

1 International Criminal Court
2 Trial Chamber IX
3 Situation: Republic of Uganda
4 In the case of The Prosecutor v. Dominic Ongwen - ICC-02/04-01/15
5 Presiding Judge Bertram Schmitt, Judge Péter Kovács and
6 Judge Raul Cano Pangalangan
7 Trial Hearing - Courtroom 3
8 Tuesday, 18 September 2018
9 (The hearing starts in open session at 9.30 a.m.)
10 THE COURT USHER: All rise.
11 The International Criminal Court is now in session.
12 PRESIDING JUDGE SCHMITT: [9:30:10] Good morning, everyone. Welcome back
13 to the courtroom.
14 Could the court officer please call the case.
15 THE COURT OFFICER: [9:30:18] Good morning, Mr President, your Honours.
16 The situation in the Republic of Uganda, in the case of The Prosecutor versus
17 Dominic Ongwen; case reference ICC-02/04-01/15.
18 And for the record, we are in open session.
19 PRESIDING JUDGE SCHMITT: [9:30:33] Thank you.
20 I ask for the appearances of the parties.
21 First the Prosecution, Mr Gumpert.
22 MR GUMPERT: [9:30:37] May it please your Honours, my name is Ben Gumpert.
23 With me today in court, Adesola Adeboyejo, Colin Black, Colleen Gilg, Beti Hohler,
24 Pubudu Sachithanandan, Kamran Choudhry, Shkelzen Zeneli, Ramu Fatima Bittaye,
25 and Hai Do Duc.

1 PRESIDING JUDGE SCHMITT: [9:30:55] Thank you very much.

2 And for the Legal Representatives, Ms Massidda.

3 MS MASSIDDA: [9:31:00] Good morning, Mr President, your Honours. For the
4 Common Legal Representatives team appearing today, Mr Orchlon Narantsetseg,
5 Ms Caroline Walter and myself, Paolina Massidda.

6 PRESIDING JUDGE SCHMITT: [9:31:11] Thank you.

7 And Mrs Hirst.

8 MS HIRST: [9:31:14] Good morning, Mr President. Good morning, your Honours.
9 My name is Megan Hirst. With me, Anushka Sehmi.

10 PRESIDING JUDGE SCHMITT: [9:31:21] Thank you.

11 And for the Defence, Mr Ayena, please. Microphone, please. It should be fine now.

12 MR AYENA ODONGO: [9:31:36] Good morning, Mr President and your Honours.

13 I am Krispus Ayena Odongo. I am assisted today by Chief Taku Achaleke,
14 co-counsel; Madam Beth Lyons, co-counsel; and Abigail Bridgman; Michael Rowse;
15 Tibor Bajnovic; Eniko Sandor; Inshuti; Roy Ayena; and our client,
16 Mr Dominic Ongwen.

17 PRESIDING JUDGE SCHMITT: [9:32:28] And Mr Tom Obhof, I think.

18 MR AYENA ODONGO: [9:32:32] Last but by no means least, Tom Obhof and
19 Owiso Owiso.

20 PRESIDING JUDGE SCHMITT: [9:32:40] Thank you, very much.

21 The Defence presentation of its evidence is set to commence on 1 October. Today,
22 however, we convene in order for the Defence to be given an opportunity to present
23 its opening statement. Let me very shortly explain what the purposes of the opening
24 statement is.

25 The Defence is here today to provide an explanation as to what it expects its evidence

1 to show in the course of the coming month. This has been done similarly during the
2 Prosecution and LRV opening statements at the commencement of the trial. It is
3 only during the closing statements that the participants will have the opportunity to
4 raise arguments or challenges against the evidence of others.

5 Short procedural issues before we start with the Defence presentation.

6 Before we move to your opening statement, the Chamber recalls that pursuant to
7 paragraph 7 of decision 1021, it ordered the Defence to certify that it had provided all
8 witness information forms to the VWU for its Defence case.

9 On 2 July, the Defence informed the Chamber it had provided 52 witness information
10 forms to VWU and only 13 remained outstanding. Could the Defence provide us,
11 the Chamber, with a further update on this matter. Mr Obhof, please

12 MR OBHOF: [9:34:13] Sorry, your Honour. This was actually on my list of things
13 to do for tomorrow when we are not in Court. If I'm not mistaken, I have been
14 checking with VWU, but I think we've done all except for the few that we are not
15 allowed to contact right now, the D-35, 36, those few people, so I think, but there
16 might be one or two normal ones remaining.

17 PRESIDING JUDGE SCHMITT: [9:34:38] So then I think I can thank you at this
18 moment on behalf of the Chamber for complying largely with the order of the
19 Chamber. Thank you very much.

20 I will give now the floor to whoever wants to start with the opening statement.

21 I don't know who wants to have the floor.

22 Mr Ayena, please.

23 MR AYENA ODONGO: [9:34:59] Mr President, it was designed that I have the floor.

24 Mr President and your Honours, you have allotted us five hours within which to
25 present our opening statement. I hope this will not include the time taken for

1 introduction and making your opening comments.

2 I have decided, your Honour, to divide this role into three parts with two of my
3 co-counsel. I shall deal with an overview of the case, Counsel Charles Taku
4 Achaleke will deal with the modes of liability, while Counsel Beth Lyons will deal
5 with matters to do with fair trial.

6 Mr President and your Honours, it would be an understatement to say that the task
7 before you in dealing with this case is a most unenviable one. This is because the
8 case is peculiar in many fundamental respects.

9 Firstly, never before has the world witnessed a conflict so complex in nature, steeped
10 in metaphysics and spiritualism, that forms the contextual basis of this case. The
11 conflict that dazzled the world by its intensity, mindlessness and protraction on both
12 sides of the protagonists was in a class of its own.

13 Secondly, the accused, who is the subject of this interrogation was just a child when
14 he was abducted, brutalised and made in the bush with no mind of his own.

15 Thirdly, your Honours are called upon to assess from no precedent the impact on the
16 accused, the spiritualism and mindless brutality on him, the coercive environment
17 bound in torture, spy network woven around him, extreme hunger, the treacherous
18 weather he was made to endure, and the constant reminder that he no longer had
19 parents and a home to return to.

20 Fourthly, your Honours will have to caution yourselves that the government of
21 Uganda that referred the matter to this Court and is the main source of the
22 Prosecution's evidence did not do so with clean hands. The adage that "those who
23 come to equity must come with clean hands" must be held against the government of
24 Uganda and the Prosecution. All this may have to be weighed against the
25 Prosecution evidence well aptly known for its blame game.

1 Furthermore, Court is cautioned to be mindful of the fact that, this being a political
2 case, those who have testified for the Prosecution case did so well aware that they
3 have to go back and live in a state which has every reason to hide their role in the
4 atrocities charged before this Court.

5 Your Honours are faced with a gigantic task to determine a few unfamiliar questions.
6 Firstly, whether the accused qualifies as a victim. If so, whether his victimhood
7 ceased at any time during his captivity under the LRA.

8 Did he, having been a victim, kept under the keen watch of Joseph Kony and his spy
9 network and scare of spiritualism transcend into a perpetrator? Has the accused,
10 abducted at the age of 9 and spent nearly 27 years under the vicious grips of the LRA,
11 become an adult in terms of mind transformation?

12 And more poignantly, your Honours will have to decide whether the accused, like
13 many of his peers, believed in Kony's spiritualism. Did he believe he was helpless
14 under the spell the Kony's spiritualism? If he did, how did it impact on his mind or
15 on his mental disposition? Did it leave him with the presence of mind to act
16 independently as a reasonable man even after attaining physical adulthood?

17 Much of these, your Honours, have already been answered by some Prosecution
18 witnesses who testified before this Court. The Defence now only is left with the
19 duty to bring witnesses to show that once captured as a victim, the accused was
20 indoctrinated and made to live by the strict edicts of the LRA based on spiritualism or
21 die, period.

22 As such, the accused did not possess a mind of his own save for the survival instinct
23 he developed to navigate the harsh conditions of the bush, including the watchful
24 eyes of the LRA spy network. The spy network varied, your Honours, from person
25 to person depending on the value attached to the victim as well as his perceived

1 propensity to escape. The accused himself was constantly put on the radars of
2 Joseph Kony for the reasons that will be shown to this Honourable Court.
3 As was observed by many, this case raises many vexing justice questions. How
4 should individual responsibility be addressed in the context of collective victimisation?
5 What practical options were available to the accused, who was raised within LRA's
6 setting of extreme brutality? Is it possible to achieve justice both for the accused,
7 himself a victim, and for the victims of the crimes he is alleged to have committed?
8 Mr President and your Honours, you will be called upon in this case to deal with the
9 concept of complex political victims. The accused falls in that category. Children
10 abducted by LRA, the accused inclusive, and used in the war in northern Uganda
11 grew up in one of the most brutal environments never before known to humanity
12 with little room for moral development that would enable him to later take
13 independent decisions. Given the nature of the LRA and their modus operandi, we
14 shall show that Dominic Ongwen's presumed culpability is sham.
15 Your Honours, I'll go to a brief history and general background to the case.
16 Mr President and your Honours, the political history of Uganda from 1966 has been
17 and remains rapturous, with the people in power always pitting one section of the
18 community against others. This has since been perfected after 1981, when the
19 leaders of the current regime took up arms against an elected government. It will be
20 shown, your Honours, that the profound underpinnings of this case cannot be
21 appreciated and understood unless a brief outline of the history of Uganda and the
22 character of the current regime, which referred this case to this Court, is understood
23 to give context to the unfolding of events that is charged before this Court.
24 And your Honours, the background history cannot be better narrated than by two or
25 three bush war heroes of the regime, starting with Colonel Dr Kizza Besigye, who was

1 the National Resistance Movement Army political ideologue, that was, he was the
2 national political commissar during its first years in power, and I beg to show a video
3 clip of what he has to say.

4 THE COURT OFFICER: [9:46:42] This will be on the evidence 2 channel.

5 (Viewing of the video excerpt)

6 MR AYENA ODONGO: [9:47:27] Mr President and your Honours, that is a very
7 apropos narrative of the politics of Uganda. The problem started from the political
8 crisis in April 1966 which forever changed the history of Uganda. At that time, in
9 order to quell a seeming secession attempt by the mighty kingdom of Buganda, Idi
10 Amin, who was the army commander under Dr Milton Obote from Lango, northern
11 Uganda and the executive prime minister of Uganda who received the instruments of
12 independence from the British, attacked the seat of the kingdom of Buganda. The
13 king of Buganda went into and later died in exile in Britain. Their kingdom was
14 abolished.

