch appeal judgment. They also said, applying this Celebici test doesn't result in
10 undue prejudice to the accused because, and I quote again from paragraph 296 of that
11 judgment, "where the conduct of an accused fulfils elements of several crimes, the
12 resulting stigma is an appropriate consequence of lawful convictions." End of quote.

13 Now, in terms of the potential risk of prejudicially increasing an accused's sentence,
14 this can be avoided so long as the Trial Chamber is careful to acknowledge the
15 overlapping facts of the cumulative convictions, doesn't account for them more than
16 once in the joint sentence, and ultimately ensures that it reflects the totality of the
17 criminal conduct and the accused's overall culpability, as the Trial Chamber did here.

18 Now, we'll return to this in more depth on Thursday when we address question 12,
19 that how cumulative convictions should be reflected in sentencing. But, in brief,
20 your Honours, the Trial Chamber correctly approached the sentencing in this case to
21 ensure that any cumulative convictions did not prejudicially increase his sentence.

22 And it followed the two-step process in Article 78(3), and it first chose an
23 individual -- an appropriate individual sentence for each crime. And it expressly
24 acknowledged in doing so that a number of crimes were in concurrence and had the
25 same or partially the same underlying conduct. And they mention, for example, the

1 analogous war crimes and crimes against humanity and some of the gender-based
2 crimes.

3 And then when it came to determining the joint sentence, the Trial Chamber again
4 was very careful to note that it would not account for any such overlapping conduct
5 more than once, exactly, so that Mr Ongwen would not be punished beyond his
6 actual culpability. That's at the judgment -- sentencing judgment 146, 149, and 376
7 to 379.

8 In any event, it also noted that, because of the strikingly large number of his distinct
9 convictions with different factual basis, any such overlap did not significantly affect
10 the joint sentence.

11 Now turning to consumption and subsidiarity. In our submission, no additional
12 principles such as these from the field of *concursum delictorum* are needed or should be
13 adopted.

14 Firstly, domestic systems differ in their understanding and their application of these
15 principles. So, in our view, their use by Trial Chambers in a discretionary manner
16 could actually lead to unequal treatment of cases. We say that for a predictable and
17 stable jurisprudence, the Court should maintain the established test with no additions
18 to that.

19 Also, the test makes sense for the international criminal arena and the complex
20 criminality adjudicated at the ICC. And it's quite different, generally speaking, from
21 the single case or single crime cases at the national level. In any event, we say that
22 the concepts are either superfluous to the current test or run counter to its rationale
23 and purpose.

24 Turning to subsidiarity, which may apply where there's a more specific offence and a
25 residual clause. This is already covered by Celebici's lesser included offence

1 principle, and so it's not needed. And this is the reason why on either test
2 convictions for torture is a crime against humanity and torture is an inhumane act as a
3 crime against humanity are impermissible as the Trial Chamber found.
4 Now, as for consumption, this may apply where two offences are typically but not
5 necessarily violated once because they are closely related and seen to protect the same
6 or closely related societal interest. A conviction for only one of the two, usually the
7 graver, may be considered sufficient to characterise the criminal conduct. And the
8 Trial Chamber applied this to see whether Dominic Ongwen could be convicted for
9 both rape and sexual slavery. And it first noted that they had materially distinct
10 elements, rape requires, sexual evasion, and sexual slavery requires the exercise of
11 ownership over the victim.
12 And then it went further in its consumption analysis. It noted that sexual slavery
13 requires subjecting the victim into any act of a sexual nature, not necessarily rape, but
14 in these concrete circumstances, the sexual acts were his repeated rapes. But here,
15 the Trial Chamber found that the two crimes covered a different scope of culpable
16 conduct, correctly so, and convicted for both.
17 So, applied as such, what the Trial Chamber did, consumption application led to the
18 same outcome as would have been achieved under Celebici. But, nevertheless, we
19 say that the concept of consumption, it shouldn't be applied to concrete facts or
20 evidence. Why? Because it could obscure the different interests protected by each
21 distinct crime, not fairly label the accused's criminality, and actually could lead to
22 different results across different cases.
23 I'll come now to question 11. In our submission, the *ne bis in idem* principle cannot
24 guide the question of cumulative convictions, and goes from that, that it should not
25 affect the test.

1 The Trial Chamber correctly found that it's rationale is to prevent a person being tried
2 again for the same conduct, successive prosecution situation, and it's irrelevant to
3 cumulative convictions in the same trial based on the same criminal conduct.

4 And, your Honours, understanding it as a principle of procedural and not substantive
5 law, in the Rome Statute context, is supported by reason of the fact that Article 20 is
6 placed in part two of the Statute, on jurisdiction and admissibility, and not in part
7 three, on general principles of criminal law.