15 This issue forever was to divide Uganda into two, the so-called Bantu in the south,
16 west, south-west, some parts of the east on the one hand, and the Nilotics in the north
17 on the other hand. But for the sake of clarity, it must be understood that until the
18 advent of the current government, the rest of the country, including the western,
19 south-western and eastern part of Uganda, mainly remained politically aligned and
20 united with the north. But it changed at the advent of the current government.

21 In 1971, with the support of the British and the Israeli government, Idi Amin bombed,
22 like has been narrated by Dr Kizza Besigye, bombed Obote out of power. Amin was
23 himself bombed out of power by UNLA forces mainly formed of the Lango and
24 Acholi tribes supported by the Tanzania defence forces in 1979.

25 In 1980, the UPC was voted back to power through an election acclaimed by the

1 international observers as generally free and fair. Nevertheless, General Museveni,
2 the current president of Uganda was not satisfied. He had other ideas. Although,
3 he has never explained whether his loss of the parliamentary election at that time to
4 his brother-in-law and his current minister of foreign affairs, Sam Kutesa, was also
5 rigged, he claimed that the general election was nevertheless rigged. Actually, he
6 came third in that parliamentary election.

7 General David Tinyefuza, sometimes called -- now called David Sejussa, who is a
8 master's degree holder, an NRA war hero, former commander of operation north,
9 former minister of defence in the NRM government, and lastly, former coordinator of
10 the security services in the same government had this to say in the same video which
11 has just been shown to you. This is at 5.11, from 5.11 to 6.

12 (Viewing of the video excerpt)

13 MR AYENA ODONGO: [9:52:46] I don't know whether that text -- the next one.

14 (Viewing of the video excerpt)

15 MR AYENA ODONGO: [9:55:10] Mr President and your Honours, that is a
16 narrative by no ordinary person in that government. So when we are talking about
17 the character of that government, you could not have got a better narrative than from
18 the person who directly participated in that -- in the formulation of these policies.
19 Yoweri Museveni went to the bush and cashed in on the sentiments of the Baganda,
20 who were baying for the blood Obote and his northern tribes mates, for their role of
21 the abolition of their kingdom. It was the relics of this bitter war, coupled with the
22 memory of the 1966 crisis, that set the stage for revenge attacks on the Acholi
23 population. The NRA, which had basically failed to defeat a united UNLA, was
24 waiting in the wings and immediately benefitted from the confusion between the
25 Acholi and their cousins, the Lango, after General Tito Okello was manipulated by

1 the same machinery to bomb Obote out of power. Within six years -- I mean, within
2 six months, they themselves had been bombed out of power, and the NRM, the
3 current regime, ushered themselves to the reins of power.

4 As they fought the rebel war, the NRM perfected the use of blame game, and this is
5 very pertinent, your Honours. The blame game, we shall show that blame game
6 played a very prominent role in the charges before you, perfected the use of the blame
7 game for winning support from unsuspecting peasants. General Elly Tumwine and
8 Major General Kahinda Otafire, historical members of the NRM, are reported to have
9 said during the burial of Professor Adonia Tiberondwa, a UPC stalwart in 2004, that
10 during their rebel war in Buganda, they would, under the cover of darkness at night,
11 camouflage and dress in UPC and UNLA uniforms and go to attack and wreak havoc
12 on the population, then retreat to their hideouts in the bushes.

13 In the morning, they would return to express sympathy with the unsuspecting
14 peasants lamenting how terrible the UPC and their army, the UNLA, were. Your
15 Honours, the strategy worked and Luwero became -- the Luwero Triangle became a
16 recruiting ground for them.

17 Mr President and your Honours, old habits die hard. It is therefore hard to believe
18 that the UPDF, which is a continuation of the NRA that successfully used above
19 described blame game in their rebel war, has suddenly forgotten it.

20 There is a saying which was crafted by a writer from Nigeria, that the mouth that has
21 tasted milk does not forget the taste of milk. It is for that reason that we invite your
22 Honours to be extremely cautious when considering and apportioning responsibilities
23 for certain atrocities, especially those committed in and around the IDP camps, which
24 had heavy UPDF deployments around them. Professor Alimadi and Professor
25 Branch, who did a lot of research on the conflict in northern Uganda, clearly states

1 that government soldiers usually perpetrated atrocities against the civilian
2 populations and made them appear as if they were done by the LRA.

3 I shall show another video script here.

4 (Viewing of the video excerpt)

5 MR AYENA ODONGO: [10:01:15] Mr President and your Honours, after bombing
6 Tito Okello out of power, Museveni's primary goal was divide Uganda into the north
7 and south and map out the north for revenge. The new rulers designedly sent to
8 northern Uganda, especially to Acholi sub-region, the Federal Democratic Army and
9 the Uganda Freedom Army, UFA, forces allied under their command, but composed
10 primarily of people from Buganda, who had a grudge with the northern tribes arising
11 from the unfortunate confrontation during the 1966 crisis mentioned above. They
12 wantonly pillaged, destroyed crops, stole livestock and, most seriously, committed
13 the most heinous forms of human rights abuses on the population. They killed
14 whole villages, raped both men and women in the full glare of their family members.
15 This state of affairs was confirmed by the first NRA commander who commanded the
16 occupation force into Acholiland, that is Major General Pecos Kutesa who testified
17 thus.

18 (Viewing of the video excerpt)

19 MR AYENA ODONGO: [10:03:24] Mr President, when the LRA after their precursor,
20 the Holy Spirit Movement of Alice Auma Lakwena, like many rebel groups in most
21 parts of country at that time, took up arms against the repression of the government
22 of the day, the UPDF counter-insurgency strategic adopted in Acholiland was
23 different in other parts of the country. It was characterised by brutal, indiscriminate
24 and rapacious responses and retributions both on the LRA, which held in their ranks
25 innocent abducted women and children, as well as on the civilian populations.

1 General David Tinnyefuza again speaks about UPDF committing atrocities against
2 civilians in the north, dehumanising them for 27 years, et cetera, et cetera, and I beg to
3 put this on the screen.

4 (Viewing of the video excerpt)

5 MR AYENA ODONGO: [10:07:37] To add to that, your Honours.

6 (Viewing of the video excerpt)

7 MR AYENA ODONGO: [10:08:05] Mr President, the last script is about the motive
8 for prolonging the war in northern Uganda.

9 It will be shown to your Honours that the war in northern Uganda became a cash cow
10 and, therefore, nobody was willing to stop it in a hurry.

11 Dr Kizza Besigye, another NRA bush war hero and now turned leader of opposition,
12 and held sway over the decision-making processes of how to defend the regime at the
13 start of the insurgency has this to say about it, and that is at 23.59 to 27.41, and then
14 again at 34.39 to 35.10.

15 (Viewing of the video excerpt)

16 PRESIDING JUDGE SCHMITT: [10:11:18] May I shortly. We should try not to see
17 things twice.

18 MR AYENA ODONGO: Yes.

19 PRESIDING JUDGE SCHMITT: [10:11:24] I know sometimes in the flow of the video
20 of this might happen, but we should at least strive to do so. Thank you.

21 MR AYENA ODONGO: [10:11:32] I'm much obliged.

22 Your Honours, it is therefore baffling that, although, as mindfully noted by you,
23 Mr President, in your comments at the commencement of this trial: "This referral
24 was understood to extend to the entire situation in northern Uganda regardless of
25 who committed the offences under this investigation."

1 The Prosecutor chose to ignore the glaring evidence of atrocities committed by the
2 UPDF and their allies against the population of northern Uganda.

3 If it was so understood, Mr President, and your Honours, doesn't it occur to you that
4 there could have been a deliberate conspiracy of silence about the roles of the
5 government forces and their allies? Isn't it intriguing that it is only this unfortunate
6 former child soldier, otherwise a victim himself, who may ever find himself before
7 this Court for the crimes he knows not the origins of?

8 Mr President and your Honours, it is even more vexing for the Prosecutor, on the
9 information given by the government of Uganda -- that the Prosecution, on the
10 information given by the government of Uganda, has chosen to selectively handle the
11 investigation under who to bring before this Court. On the scale of what happened
12 in northern Uganda, perhaps what is before you should have been the last. It will be
13 shown that the government forces has more to answer about the war crimes of
14 attacking civilian populations with which the accused is charged.

15 Mr President and your Honours, I will now go to the emergence of LRA and the IDP
16 camps.

17 Mr President and your Honours, the emergence of the Lord's Resistance Army was a
18 direct result of and response to the state policy that threatened to decimate a whole
19 ethnic group and beyond. The statements of General David Tinnyefuza in the above
20 video narrative tells it all. As stated in the background to this statement, LRA was
21 only used as a pretext for the government of Yoweri Museveni to execute its well laid
22 out plan against the people of Acholi particularly and northern Uganda in general.
23 The LRA presented itself as the perfect justification for the government of Uganda to
24 complete its mission of bringing not only the northern but some eastern tribes to their
25 knees to ensure they may no longer be a political threat to their hegemony. They

1 committed all manner of human rights abuses, not only in Ahcoliland, but in the
2 whole of northern and eastern Uganda. They killed, they pillaged and destroyed
3 properties. They raided and took away a population of more than 3 million cattle
4 and livestock and blamed it on the Karamojong cattle raiders.

5 But, your Honours, the people of northern and eastern Uganda are not fools. They
6 know that the Karamojongs do not have helicopters which were used to identify
7 where the animals were.

8 The problem with the Prosecutor's investigation has tended to show that the whole of
9 northern Uganda, among other things, was occupied by only the Acholi and that it
10 was only the Acholi people who suffered. This is far from the truth. The whole of
11 northern Uganda and Lango in particular suffered in equal measure.

12 Evidence shall be provided to show that the LRA as a matter of fact started as a
13 pro-people revolutionary army to counter the threat posed to the Acholi by the then
14 National Resistance Army, which became Uganda People's Defence Forces. At the
15 beginning, the LRA found a population seriously exasperated and threatened by the
16 onslaught of the government forces and ready to voluntarily join them for their own
17 self-preservation and also to protect the community.

18 Mr President and your Honours, this policy changed over time when the government
19 devised a successful propaganda that militated the opinions of the population against
20 the LRA. The population turned hostile to LRA and in fact became allies to the
21 government forces. The LRA lost their recruitment/conscription ground as the
22 population was no longer willing to voluntarily join their ranks.

23 Faced with this new challenge and dilemma, Joseph Kony and his LRA changed
24 tactics and came out with a new policy of forceful recruitment/conscription into the
25 LRA. The accused before you, your Honours, fell victim of this new policy of

1 abduction and forceful recruitment/conscription into the LRA.

2 As for the IDP camps, your Honours, in her opening statement, the Prosecutor
3 recognizes that the civilians did not move into the IDP camps of their own volition
4 but were forced into the camps. She said, and I quote, "Violent attacks on civilian
5 targets ... resulted in those ordinary people being forced into internal displaced
6 persons' camps."

7 The issue for your determination, your Honours, is who actually forced them into the
8 IDP camps?

9 Defence, your Honours, will start from the premise that the context of this case,
10 particularly what happened in and around the IDP camps on the backdrop of the
11 LRA propaganda of blame game enunciated above, it remains a curious matter of
12 evidence to find out who actually forced the population of more than 2 million people
13 into the IDP camps across northern Uganda and what was the motive behind it?
14 This may partly answer the question of the extent of atrocities committed in and
15 around the camps during the charged incidents.

16 Mr President and your Honours, Defence shall bring witnesses who will testify that
17 the establishment of the IDP camps was a government project and part of the war
18 strategy against the population of northern Uganda generally, but the Acholi in
19 particular. This can be explained in several ways, first among them being that in
20 1987, when the government started forcing the entire population of northern Uganda
21 into the camps, LRA was a force of hardly 500 men and women under arms. On the
22 other hand, the NRA, now UPDF, had more than 40,000 well-armed personnel. That
23 army could not have failed to contain a rag tag rebel group of that number, spread
24 over the entire Acholiland and the northeastern and southern parts of Lango
25 sub-region.

1 Secondly, your Honours, enforcement of the policy to force the population into the
2 camps was ruthlessly hushed up. Bombs were indiscriminately thrown into the
3 villages to scare the people to move into the camps. And at this point I refer to a
4 statement made by Bishop Ochola and the other lady who was scarred, who you
5 could see burnt scars on. This is at 36.40 to 36.44.

6 (Viewing of the video excerpt)

7 MR AYENA ODONGO: [10:22:17] This alone, your Honours, caused many deaths
8 which the government has never accounted for. What was the hurry in forcing
9 people into those camps even where there was no LRA presence?

10 Thirdly, your Honours, the government left the IDP camps to remain a death trap for
11 the population. It had never put in place any arrangement for life sustenance such
12 as shelter, food, and water, sanitation, medical supplies, et cetera, et cetera. On the
13 other hand, as they were forced into the camps, the people were not allowed to carry
14 with them any livelihood supplies such as livestock, food grains, et cetera, et cetera.
15 Neither were they allowed to go back and pick them, to pick whatever supplies were
16 left behind. Meanwhile the government soldiers helped themselves on whatever
17 was left behind, some of which they brought to sell to the camp dwellers for those
18 who could afford it.

19 I am now coming to how the IDP camps were made legitimate military targets.

20 Your Honours, it is the case that before the government policy to deny the LRA
21 support by taking people into the IDP camps, LRA depended on the population for
22 food and for recruitment. As soon as the policy for IDP camps was put in place,
23 many things happened.

24 Number one, the government did not put sufficient security arrangements to
25 safeguard the IDP camps. In camps, some of which contained more than 40,000

1 people, the government would put maybe about 20 or less than 30 UPDF officers
2 composed mainly of badly trained LDUs. This made the barracks a soft target for
3 the LRAs, soft target for getting military hardwares. And as they became soft target
4 for getting military hardwares, it also happened, your Honours, that the IDP camps
5 became the only place where food could be found in the whole of northern Uganda.
6 Therefore, out of necessity, your Honours, the LRA had to find a way of getting this
7 food from the IDP camps. But before doing that, your Honours, their gateway to the
8 IDP camps where the food was was the military barracks. They had to go through
9 the military barracks.

10 And it is now mentioned, your Honours, that the death that finally occurred in the
11 IDP camps were not a deliberate design of the LRA, but they occurred during the
12 crossfires between the LRA and the UPDF and their allied forces.

13 The worst thing that has happened and your Honours have not been assisted with is
14 there have been no forensic examination of those who died to establish whose gun
15 actually killed the victims. Were they the guns of the rebels or the guns of the
16 UPDF?

17 The other thing worthy of note, your Honours, is that the government of Uganda took
18 a very reckless decision to attack the LRA, who were well established in southern
19 Sudan where, according to evidence available, they had robust food production
20 schemes and they were far away from the population of Uganda. But when they
21 were provoked and pushed out of the southern Sudan, they had to return home to
22 find an empty space in the villages greeting them with no food, with no people to
23 associate with, everybody put in the camps. It was for this reason, your Honours,
24 that the LRA attacks intensified in the IDP camps, first, against the military targets
25 and, secondly, for purposes of getting food.

1 Your Honours will also be reminded that the IDP camps became the recruiting
2 grounds for LDUs, Arrow Boys, Amuka, and so on and so forth, and for getting
3 informers for the government; government informers. Therefore, your Honours,
4 these are some of the reasons that put the population, the civilian population in
5 harm's way.

6 Your Honours, I want to turn to the issue of the 70 charges. Your Honours, the
7 Prosecution has made very interesting, if contradictory, propositions about the
8 number of charges in this case. They have discredited the public concern about the
9 same. Dominic Ongwen, who was just a mere child victim, has had 70 charges
10 against him. Not even Joseph Kony, who was Dominic Ongwen's boss, attracted so
11 many charges from the charges we have seen earlier on. Perhaps this is the most -- I
12 mean, perhaps this is the biggest number of charges ever brought before any
13 international court.

14 But the Prosecution says, to downplay the enormity of their task, the Prosecution
15 says:

16 "The large number of charges is not designed to show that this case is more serious
17 than the case against any other accused person. Nor will a trial involving 70 charges
18 last 10 times as long as a case involving only seven. This isn't an arithmetical
19 exercise."

20 Your Honours, as can be seen from the subsequent sentences, it is clear that the
21 Prosecution is not clear about their own case theory and strategy. They have,
22 moreover, heavily contradicted their earlier statement when Mr Gumpert said "There
23 is a great deal of evidence". No wonder, your Honours, it seems clear that the
24 Prosecution does not appreciate the enormity of the case they have brought against
25 the accused, leading them to leave undone what they ought to have done and they

1 did what they ought not to have done. The Prosecution by bringing 70 charges
2 against the accused clearly decided to go on a fishing expedition and spread the net
3 so widely that they failed to concretise on the key evidential parameters needed to
4 convict the accused.

5 The Defence, your Honours, is of the considered view that every charge brought
6 before court must be proved by the Prosecution beyond any element of reasonable
7 doubt, or at least to a level of sufficiency, meaning that the more the charges the more
8 evidence required. As a matter of fact, under the Rome Statute it is a matter of
9 arithmetical exercise. That is why there is a formula, your Honours, provided for
10 appropriation of timelines and resources.

11 Your Honours, it is the case of the Defence that because of the romantic approach to
12 the number of charges by the Prosecution the Defence has been put to undue
13 detriment, given the inequality of arms provided to the Defence. Your Honours, we
14 remember that many times the Prosecution has had to make approaches to your
15 Lordships to allow for increased resources, but, with the minimum resources, the
16 Defence team has had to burn many more midnight candles than the Prosecution.

17 Mr President, maybe at this point I would turn to who Dominic Ongwen is.

18 Mr President and your Honours, having given the background to the case and the
19 outline history of Uganda, we deem it imperative to proceed to introduce Dominic
20 Ongwen, the person. And to put on record his background, identity and the
21 vicissitudes and vacillation of his life in the bush until he escaped. From the onset,
22 your Honours, it can be stated without any fear of contradiction that he is clearly a
23 product of the interplay between the politics of the current government of Uganda
24 and LRA in the melodrama of the vicious conflict that engulfed the whole of northern
25 Uganda and beyond for more than two and a half decades.

1 Mr President and your Honours, even the most prolific forensic legal eloquence
2 cannot change the fact that the accused before you is a product of the violent,
3 insensitive, disruptive, discriminatory, persecutory and repressive nature of the
4 politics of the current government of Uganda, already ably illustrated above, on the
5 one hand, and the LRA. Witnesses shall be brought to testify and further narrate the
6 story that the spectre of the conflict giving rise to this case, as well as the charged
7 crimes, have a direct link to the nature of the politics of Uganda. It will also be
8 shown that Dominic Ongwen was a victim, rather than a perpetrator of the political
9 interplay in this conflict between the protagonists.

10 And it is the case of the Defence, your Honours, that once a victim, always a victim.
11 One cannot be a victim and, still under the grips of the same system that victimised
12 him, become a perpetrator.

13 But before going into any details about Dominic Ongwen, it is instructive to remind
14 this Honourable Court from the outset that he is before you, your Honours, not
15 because he was captured, as is being peddled in some quarters. Dominic Ongwen is
16 before you, your Honours, because he surrendered and gave himself up. And it
17 cannot be overstated that when he surrendered he was aware of his pending
18 indictment before this Court.

19 So, Mr President, why did he surrender?

20 Your Honours, the reason is well stated by the accused himself. Right from the
21 beginning during his first interview at the American army base in the Central African
22 Republic, when he said, "LRA is not my army". Your Honours, what he was
23 referring to was that the charges before this Court are against the LRA and, therefore,
24 he did not have to fear to appear to exonerate himself before this Court.

25 He repeated the same at every opportunity, especially at the beginning of the pre-trial

1 hearing and at the commencement of these trial proceedings. We respectfully invite
2 your Honours not to take this conduct and gesture of the accused for granted. It
3 should be interpreted in his favour to show that the accused is true to what he is
4 saying, that he knew not what he was doing and that, in any event, he did not have
5 the intent to do, if at all he did, what he's accused of having done. But more
6 importantly, he was acutely aware that, as far as he's concerned, the charges before
7 you are charges against LRA as an institution that victimised him.