8 *Ne bis in idem* protects a person from the harassment of further prosecutions, ensures
9 proper and efficient use of prosecutorial and judicial resources, and promotes finality
10 or legal certainty of proceedings. And these are matters which don't really apply to
11 multiple convictions in a single trial.

12 Now, Mr Ongwen and the ADC rely on certain US double jeopardy authorities which
13 prohibited both a second prosecution for the same offence and multiple punishments
14 for the same offence at a single trial. We say that these authorities are not on point
15 for two reasons.

16 First, in the US, the double jeopardy rule is narrowly construed. An accused can't
17 face successive trials or be twice punished in the same trial for the same offence. So
18 it's difficult to see the value of these cases on the question of whether concurrent
19 convictions can be entered for genuinely distinct offences based on the same conduct.

20 And, secondly, the second reason why they're not really apposite, is that, in the US,
21 and also the same thing in several common law jurisdictions, the Prosecution can't
22 appeal acquittals. So double jeopardy, as a concept, will attach at the end of trial, but
23 in the ICC --

24 THE COURT OFFICER: [16:33:51] Counsel has two minutes.

25 MS BRADY: [16:33:52] -- both parties can appeal a verdict, so it's not final in terms

1 of *res judicata*. So we say *ne bis in idem* doesn't yet apply at the trial conviction stage
2 that. US double jeopardy authorities have little relevance.
3 Now, quickly turning to the convictions challenged in this appeal. I won't dwell on
4 it very long because we've covered this quite well in our briefs. Sexual slavery and
5 forced marriage as inhumane act are permissibly concurrent because they have
6 materially distinct elements which reflect and protect different interests. And we've
7 heard, in particular, that the forced marriage requires the elements of inhumane acts,
8 and its key aspect is forced conjugal association. Sexual slavery, on the other hand,
9 requires the exercise of ownership rights and subjecting the victim to sexual acts.
10 As for war crimes and crimes against humanity, the cases that they're relying on to
11 support generally are dissents or they're early cases, they're outliers, we say. After
12 Celebici, all international courts and tribunals convicted accused for both war crimes
13 and crimes against humanity, as has this Chamber in Ntaganda and Trial Chambers
14 in Katanga and Bemba. And this was correct. For some crimes, such as like
15 murder and torture, the underlying acts have different elements. But for all crimes,
16 such as protected persons, prohibited purpose for torture, et cetera, but for all crimes,
17 even those with the same elements, of course the contextual elements differ. So
18 that's why convictions for both are needed to protect the different interests and to
19 reflect the different harms.
20 In conclusion, your Honours, Dominic Ongwen was properly convicted for both war
21 crimes and crimes against humanity, for analogous crimes and for the crimes against
22 humanity of rape and sexual slavery, and sexual slavery and forced marriage as an
23 inhumane act, and we ask this Chamber to uphold all of his convictions.
24 Thank you. That completes my submissions.
25 PRESIDING JUDGE IBÁÑEZ CARRANZA: [16:36:08] Thank you.

1 And now counsel for Victims' Group 1, you have the floor for ten minutes, please.

2 MR COX: [16:36:16] Thank you, your Honour.

3 We completely adhere, support what the -- the OTP has said, especially with regards
4 with the Celebici test.

5 However, your Honour, I would like to maybe remind the standard of appellate
6 review on legal errors. And as the OTP has said, the trial judgment was clear that it
7 knew and even applied the subsidiary principle. So we're not -- the Defence has not
8 been able to show how materially this alleged error of law has affected the outcome of
9 the decision. So to me it's -- it's puzzling and it's interesting discussions, but I'm not
10 sure it's appropriate for -- this is an Appellate Chamber and it's in regard with this
11 case, not in the abstract, but in this case that this trial judgment has even complied in
12 a certain way with the principles that the Defence is trying to impose.

13 We understand that Celebici is better because of the context and all that and we agree
14 with that. However, the Defence has not shown how, by adopting the subsidiarity
15 principle, it would change the outcome. Therefore, they have not met the standard
16 for appellate review.

17 And the decision taken by the Trial Chamber is very interesting in the sense of the fair
18 labelling. What do they say about fair labelling? And I would like to quote 2722,
19 where it says: "This also implicates the principle of fair labelling, and how the
20 proper characterisation of the evil committed, that is to say, calling the crime by its"
21 true nature -- "true name", sorry, "is part of the justice sought by the victims. It is not
22 enough to punish it merely is a combination of other crimes ([for example] rape and
23 unlawful detention), or subsumed under the generic 'any other form of sexual
24 violence'."