8 From evidence available, your Honours, from both his aunty, the wife of his paternal
9 uncle, and the said uncle himself, who now plays father figure for him, the accused
10 was 9 or 10 years at the time of his abduction. This evidence seems to be in tandem
11 with the reports from those who were around when he was abducted, and who say
12 that he had to be carried by other captives all the way up to the LRA's main military
13 base because he was too little to walk.

14 Dominic Ongwen was, as a matter of fact, born in or around 1978 in Coo Rom village,
15 Kilak county, Amoro district, Northern Uganda. Like many other children, he was a
16 happy, harmless and innocent child enjoying the protection of his parents and the
17 community. However, at that tender age, under the seeming watch of the
18 Government of Uganda, as he innocently walked to Alero Primary School, in 1987, he
19 was abducted, never to see his parents again. A dark cloud was drawn against him.
20 All his hopes and the hopes of his parents and his community that he might grow into
21 a useful citizen were dashed.

22 As we have said before, your Honours, Dominic Ongwen has now suffered multiple
23 jeopardy. The first jeopardy is that he was denied his childhood. The second
24 jeopardy, your Honours, is that he was conscripted and kept as a slave under
25 captivity of the LRA to do the job of LRAs for 27 years.

1 The third one, your Honours, is that when he gracefully found an opportunity to
2 escape from the grips of the LRA, hoping that he might now reconnect with his
3 community, alas, he found himself before this Court.
4 For more than two years now he has been in detention and we never know for how
5 long this will take.
6 The fourth jeopardy would be if and, God forbid, he should be convicted for crimes
7 he could not have had the intent of committing if at all he did commit. For the next
8 27 years or so, he was kept in virtual captivity under the most vicious regime of edicts
9 after undergoing such indoctrination that has shocked the conscience of the world.
10 Mr President and your Honours, all considered, it will appear like a mockery of the
11 expectation of the institution of humanitarian justice that the government of Uganda,
12 many of whose leaders should have been the first candidates to be arraigned before
13 this Court, rushed to refer the case against the accused person, among others.
14 Your Honours, evidence will be led to show that Dominic Ongwen mirrors the state
15 of Uganda, the state of Uganda and its prodigal child, the LRA. Helpless as he was
16 from childhood, he was gripped by the Stockholm syndrome, by which he came to
17 believe that he owed his life to Joseph Kony, the seeming demigod. He lost his true
18 identity in the mire of the bush war and became an instrument of Joseph Kony's war.
19 Defence will lead evidence to show that once abducted, he was like all others like him
20 who were abducted, tortured and forced to watch violent rituals of people being
21 tortured and killed. That, your Honours, was the proverbial blueprint of his own
22 indoctrination into the LRA. He was to learn that in the LRA survival depended on
23 total submission and loyalty. And as he was told to fight, the enemies were clearly
24 identified to him. They were Yoweri Museveni and his UPDF and their allied forces,
25 and not the ordinary civilians.

1 Therefore, your Honours, it will be hard to believe that a child who got instructions,
2 his instructions from the beginning about who his enemies are would be charged or
3 would be accused of intentionally attacking and persecuting the civilian population.
4 It has been suggested by the Prosecution that Mr Ongwen rapidly rose in rank
5 because of his unquestioning loyalty to Joseph Kony and his LRA. And he has also
6 been accused of playing a prominent role in attacking the charged targets. Your
7 Honours, that could not be any further from the truth. From evidence already
8 available on Court record and those we are yet to bring, Dominic Ongwen's rise in
9 rank could be attributed to mainly three factors:

10 Number one, Mr President and your Honours, the period between 2002 and 2005 saw
11 the death or capture of most of the LRA top commanders, who included Major
12 General Tabuley, Major General Raska Lukwiya, Brigadier Kenneth Banya, Brigadier
13 Sam Kolo and Colonel Onen Kamdulu, to mention but a few. He was therefore only
14 promoted to fill the void.

15 And, your Honours, you will find on Court record a government-provided list of top
16 commanders of LRA around this time, and you will find from that list, your Honours,
17 that Dominic Ongwen appeared as number 36. So he was by any stretch of
18 imagination not a centrepiece in the planning arrangement of the LRA.

19 Number two, your Honours, at this time Dominic Ongwen was perceived by Joseph
20 Kony as contemplating escape from the LRA. He had to be, to use my learned friend
21 Ben Gumpert's word, he had to be incentivised to dissuade him from escaping. And
22 evidence abound on Court record that Kony used mind games to keep his victims
23 within the LRA. One of the tactics effectively used was sham promotions, and this is
24 how Dominic Ongwen could have been promoted.

25 Number three, Dominic Ongwen, even from Prosecution witness testimony on court

1 record, was an acclaimed skillful and courageous commander against the UPDF.
2 Your Honours, the Enough Project, a campaign group, said of Dominic Ongwen, and
3 I quote, "He earned the reputation of being able to emerge from the bloodiest of
4 battles with no casualties among his fighters."
5 Your Honours, Dominic Ongwen seemed, according to Joseph Kony himself, also to
6 be a darling to the spirits. His promotion was therefore inspired or instructed by the
7 spirits and not because of his self-propelled, you know, will.
8 As for his loyalty, your Honours, to Joseph Kony, if he was loyal, it was not for
9 anything else but the reason admitted by the Prosecution, your Honours, that is,
10 survival instinct to avoid Joseph Kony's wrath.
11 And when we say Dominic Ongwen mirrors the state of Uganda, what is the state of
12 Uganda and its leadership like? It is as described by their own in the video that has
13 been brought, shown to your Honours.
14 Mr President and your Honours, as someone once said, "Mean circumstances beget
15 mean children and the fruits rotten as they ripen". It needs no emphasis, your
16 Honours, to say that the mean circumstances in the state of Uganda begat Joseph
17 Kony and his Lord's Resistance Army. Joseph Kony and his Lord's Resistance Army
18 begat Dominic Ongwen, the accused.
19 Your Honours, I'm being reminded that it might be a good point to stop for a break.
20 PRESIDING JUDGE SCHMITT: [10:54:59] Yes. I assume that you want to go to
21 another topic, so I pick up your suggestion. We will have a break until 11.30.
22 Thank you.
23 MR AYENA ODONGO: [10:55:10] Very much obliged.
24 THE COURT USHER: [10:55:15] All rise.
25 (Recess taken at 10.55 a.m.)

1 (Upon resuming in open session at 11.31 a.m.)

2 THE COURT USHER: [11:31:57] All rise.

3 PRESIDING JUDGE SCHMITT: [11:32:13] Mr Ayena, you still have the floor.

4 MR AYENA ODONGO: (Microphone not activated)

5 PRESIDING JUDGE SCHMITT: Microphone, please. Microphone please. It only
6 happens at the beginning always, Mr Ayena.

7 MR AYENA ODONGO: [11:32:35] Thank you.

8 Mr President and your Honours, it needs no reminder that this is a court of justice
9 and not a court of political convenience, where states that find themselves inextricably
10 interwoven in the very mess they have created, run to it to clean their mess. While
11 we do fully associate ourselves with the fact that, not only the victims of the violence
12 in northern Uganda, but the entire world, has waited for far too long for justice for the
13 people of northern Uganda, it behoves this court to ensure that justice is not only
14 done, but seen to be done to all and sundry.

15 The people are hopeful to see fulfilled the legal adage that "justice is no respecter of
16 any person, however majestic".

17 With the risk of being misunderstood, Mr President and your Honour, let it be stated
18 here and now that, justice in the situation in northern Uganda shall not be complete
19 and shall not be seen to be done, unless the leaders of the government of Uganda,
20 particularly the UPDF commanders, who devised and supervised the purported
21 policies of countering the LRA, are arraigned before this court. Just like it has
22 already been elicited from many prosecution witnesses, Defence will bring witnesses
23 to show that some, if not most of the crimes the accused has been charged with could
24 have been either committed by the UPDF, or at their behest. The people of northern
25 Uganda had hoped that all the key players in the theatre of violence in northern

1 Uganda would be before this court at the same time in order to unable the Court to
2 properly discern and appropriately apportion responsibility to the perpetrators.
3 Sometimes one is left to wonder whether the saying that "when a coward sees
4 a weakling he feels hungry for a fight", is holding good in this case. Is the accused
5 before you that proverbial weakling in the theatre of atrocities in northern Uganda?
6 Are the UPDF commanders and the leadership of Uganda, often accused of
7 committing atrocities or designing policies that led to atrocities of genocidal
8 proportions, the strong ones the Prosecution daren't touch?
9 Defence is not here to condone impunity, your Honours. Far from it. Defence is
10 here to lead evidence to confirm that the Prosecution has miserably failed to adduce
11 evidence to prove, or even to provide sufficient evidence, to prove that the accused is
12 responsible for any criminal act or omission which he has been charged with.
13 Your Honours will have realised that the Defence has not adduced any evidence to
14 prove intent on the part -- I mean, Prosecution has not produced any evidence to
15 prove intent on the part of the accused.
16 The crimes are indeed against the LRA and its omnipotent leader, Joseph Kony, or his
17 commanders, who may have assisted him in the formulation of the LRA policies long
18 before the accused was abducted and conscripted into the LRA.
19 Mr President and your Honours, witnesses shall testify that the conflict in northern
20 Uganda turned out to be a cash cow for the UPDF officers who went to great length to
21 ensure that the conflict did not end. And I will want to show a short video at 34.40
22 to 35.10.
23 (Viewing of the video excerpt)
24 MR AYENA ODONGO: [11:38:59] Your Honours, that will go -- Mr President and
25 your Honours, that will go a long way into proving the motives behind the -- I mean,

1 the continued war in northern Uganda. Indeed, it will also show that, you know,
2 some of the alleged crimes could scarcely have been committed by the accused.
3 But, Mr President and your Honours, let us now look at the LRA organisational
4 command structure and operations to see whether the accused had a prominent place
5 and had the opportunity to do what he is accused of having been done -- of him
6 having done, especially of intent.
7 Spiritualism in the LRA.
8 Your Honours, Joseph Kony claimed to be the messiah sent by God to cleanse and
9 transform society to turn to God and be ruled by the Ten Commandments. His
10 mission was first and foremost to save the Acholi people from an evil and repressive
11 NRM regime of Yoweri Museveni. He was to prepare an army of clean people who
12 would overthrow Museveni's government and install a government based on the Ten
13 Commandments. Therefore, the cleansing process started with the LRA soldiers
14 themselves who had to conform to the Ten Commandments as interpreted by
15 Joseph Kony himself. Joseph Kony claimed to be a messiah sent -- I think that part is
16 covered.
17 The LRA was woven around the mind boggling indoctrination and unparalleled
18 ruthlessness as a policy of exacting complete loyalty from its soldiers. The success of
19 the mysticism with which it prosecuted the war, and which gripped the abductees
20 with awe and total submission, was only justified or, shall we say, was facilitated by
21 the sheer negligence and failure of the government of Uganda and the international
22 community to summarily end the conflict or capture the leader of LRA, even with the
23 intervention of the mightiest army alternate world, the American army, after
24 spending tens of billions of American taxpayers' money.
25 Mr President and your Honours, LRA was and still is a spirit-based organisation.

1 A fairly elaborate detail of the LRA organisation, operations and structure is
2 contained in a document compiled and edited by Lieutenant Colonel RW Skow,
3 Defence and Army Attaché, US Embassy, Kampala, which is found in the document
4 presented as -- the Defence document presented as UGA-D26-0022-0001.
5 Your Honours, from the reading of the above document and from what is known
6 about Joseph Kony's spiritualism, it is clear that Joseph Kony was believed to have
7 some supernatural powers. It was a mixed grill of Christian, Muslim, as well as
8 traditional beliefs. According to the testimonies of some witnesses already on court
9 record, and evidence yet to be produced by the Defence, LRA is an organisation
10 believed to belong to some metaphysical beings from the spirit world. Those
11 ill-defined metaphysical beings used Joseph Kony as the medium through whom they
12 controlled the affair of LRA. Nevertheless, to the ordinary mortal, LRA was
13 a personal army of Joseph Kony, who used spiritual powers to control it. Quite often
14 Joseph Kony himself is stated to have told some people that the army was not his as
15 an human person, but rather it belonged to the spirits that used him as their
16 messenger.
17 This -- I mean, the spirits were stated to be 13 in number. Each of these chaired
18 a different functional committee, according to evidence from the same document
19 referred to. I mean, according to evidence available. Your Honours, these were
20 stated to come from as far afield as the USA, China, Italy, Tanzania, and Uganda.
21 Some among them were Juma Oris, aka Oriska Debohr, who was the overall
22 chairman of all the spirits. Silly Salindi, aka Mallia Mackay, who is the chairperson
23 in charge of operations. Then there was Who Are You, otherwise known as
24 Zink Bricky, this was a spirit from the USA who was the chairman of intelligence
25 operations. Then there was King Bruce, another spirit from the USA, who controlled

1 heavy weapons. And last but not least, your Honours, Willing Hing Su, a spirit from
2 China, who was responsible for performing miracles which helped the LRA win
3 battles.

4 Mr President and your Honours, it is clear from the above that Joseph Kony's powers
5 were akin to witchcraft. Therefore, it will be -- therefore, it will be necessary to refer
6 your Honours to the Uganda Witchcraft Act to illustrate the impact of witchcraft on
7 the minds of at least those who believed it. Section 2 of the act recognises and
8 criminalises use of witchcraft and supernatural powers, which is punishable by life
9 imprisonment. And it provides, and I beg to quote, Mr President, your Honours,
10 "Any person indirectly or directly threaten another with death by witchcraft or by any
11 other supernatural means commits an offence and is liable on conviction to life
12 imprisonment."

13 The second provision, your Honour, is that, "Any person who directly or indirectly
14 threatens to cause disease or any physical harm to another, or to cause disease or
15 harm to any livestock or harm to any ... or by any other supernatural means, commits
16 an offence is liable to conviction to imprisonment for a period not exceeding ten
17 years."

18 Your Honours, the witchcraft act seems clearly to point out that witchcraft is akin to
19 supernatural power. This definition of witchcraft is supported by social and
20 anthropological writers like EE Evans Pritchard, who describes an act of witchcraft as
21 a psychic act, and LaFontaine in his essay on the Bagisu tribe of Bugisu in Uganda,
22 who defines witchcraft as all supernatural attacks.

23 The Tanzanian statute, which your Honours will also be referred to, is even on
24 a better footing. Section 2 reads, "Witchcraft includes sorcery, enchantment,
25 bewitching, the use of instruments of witchcraft, the purported exercise of any occult

1 power and the purported possession of any occult knowledge."
2 Mr President and your Honours, we felt constrained to make reference to these to
3 remind this Court about the cultural belief of this society from which this case arises.
4 It is important that your Honours keep them in your mind when considering
5 spiritualism in LRA, that the accused belongs to the Ugandan society, which
6 recognises the existence and threat of supernatural powers. It will therefore be easy
7 to put into context how the accused could have been affected by the supernatural
8 powers or belief in it, which Joseph Kony was believed to possess.
9 Defence will also bring witnesses who practise or have practised witchcraft in the past
10 to give their testimonies about the presence and impact of supernatural powers on
11 victims.
12 Your Honours will remember some Prosecution testimonies about the spiritual
13 attributes of Joseph Kony, that included his prophecies, spellbinding, combat
14 operations, fighting against and defeating spirits, some of which were sent to assist
15 the UPDF in their war efforts against the LRA, et cetera, et cetera. It will also be
16 shown that this spiritual warfare was not confined to Joseph Kony alone. President
17 Museveni himself is on record in Uganda as having said that when they were fighting
18 guerilla warfare in the bush, they used witchcraft.
19 Mr President and your Honours, I will now turn to the organisation and command
20 structure of the LRA. Your Honours will be reminded that many Prosecution
21 witnesses have already given useful information about the organisational, operational
22 and command structure of the LRA. Prosecution Witness 2000 -- 205 - of course we
23 didn't have as many as 2005 - a former LRA officer, who worked under
24 Dominic Ongwen and is currently with the UPDF, testified that although LRA had
25 appearances of a conventional army, nevertheless, it did not actually function as such.

1 Witness P-0070 stated that the LRA followed no strict chain of command like the
2 UPDF.

3 Witness P-0142 stated that the LRA brigades and battalions were grossly smaller than
4 that of a conventional military. They clearly testified that in LRA Joseph Kony can
5 issue an order directly to a battalion commander or any rank, skipping over more
6 senior commanders. This would not happen in a properly functioning conventional
7 army. Joseph Kony did not have to consult anybody on any matter. And if he
8 didn't, however wrong he was, it was not open to anybody to oppose his orders.

9 It will be up to you, to your Honours to consider whether in those circumstances the
10 accused was an exception to this strict edict.

11 Defence will lead evidence to show that while in the conventional army the
12 commander-in-chief consults the army council on whether or not to attack, in the LRA,
13 Kony instead issued orders allegedly from his erstwhile spirits without consulting
14 anybody and without regard to rank and hierarchy. The orders were strict and
15 unquestionable. It will be shown that Joseph Kony used the pretext of being the
16 spirit medium to control and direct all aspects of planning and operations of LRA
17 war.

18 It is, therefore, not true, as asserted by the Prosecution, that the LRA is a disciplined,
19 hierarchical armed group with a formal rank structure mirroring that of
20 a conventional army, and further that, orders flowed down the chain of command
21 and reports on operations were transmitted back up the chain of command.

22 Defence will, however, bring witnesses who will reemphasise the Prosecution
23 evidence that discipline in the LRA was strict and punishment of infractions of the
24 rules were brutal. Attempts to escape especially were particularly harshly dealt with.
25 Those who were caught were either put to death or caned so severely that permanent

1 injuries was usually caused.

2 As a matter of fact, the structure and rank hierarchy in the LRA counted for nothing.

3 Joseph Kony was merely a copycat who wanted to show Museveni that what

4 Museveni could do, he too could do. For instance, witnesses will be brought to

5 testify that whenever Museveni promoted himself and his top commanders, Kony

6 replicated the same thing. When Museveni, for instance, promoted himself and the

7 chief of his defence forces to the rank of lieutenant general and major general

8 respectively, Kony also promoted himself and his second in command, the late

9 Vincent Otti, to a lieutenant general and major general respectively.

10 When Museveni made himself a general and his army commander, a lieutenant

11 general, Kony too made himself a general and his second in command, lieutenant

12 general.

13 By the same token, when the highest operational unit of the UPDF was the brigade,

14 Kony also made the highest operational unit of the LRA the brigade and put the late

15 Tabuley in charge. I mean, later when the UPDF established divisions, Kony also

16 did the same and put the late Tabuley in charge as the division commander.

17 Defence shall bring in witnesses to show in more graphic details, your Honours, how

18 Joseph Kony and his LRA used spiritualism to control the minds of the LRA soldiers.

19 From the time of abduction abductees were run through a raft of initiation ceremonies,

20 which did not only include libations by use of the shea oil, but were covered into

21 total submission by infliction of excruciating pain through beatings and exposure to

22 some of the most horrifying and gruesome torture and killings. Some of them were

23 made to participate in these episodes themselves. Some were made to kill their own

24 parents. And all these were alleged to be dictates for a cleansing process from the

25 spirits.

1 Your Honours, I shall now look at the Prosecution case in outline.

2 Mr President and your Honours, the evidential premise of the prosecution case, and
3 that is what the Prosecution calls the varieties from which their evidence come, are
4 three. And these are, first, from accounts given by victims of war; secondly, from
5 former LRA soldiers; and thirdly, but mainly on sound recordings and other allegedly
6 reliable records of radio communication passing between the LRA commanders at the
7 time these attacks took place.

8 The Prosecution has also accused Dominic Ongwen of playing a prominent role in the
9 planning and execution of the charged attacks first and foremost, as stated earlier.

10 Dominic Ongwen like others conscripted into the LRA were clearly instructed and
11 knew that their enemies were Yoweri Museveni and his UPDF and their allied forces.

12 As such, Dominic Ongwen could not have had the motive, let alone formed the
13 intention of attacking a civilian population, which was not indicated to him as the
14 enemies of LRA.

15 It will be clear that LRA only engaged in attacks on UPDF soft targets to get military
16 and other supplies from them or in self-defence. The only LRA attack which
17 involved civilians, especially the IDP camps, were not targeted at civilians, per se.
18 They were aimed to look for food out of necessity. And, your Honours, isn't it the
19 saying that necessity obeys no law.