25 And this is interesting, your Honour, because this is compatible with standards of

1 human rights courts, especially the Inter-American Court of Human Rights who was,
2 I would say, a pioneer establishing the right to truth. In the case Velásquez
3 Rodríguez against Honduras, it already said that victims and the surviving families of
4 victims had a right to truth. Even more, this was developed, and it's constant
5 jurisprudence of the Inter-American court, but even while the crimes were being
6 committed in the Myrna Mack case against Guatemala where it said expressly that
7 victims have a right to truth. If victims have a right to truth - and this is something
8 that is also embedded in the Statute - then it's needed for purpose of justice that all the
9 culpability that the accused and convicted, in first instance of Mr Ongwen, responds
10 for. If we only say that crimes against humanity were committed, this would not
11 truly describe the truth. This would not adhere to fair labelling, this would not
12 respect the right of truth that victims and survivors have a right.

13 So under these principles, it's clear to me that you must uphold the decision in the
14 sense that both war crimes were committed and crimes against humanity especially in
15 this context where the contextual element of crimes against humanity and an armed
16 conflict were not only known by Mr Dominic Ongwen, were actively produced by Mr
17 Ongwen. He himself took part on the attack. He himself contributed in the armed
18 conflict. How do we know this? Because of all the victims and all the testimonies
19 that were given in court, but also because of his own words.

20 As I remembered yesterday in the de Jong report, he said that he knew about
21 ammunition, that's how he rose through the ranks. So especially in this case -- I'm
22 sorry that I keep on coming for this case, because I am a lawyer for concrete people.
23 In this case, the conduct of Mr Ongwen is relevant because he created the contextual
24 elements. Are we going to forget about that? Are we going to dismiss it? Then it
25 wouldn't really describe the real situation. It wouldn't be a historic record of what

1 happened to our -- the people we represent with Mr Manoba and the rest of the team.
2 So to me, first, consumption, subsidiary, in this case were considered by the Trial
3 Chamber and did not have an impact. Second, about *ne bis in idem*, we agree that it's
4 a procedural right. That's the way it's described in Article 20. But even if we take
5 the substantive nature of *ne bis in idem*, we have to go to why is *ne bis in idem* created
6 established by criminal law. It was so the person only responds for the unlawful
7 nature of his conduct or crimes only once. But if that person commits more than one
8 crime with its conduct, there's no *ne bis in idem* problem even substantially because
9 they must respond for all the unlawfulness. This is -- once again, if we take another
10 view, it would undermine the purposes of criminal punishment, be it that you adhere
11 to or you agree with -- I'm sorry, because I keep on saying "adhere" because I'm
12 translating from Spanish, so I'm sorry. But you agree with, I don't know, deterrence
13 effect of punishment, the retribution, the confirmation of a norm -- a value or norm, a
14 juridical norm, any of the functions of criminal law require that the person that
15 commits a crime responds for all its crimes, for all the unlawfulness. That's the
16 principle of culpability. That's what's behind *ne bis in idem* even substantially.
17 Therefore, your Honour, here you don't have that problem because his conduct
18 violated different norms, violated different legal protections, produced different
19 harms and he contributed directly in a -- contributing with essential elements for the
20 contextual elements to be present in the case.

21 Thank you, your Honour.

22 PRESIDING JUDGE IBÁÑEZ CARRANZA: [16:44:47] Thank you.

23 Now, please, counsel for Victims' Group 2. Mrs Massidda, Paolina Massidda, you
24 have ten minutes, please.

25 MS MASSIDDA: [16:44:55] Thank you very much, Madam President. Now, in the

1 framework of a statute, cumulative convictions serve a fundamental purpose, as
2 already stated by the Prosecution, of fully reflecting the culpability of an accused.
3 For the purpose of answering question 6, the first prong, considering the exhaustive
4 arguments presented by the Prosecution and by my colleague, Mr Cox, which we
5 share in full, I will only limit my observation in saying that the Trial Chamber
6 correctly applied the test developed in the Celebici case, and I will then develop few
7 arguments in relation to the second prong of a question, the *ne bis in idem* principle on
8 the point of view of the preparatory works and how the preparatory works allowed
9 to conclude that this principle, in our submission, is not applicable in the context of
10 cumulative convictions.

11 Starting with the decision and precedent in this case, the Appeals Chamber in the
12 Bemba et al. case already indicated, and I quote, in relation *ne bis in idem*, "the
13 provision concerns the question of whether a person may be tried more than once for
14 the same conduct. At issue here, however, is the question of whether a
15 Trial Chamber at the end of a trial may enter multiple convictions if the same conduct
16 fulfils the legal elements of more than one offence". It's judgment 13, 8 March, 2018,
17 paragraph 748.

18 Now, the legislative history of a current formulation of Article 20 supports that
19 conclusion of the Appeals Chamber. If we quickly review the relevant drafting
20 history, we see that in 1994 the International Law Commission - and this is reference
21 two in our list of authorities - already stated, I quote, "the non bis in idem principle
22 applies both to cases where an accused has been first tried by the ICC and the
23 subsequent trial is proposed before another court, and to the converse situation of a
24 person already tried before some other court and subsequently accused of a crime
25 under the Statute. In both situations, the principle only applies where the first court

1 actually exercised jurisdiction it made a determination on the merits with respect to
2 the particular acts constituting the crime and when there was a sufficient measure of
3 identity between the crimes which are the subject of the successive trials". End of
4 quote.