20 The Defence shall bring evidence to discredit the two first varieties of evidence. First
21 of all, by the same token, the Defence shall bring witnesses who were also victims to
22 give different accounts, I mean different and more credible accounts of events from
23 those given by the victims of the war who testified as prosecution witnesses.

24 Secondly, and particularly in the case of the attack on Abok and Lukodi, Defence will
25 bring witnesses who participated in the counterattack as part of the government

1 auxiliary forces to give a more credible account of what exactly happened and who
2 they discern as having led the attacks.

3 The third category of witnesses shall be victims who escaped from captivity and
4 returned.

5 Fourthly, we shall bring some community leaders, including some camp leaders, not
6 only to give an account of what happened during the attacks, but also to show the
7 organisation, positioning, strength and laxity of the UPDF around the IDP camps,
8 which exposed the civilians in the camps to vulnerability.

9 The same variety of witnesses shall also show that there was always exchange of
10 gunfire between the LRA and the government soldiers. Therefore, in the absence of
11 forensic analysis of the gunshot wounds, like as already has been stated, it cannot be
12 said with certainty whose gunshots killed the victims, were they the LRA or
13 government soldiers?

14 And in respect to the intercepts, Mr President and your Honours, in the case of the
15 third variety, sound recordings are allegedly stated to be reliable records of radio
16 communications passing between the LRA commanders at the time these attacks took
17 place. First of all, Defence will assiduously contest and take issue with the assertion
18 of the Prosecution that the interceptors were trained professionals.

19 From records on the interceptors, it is clear that they were persons trained on the job.
20 It will be shown that it takes more than a person who hardly possesses an ordinary
21 level certificate who trains on the job to be a professional. Take P-003, for example,
22 he is a former child soldier of the UPDF who trained on the job, and apart from
23 getting some certificate after a few months' training, he did not prove any
24 professional specialisation after training from any accredited institution.

25 Your Honours will realise that it will be very unsafe to rely on supposedly expert

1 evidence given by such a person.

2 Secondly, your Honours, the Prosecution promised during the opening statement to
3 submit radio communication intercepts and logbooks to prove Mr Ongwen's
4 participation in the attacks at the four charged crime locations. The Prosecution
5 claimed that these recordings show Mr Ongwen's responsibility for Odek, Lukodi,
6 and Abok and that the logbooks contained recordings showing Ongwen's alleged
7 participation in Pajule. To date you will reckon, your Honours, the Prosecution has
8 not fulfilled their promise in that regard. They have not provided this to assist the
9 Court.

10 Can the Court rely on secondary evidence when the primary evidence promised to be
11 produced by the Prosecution have deliberately been kept away? What inference can
12 be drawn from their failure to deliver on their promise?

13 The only reasonable inference as far as Defence is concerned is that there is something
14 to hide from the primary evidence. Mr President and your Honours, the Defence
15 will show that without the benefit of primary evidence, this Court shall not be able to
16 evaluate properly with certainty to decide, number one, whether or not the voice
17 attribution in the tapes is indeed that of Dominic Ongwen. Many doubts persist and
18 were not clarified by the OTP witnesses. For example, the Defence highlighted
19 during cross-examination items such as intelligence reports and logbook entries that
20 indicate George Labongo as taking responsibility for the charged attacks on Abok
21 Odek.

22 The Defence will also caution Court about the safety of relying on the voice
23 attribution made by Prosecution witness number 16 and number 19, who did not
24 create the audios and were not used to hearing voices on the recordings. It is also
25 pertinent, your Honours, to note that these witnesses had never met

1 Dominic Ongwen in person or heard his voice to enable them to identify in the
2 courtroom that the voice in the intercepts were indeed his.

3 Mr President and your Honours, even more telling is the fact that these witnesses
4 who purported to attribute the intercepted voice to Dominic Ongwen were not
5 provided with copies of the alleged contemporaneous notes they made to enable
6 them to explain variations in the messages and diction in several areas of inaudible
7 segments of their enhanced versions.

8 The difficulties these witnesses had in listening in and explaining the enhanced copies
9 mirrors the even greater difficulties they might have had recording the intercepts and
10 transcribing contemporaneously in English, which was not language in which the
11 speakers communicated.

12 In case the Court is satisfied that the voice is that of Dominic Ongwen, it will still be
13 faced with the task of determining whether, considering the poor background
14 provided by the secondary evidence, Mr Ongwen is generally reporting to
15 Joseph Kony or just taking credit for the acts of another person so as to win
16 Joseph Kony's favour.

17 Note must be taken of the inaudible voices in the background of those intercepts.

18 Was the person alleged to be Dominic Ongwen talking without being prompted to do
19 so by the voices in the background?

20 Number two, whether the statement attributed to Dominic Ongwen was consistent
21 with what had taken place in the crime base, especially when he stated to have killed
22 all the people in Odek camp, although the facts on the record given by the
23 government seems to suggest that only about 60 out of 60,000 people -- 6,000 people
24 in the camp died in the attack.

25 Number three, your Honours will have to answer the question whether the statement

1 was consistent with someone not suffering from a mental disease or defect borne out
2 of fear for his life.

3 Mr President and your Honours, Defence will challenge the storage and the chain of
4 custody of the exhibits. Those who were in charge of intercepting, recording and
5 storage of the exhibits clearly told Court that their place was damp. The tapes were
6 rubbed and reused many times over.

7 In addition, there was always a serious destructive conflict and rivalry between the
8 personnel of the different security agencies who were housed in the single building in
9 Gulu.

10 It cannot be ruled out, Mr President and your Honours, that these affected the
11 integrity of the records. It will be shown that those recordings were not only
12 improperly kept, but they were susceptible to human interference, especially by the
13 UPDF, who played a role in the charged atrocities.

14 In addition, Court has to be reminded that there is evidence on Court record that the
15 accused was an enigma to and a thorn in the flesh of the UPDF and therefore they
16 have a motive to fix him.

17 The Prosecution will draw the attention to the Prosecution's -- I mean, the Defence
18 will draw the attention to the Prosecution's own admission that the exhibits were not
19 beyond reproach. Mr Gumpert said, "The collected material was intercepted and
20 recorded, sound recorded with rudimentary equipment over ten years ago. And it
21 was done in the context of an armed conflict. That too hampered the ability of the
22 radio operators to intercept and record all of the LRA communications. Recording
23 wasn't always meticulous. Sometimes labels fell off the sound recordings, and at one
24 time the ISO's archive was affected by damp. Sometimes communications recorded
25 in one logbook are not reflected in another or can't be discerned in the corresponding

1 sound recordings."

2 Mr President and your Honours, Defence will show that logbooks, which the
3 Prosecution heavily relies on, are the most unreliable ones, reason being that they
4 were most susceptible to human interference.

5 In the instance case, according to the Prosecution evidence, the logbooks and the
6 cassette tapes from all the security agencies ended up at the hands of Prosecution
7 witness number 138 at the chieftaincy of military intelligence.

8 Prosecution P-138's evidence of how the records were kept in his office for more than
9 ten years also leaves a lot to be desired. He testified that he had to spend
10 a considerable amount of time sorting out what he thought was relevant for the
11 Prosecution case from a huge heap.

12 Mr President and your Honours, the Prosecution presented before you what they
13 called enhanced audios. You will, however, be reminded, your Honours, that the
14 Defence demonstrated in cross-examination, where an enhanced audio was used for
15 attribution, that it was possible for the OTP audio enhancers to alter the character of
16 the voice and possibly even content, making it unreliable.

17 Mr President and your Honours, the Defence will show that authentication is a basic
18 requirement when dealing with audio evidence in a court case. Much as the Defence
19 would agree with the Prosecution's assertion that intercepts are "the most important
20 evidence the Chamber will hear during the trial", we do not agree that "the Court will
21 find the intercept evidence particularly valuable because it is unaffected by human
22 memory's fallibility, and it is true of bias or the suspect motivations that can taint
23 witness testimony", and, further, that they are "an accurate record of [the LRA] plans
24 and operations".

25 The Defence will raise issues with the authenticity of the intercepts. It will be shown,

1 Your Honours, that it will not be lost on you that, despite leading evidence through
2 Mr Laroche and Mr French, the purported originals are actually copies of tapes, the
3 OTP did not call an expert to authenticate them. The Prosecution has not brought an
4 expert in audio attribution before you. They have not even sought leave to
5 authenticate the tapes which the Defence has been able to show contain
6 discontinuities.

7 During cross-examination Defence was able to show to your Honours multiple points
8 in the audio recordings from around the key time periods, which exhibit indications
9 of breaks in the recordings, showing a clear likelihood that the tapes had been
10 tampered with. In short, the Defence will show that the recordings as presented
11 before this court have serious problems identified with them and are unreliable.

12 There was not an attempt through these radio intercepts or the alleged
13 contemporaneous notes to identify the LRA commanders with whom Mr Ongwen
14 committed the modes of liabilities he is charged with.

15 Mr President and your Honours will be reminded that Prosecution's own witnesses
16 described - I mean, discredited - the software they have in their office, that is,
17 BATVOX, which can identify voices in audio. If they do not trust the reliability of
18 the software on which they spent thousands of euros, how do they expect this court to
19 trust the result that would be obtained from it?

20 In addition to simply not having translations, OTP witnesses told Court that many of
21 the messages were in TONFAS -- in TONFA codes. Though we were told a little
22 about these codes, the OTP did not demonstrate that its witnesses, P-3, P-59, P-16, and
23 P-440, could decode a message with a code book and produce an intelligible message.
24 That is despite claiming to have disclosed a number of code books and provided
25 rough notes.

1 The Prosecution did not (Redacted) that was P-440, whom it called to
2 explain the Acholi jargons and proverbs the LRA used and which the Prosecution
3 wished the Court to believe. As much of what was alleged recorded were in those
4 jargons and allegories, it is perfectly right to speculate that threats could have been
5 issued in the orders given in relation to the charged crimes that the OTP has simply
6 not presented to court. The OTP has also provided no explanation as to the absence
7 of recordings from the Uganda External Security Organisation.

8 The Prosecution argues that the logbooks established Dominic Ongwen's role at
9 Pajule even though there is no audio intercept from him there. Given other evidence
10 that the tapes provided were either in fact altered, it is certainly curious that there is
11 no audio provided that shows Mr Ongwen was present.

12 Mr President and your Honours, court record elicited by Prosecution shows
13 that - from testimonies elicited by Prosecution - shows that the competent intelligence
14 services and the Joint Intelligence Committee at the CMI in Kampala conducted
15 a critical analysis of all the intercepts in their natural and original forms in which they
16 were submitted. They examined and confronted them with the contemporaneous
17 reports that accompanied the intercepts. They verified other sources of intelligence,
18 including counter-intelligence and through directional findings determined the
19 location of the respective LRA commanders during the charged attacks. And
20 evidence shall be provided by way of the directional findings provided by the
21 Government of Uganda that Dominic Ongwen was nowhere within the vicinity of the
22 charged crimes.

23 Your Honours, the Defence case is that the first line -- the first line of Defence case is
24 that the charges brought against Dominic Ongwen, as already been indicated, are
25 indeed against the LRA as an institution and not against Dominic Ongwen.

1 Secondly, the Defence will show that Dominic Ongwen did not personally participate
2 in the charged crimes.

3 Thirdly, the Defence will show that Dominic Ongwen had no command responsibility
4 for the charged crimes; neither did he have any role in the planning and execution of
5 the charged attacks.

6 Fourthly, the accused will plead affirmative defences provided under -- well, under
7 Article 31 of the Rome Statute, that is mental disease or defect.

8 Last, but by not least, and closely linked to the affirmative defences, the accused will
9 plead, but only in the alternative, the defence of duress. He did not have a mind of
10 his own. And it will be assiduously argued that the conventional understanding of
11 the principle of, you know, being under immediate danger, apprehension of
12 immediate danger, does not hold good in a spiritual world where Joseph Kony,
13 though not physically around hovering a gun over Dominic Ongwen, was perceived
14 to be around anyway in spirit.

15 Your Honours shall be reminded that Prosecution totally failed to show that there
16 was any ballistic analysis of the ammunitions that killed the victims. We have
17 already talked about that. Your Honours, when we talk about mental disease, as has
18 already been suggested, Professor Moreno Ocampo, the inaugural chief prosecutor of
19 this court, is on record as having said, "Kony is abducting children and transforming
20 them into monsters". By this, he was talking about nothing but the impact of LRA
21 indoctrination and the coercive environment in which the abducted children grew up,
22 which made them monsters. By definition a monster, in the context of this case,
23 your Honours, is a devil or demon. Mr Moreno Ocampo was spot on.

24 Your Honours, I know that time is running against me and I shall leave the others to
25 my colleagues. But before I leave the stage I want to, in conclusion, remind the

1 Court about what is important to consider when you come to the question of duress.
2 The most pertinent issue you must resolve, and, we propose very strongly, that you
3 should resolve it in favour of the accused. What was the impact of indoctrination, of
4 spiritualism, of the coercive environment, of the injuries, of everything that happened
5 to Dominic Ongwen in 27 years, what was the impact on his mind?
6 And in particular we indulge you to consider the conditions of multiple injuries
7 Ongwen sustained around the charged periods when he was limping, and he is still
8 limping, what did it impact on his mind? Could any child under those conditions
9 have been put in a state where he lost his mind? He was under apprehension of
10 danger all the time and therefore did what he did not intend to do. Did he act
11 if -- and, of course, we say he did not. In case you find that he did what he is
12 supposed to have -- he is alleged to have done, the question is did he form the
13 intention, did he have the mind, the presence of mind to do it?
14 And in conclusion, Mr President and your Honours, the Court -- we have laid the
15 ground - the context - that the context of this case is predicated on the character of the
16 state of Uganda and the things that are very likely to be done by the government
17 forces.
18 Mr President, the Court will be reminded also that the recent European Parliament's
19 resolution, which resonates the overwhelming expression of American public opinion
20 about what happened during the by-election in Arua will vindicate the Defence that
21 the state was prone to attacking the civilians in Acholiland. The leadership of
22 Uganda is now reinventing the wheel - and this is not the first time he has done it - to
23 give in the English dictionary a new meaning of torture. According to him, killing
24 and beating some opposition leaders is not torture, although some of them are lying
25 prostrate in hospitals around the world. This attitude is not new to Ugandans. We

1 invite Court to take judicial notice of that trait in the character of the State.

2 I rest my case, your Honours.

3 PRESIDING JUDGE SCHMITT: [12:30:39] Thank you, Mr Ayena.

4 Mr Taku, you have the floor.

5 MR TAKU: [12:30:48] Well, your Honours, with all humility, when one listens to the
6 brilliant eloquence of my learned colleague, honourable Ayena, and I'm given the
7 charge to get up to continue from where he left, I can brave to say I know I have quite
8 the job to do. But he has laid the groundwork, he has laid an overview of the case.
9 I will focus on the case and when it be, if I lay some of the issues, I will direct you to
10 the evidence. I will make strong statements, but each of them will be substantiated,
11 lest I'm misinterpreted.

12 Your Honours, your honours will remember that on 6 December 2016, when you
13 called on Mr Ongwen to plead to an abridged statement of facts in the charges
14 confirmed against him, he provided the following answer, quote:

15 "This is a decision of life and death. In my opinion, this amounts to my going back
16 into the bush for a second time. The International Criminal Court, do you agree that
17 I am the leader of the LRA? Do you agree that my life was not ruined?" End of
18 quote.

19 When your Honour, the honourable President asked him: "Do you make an
20 admission of guilt with any charge?"

21 Mr Ongwen again answered: "In the name of God, I deny all these charges in
22 respect to the war in northern Uganda." End of quote.

23 By these statements, Mr Ongwen clearly stated in clear and unequivocal terms that he
24 understood the abridged statement of facts that was read out in Court to mean that he
25 was committed to trial for crimes committed by Joseph Kony and the LRA in the

1 conflict in northern Uganda.

2 Your Honours, Joseph Kony is not here in this courtroom standing here, but

3 Dominic Ongwen is here treated as his substitute. The Prosecution indeed intended

4 Dominic Ongwen to be the clone of Mr Kony in this case.

5 Your Honours, contrary to the Prosecution's assertion in her opening statement on 6

6 December 2016 that, and I quote, "this trial is not about the LRA's culpability for its

7 crimes, but about one person: Dominic Ongwen", end of quote, the evidence will

8 show that this case is about, this case is about Dominic Ongwen being held

9 accountable for the crimes against Joseph Kony and the LRA.

10 If the Prosecution's statement was true about the LRA and Joseph Kony, then the

11 Prosecution should be prosecuting Joseph Kony, its founder and leader.

12 Joseph Kony should be sitting in the dock, not Dominic Ongwen. But Joseph Kony

13 indeed is not in this courtroom.

14 Dominic Ongwen, himself a victim, a child soldier, forced into service by the LRA and

15 Joseph Kony, ought not to have been charged, asked to defend himself as

16 regards whether he is responsible for actions taken on the orders of Joseph Kony.

17 The confirmed charges and the Prosecution evidence led in this case seek to present

18 Mr Ongwen as an appropriate substitute, symbol, caricature, ghost or phantom of the

19 absent Joseph Kony, whose absence from this courtroom is tangible. The confirmed

20 charges allege that Mr Ongwen, Joseph Kony and some LRA commanders, named

21 and unnamed, conceived plans to commit the crimes for which Mr Ongwen stands on

22 trial.

23 The Prosecution conceded that the charges it brought were a collage of charges it was

24 not bringing against others. In a footnote 13, in filing 1110 of a legal document, the

25 Prosecution stated, and I quote: "The 70 offences charged by the Prosecution

1 represent a selection of crimes that were investigated and considered in the situation
2 in Uganda." End of quote.

3 The charges and modes of liability alleged are a serious indictment of all child soldier
4 victims who faced Mr Ongwen's predicament but were not charged. The charges
5 and the allegations are a critical indictment of the very conscience of humanity that
6 this Court was established to protect.

7 Your Honours, Mr Ongwen totally respects all the victims of the conflict in northern
8 Uganda and all child victims abducted or associated with brutal armed conflict all
9 over the world. And he wants me to make that very clear before your Honours.

10 Many testified and many more will be testifying how Mr Ongwen put his life in
11 danger to protect them. The evidence will be led to demonstrate that Mr Ongwen is
12 strongly asserting his right to occupy his rightful place among the victims of the
13 atrocious crimes that destroyed, shattered and devastated his childhood and that of
14 victims in northern Uganda.

15 Some victims came here to tell their story. Many more victims will be called by
16 Mr Ongwen to tell their own stories. Whether called by the Prosecution, by victims'
17 counsel or the Defence, they all have a unique characteristic and a common story to
18 tell. The story was conceded in part by the Prosecution in her opening statement
19 that the LRA structure and the rules that were responsible for the victimhood of these
20 victims of Mr Ongwen were conceived, established, superintended, commanded and
21 controlled entirely by Joseph Kony and his spirit legion of spirits to whom
22 brainwashed abductees and victims owed unquestioned loyalty under the penalty of
23 death.

24 The victims that the Defence will call to testify, like my learned colleague has said,
25 those victims, like those victims who have testified before will identify Joseph Kony

1 and the LRA, not Dominic Ongwen, as the orchestrator of the victimhood. With the
2 Prosecution of Dominic Ongwen therefore, the soul of their individual and collective
3 humanity is on trial in this courtroom. Dominic Ongwen should be sitting on the
4 bench of potential witnesses awaiting the potential prosecution of Joseph Kony as
5 senior UPDF perpetrators, if that will ever happen. He should not be sitting here
6 answering 70 charges, as learned honourable Ayena has submitted. The evidence
7 will establish that the present trial potentially supplants and sanitises the crimes
8 perpetrated by the LRA, Joseph Kony and the UPDF in northern Uganda against
9 northern Ugandan victims, among whom is Dominic Ongwen.

10 On 6 December 2016, the Prosecutor commenced the Prosecution case by defining
11 Joseph Kony and by defining Dominic Ongwen.

12 About Joseph Kony, the Prosecutor said of the LRA, "discipline was strict and
13 punishments for infraction of the rules were brutal. Attempts to escape were
14 particularly harshly dealt with. Those who were caught were either put to death
15 or caned so severely that permanent injury was often caused." End of quote.