5 On this draft, the Committee of Experts recommended - and this reference 3 in our list
6 of authority - and I quote, "the prohibition is not against being twice punished, but
7 against being forced to stand trial for the same offence". End of quote.

8 An observation which was then reiterated by the International Commission of Jurists
9 in 1995, which the draft Statute was being revised by the committee - and this is
10 reference 4 of our list of authorities - and I quote, "Also important to the issue of
11 complementarity is the principle of *non bis in idem* or double jeopardy, which means
12 that no person shall be tried twice for the same crime". End of quote.

13 At the meetings of the preparatory committee, the Committee of Experts in 1996 again
14 indicated - reference 5 of our list of authorities - I quote, "The prohibition is not
15 against being twice punished, but against being twice forced to stand trial for the
16 same offences". End of quote.

17 Most importantly, the ICTY, whose statute inspired the provision concerning the *ne*
18 *bis in idem* principle in the draft statute developed by the International Law
19 Commission, sent a contribution to a final draft being prepared of a preparatory
20 committee. And this is reference 6 in our list of authority. In said contribution, the
21 ICTY clarified that because the concurring jurisdiction of the ICTY and national courts
22 may lead to situations of repeated prosecution of the same person for the same
23 conduct, Article 10 of the ICTY Statute prohibits such repeated prosecutions unless a
24 person has been already tried by the Tribunal, or a person already tried by a national
25 court has been tried for an ordinary crime or the proceedings were not impartial or

1 independent, designed to shield said person from international criminal liability or
2 the case was not diligently prosecuted.

3 This general view was equally shared by the international human rights organisations
4 like Amnesty International, which actively contributed, actually, to the development
5 of this principle in the context of preparatory committee work. And I will simply
6 refer your Honours to references number 8 and 9 of our list of references.

7 In conclusions, your Honours, it's our submission that the review of a Preparatory
8 Works allow concluding that the principle of *ne bis in idem*, as formulated in the
9 Rome Statute, does not provide or in fact was not conceived to provide any guidance
10 on the question of concurrence of crimes or cumulative conviction. The principle
11 itself, as formulated in Article 20, exclusively deals with the prohibition against
12 double jeopardy, meaning that no person shall be tried twice for the same crime in the
13 context of a complementarity system of a court.

14 In other words, said article deals with a rather jurisdictional issue and is meant to
15 protect a convicted person to be called at trial again for crimes for which he or she
16 had already been convicted or acquitted.

17 A final note, your Honour. On what Mr Cox also indicated before me, in relation to
18 the interest of victims that we represent, to see all the crimes rightly prosecuted and
19 the person convicted rightly for all the crimes --

20 THE COURT OFFICER: [16:52:58] Counsel has two minutes.

21 MS MASSIDDA: [16:53:00] Thank you. And the persons who committed the crime
22 rightly convicted for all the crimes. Thank you very much.

23 PRESIDING JUDGE IBÁÑEZ CARRANZA: [16:53:10] Thank you. Thank you.

24 We have now reached the end of the day, of the hearing. I thank the *amici* who have
25 assisted us on the issue -- on the issues concerning grounds excluding criminal

1 responsibility under Article 31 of the Statute and sexual and gender-based crimes.
2 Your contributions will certainly assist the Chamber in reaching its determination of
3 the matter.

4 We will reconvene tomorrow at 10 a.m. The hearing is now adjourned until then.

5 THE COURT USHER: [16:53:50] All rise.

6 (The hearing ends in open session at 4.53 p.m.)

7 CORRECTIONS REPORT

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

10 Page 11 line 19:

11 "MR COX: [10:23:45]" is corrected to "MR CROSS: [10:23:45]"

12 Page 45 line 16:

13 "a conjugal slavery" is corrected to "as conjugal slavery"

14 Page 45 line 17:

15 "an abstracts" is corrected to "an abstract"

16 Page 46 line 22:

17 "the "is translated and added.

18 Page 48 line 14:

19 "of" is translated and added.

20 Page 42 line 8:

21 "the " is translated and added.

22 Page 94 line 24:

23 "* MR NARAYANAN" is corrected to " MS NARAYANAN"

24 Page 102 line 21:

25 "in loyalty" is corrected to "on loyalty"

- 1 Page 114 line 11:
- 2 “concepts consumption and subsidiarity” is corrected to “concepts of consumption
- 3 and subsidiarity”
- 4 Page 114 line 21:
- 5 “difference elements” is corrected to “distinct elements”