16 The Prosecutor in her opening statement cited one occasion when Joseph Kony and
17 his deputy Vincent Otti boasted about their actions with sadistic arrogance over
18 Radio Mega FM, quote:

19 Joseph Kony viewed children are easily moulded into ruthless fighters that he needed
20 to continue his policy of murder and persecution. End of quote.

21 But then, this is only an incomplete picture of whom Joseph Kony is. The Defence
22 will complete, we will bring more in order to inform who Joseph Kony was.

23 The Defence will present a complete picture of this command, control and coercive
24 violent power structure established by Joseph Kony. The evidence will show that
25 Joseph Kony and Joseph Kony alone used this structure to impose the misery which

1 the Prosecutor in her opening statement alleged, quote:
2 "... blighted the lives of millions of people living in northern Uganda. Ordinary
3 citizens, civilians who wanted no more than to be allowed to live their lives in peace,
4 could no longer live in the villages in which they were born or raised. Violent
5 attacks on civilian targets by an armed group, calling itself the Lord's Resistance
6 Army or LRA, had resulted in those ordinary people being forced into the camps for
7 internally displaced persons and often reduced to dependency on international food
8 aid. These camps were themselves subject to regular and terrifying attacks." End
9 of quote.

10 Joseph Kony, Joseph Kony himself created and owned as superintendent and
11 commanded this network. The Prosecutor should be looking for him and not
12 Dominic Ongwen, the victim.

13 The evidence will show that Joseph Kony had an elaborate modern radio
14 communication technology network which he used to exert control and command
15 over all operations ordered, supervised and implemented by him. No matter his
16 physical location, he relied on this radio communication technology to oversee the
17 effective execution of his orders and to personally participate as the ultimate supreme
18 commander in the supervision of the execution of his orders. The Prosecution
19 effectively conceded this in its opening statement that, quote, "The radio was used to
20 exert pressure upon commanders" at transcript T-26, page 42, lines 16 to 25, T-26,
21 page 45, lines 4 to 18.

22 The evidence will show that Joseph Kony deployed --

23 THE INTERPRETER: [12:42:22] Message from the interpretation: Your Honour,
24 could counsel slow down a bit.

25 PRESIDING JUDGE SCHMITT: [12:42:27] Mr Taku, I'm reminded by the booth that

1 you perhaps should a little bit slow down.

2 MR TAKU: [12:42:33] Okay, your Honour. Thank you, your Honour.

3 PRESIDING JUDGE SCHMITT: [12:42:34] Yes, thank you.

4 MR TAKU: [12:42:36] The evidence will show that Joseph Kony deployed trained
5 intelligence officers and trained signallers who reported directly to the director of
6 intelligence and the director of radio communications who were at the Control Altar
7 under the direct command of Vincent Otti and Joseph Kony. These signallers and
8 intelligence officers provided constant information about the units to which they were
9 deployed and the activities of their commanders.

10 The evidence will show that Joseph Kony imposed elaborate rituals, as learned
11 honourable Ayena has submitted, and spiritual interventions that were performed by
12 special commanders from the yards deployed to all units of the LRA.

13 The evidence will establish that Joseph Kony kept elaborate records of all the events
14 that occurred within the LRA, including the numbers and names of women in the
15 LRA, the number of sick persons in the sickbays, the record of food in stock and
16 distributed to different units.

17 The evidence will show that apart from the rules, Joseph Kony established a vast
18 power and control network which he used to keep surveillance and exerted
19 additional absolute power, influence, authority, control and command over
20 Dominic Ongwen and the LRA.

21 Some witnesses who have testified, your Honours, in this case, were double status
22 informants for Joseph Kony and the UPDF. Your Honour, the Single Judge in your
23 decision at paragraph 8, filing 1234 of 20 April 2018 agreed with the Defence filing
24 ICC-02/04-01/15-1229 at paragraph 18 that "other individuals with a similar
25 background have provided testimony in the present case following disclosure of their

1 identities to the Defence."

2 This occurred when the government of Uganda objected to the disclosure of the
3 identity of a double informant whom it stated was a Lord's Resistance Army civilian
4 collaborator with very close contacts with Joseph Kony, who informed the LRA of
5 UPDF movements until he was persuaded to switch sides and become an informant
6 for the UPDF. Filing 1217-Anx 5 April 2018.

7 The evidence will show that the Mega FM radio interview by Mr Joseph Kony and
8 Otti was not an isolated tool in Joseph Kony's extensive and elaborate control and
9 command arsenal with which he controlled, directed, manipulated and dominated
10 the world view and mind of Mr Ongwen and every other person working within his
11 regime.

12 Joseph Kony had extensive contacts with foreign governments, among them the
13 government of Sudan, politicians and informants within, informants within the UPDF
14 and government of Uganda, who sustained his personal survival and that of the LRA.
15 Some of the LRA Prosecution witnesses were senior commanders who testified that
16 life in the LRA was tightly controlled by the rules and the spirit.

17 P-440, like the honourable Ayena talked about, was a senior commander, he was
18 senior to Dominic Ongwen by his command position in Control Altar and his
19 proximity to Joseph Kony during the charged period. He and other LRA
20 commanders who testified provided evidence of the tight command and control that
21 Joseph Kony and the spirits exerted on every aspect of individual and collective life of
22 the LRA. The spirits and Joseph Kony revealed future events in the present. They
23 read the thoughts of individuals. They meted out punishments for infractions of the
24 rules.

25 Kony developed a command and control operational strategy that did not deploy

1 soldiers from a single unit to conduct an operation. Rank was not a consideration
2 for him to decide who would lead an operation. One senior commander recorded
3 a statement, that is UGA-OTP-0283-2035 and UGA-OTP-0283-1616 at 1619, and I
4 quote:

5 "Despite the fact that we had four brigades we could sometimes pool manpower from
6 the various brigades to go for a joint operation under the command of one person
7 who could be chosen by the high command."

8 So the person chosen is chosen by the high command. He doesn't plan the operation,
9 he is chosen with other units so that they could control each other.

10 The spirit had absolute power over promotions with Joseph Kony acting as the spirit
11 medium. Joseph Kony and the spirits determined and ordered all operations,
12 ordered abductions, wife distribution, punishments. They held absolute power of
13 life and death over every LRA combatant. Defaulting officers were mercilessly
14 executed.

15 Vincent Otti and Otti Lagony, who were Kony's deputies at different times, were
16 among the many executed. Joseph Kony executed his own chief of security, Agwing,
17 for the rape of his own wife. The wife reported to Joseph Kony that the husband had
18 raped her. So when you see the words "conjugal unions", so I should "conjugal
19 unions", because that is what is in the confirmation decision.

20 And Joseph Kony wanted zero tolerance for sexual offences, executed his own chief of
21 security, Agwing.

22 He imprisoned and ordered that Dominic Ongwen be executed shortly before
23 Ongwen escaped and surrendered in Central African Republic.

24 The Prosecutor promised during her opening statement to refer only in very limited,
25 in a very limited way to some LRA commanders during the trial. With

1 Dominic Ongwen on trial, the evidence will show that the Prosecution placed
2 responsibility for alleged crimes which were committed by Joseph Kony and some of
3 his commanders, whom the Prosecutor said they will adduce only, they will mention
4 them only in a limited manner. With Dominic Ongwen here, the Prosecutor now
5 decided we will not mention the matter, only very limited information about them,
6 even though in the form of criminal liability, Dominic is alleged to have planned the
7 attacks with them.

8 Now, as honourable Ayena said, surprisingly with Dominic Ongwen, the charges
9 against him skyrocketed to 70. Why does again Kony remain at 7?

10 Therefore, I would like to say that this trial is intended to sanitise Joseph Kony, to
11 make him look like a saint, make him look like a subordinate to Ongwen. Ongwen
12 was (indiscernible) when committing other crimes. There is no need to do with
13 therefore Joseph Kony. 70 counts against Ongwen will solve the problem.

14 Now, your Honours, to realise this objective, the Prosecutor, because the Prosecutor
15 had promised that they will not lead a lot of information against some of these
16 commanders, very little, if at all, a lot of exculpatory evidence had been withheld
17 from Mr Ongwen, evidence that will relate to people who are mentioned in the form
18 of criminal liability, are co-perpetrators or who (indiscernible) Ongwen at different
19 times is withheld.

20 The character of the conflict during the charged period, for example, reports, and the
21 evidence we will produce, your Honours, is UGA-OTP-0025-0257,
22 UGA-OTP-0025-0205 is showing that the delivery, the evidence will show the delivery
23 of weapons and arms from Sudan, including during the charged period, making this
24 conflict an international armed conflict as opposed to the internal armed conflict that
25 the Prosecutor allegedly, and it was confirmed, the charges.

1 The evidence, your Honours, from some of the victims themselves, the Prosecutor
2 brought evidence against the Lwala attacks, trying to place Ongwen in Teso during
3 these attacks. But the evidence from the victims themselves, and some of them, only
4 one of them identified the attackers. And this evidence also from the UPDF itself,
5 UPDF also has a list of the girls who were abducted and the commanders, and they
6 identify one Okello Kapere as the one who led the attack, not Dominic Ongwen.

7 UGA-0206-0090, UGA-0206-0091.

8 The Prosecution had this evidence in its custody, your Honours, during the
9 prosecution case, including the statements identifying Okello Kapere and Tabuley as
10 the commanders who led the attack and abducted those girls.

11 As part of this evidence, overwhelming evidence that the Prosecutor did not do what
12 should be done in the interests of justice. They should drop the charges in regards to
13 the Lwala attack against Ongwen, with overwhelming evidence, including their own
14 evidence and the evidence from the victims. No. They can keep the charges and
15 withhold most of the evidence.

16 Joseph Kony is a central issue in this case. Whether he is here or not, the ghost of
17 Joseph Kony is controlling this case, it's right here in the courtroom. And it is the
18 ghost and the shadow of Joseph Kony and of course that of the senior commanders of
19 the UPDF that are in issue in this case.

20 The Prosecution mentioned that we do not have any burden of proof whatsoever, I
21 will stop at that. But then apart from the question of proving the case, for purposes
22 of completeness, we believe that it is our duty and the duty of all participants in this
23 case to bring the complete picture to your Honours so that justice can be done to the
24 people of northern Uganda.

25 One of the purposes of a criminal trial is for the historical record. So if evidence is

1 withheld, it causes prejudice. It defeats the aims of justice and therefore as the
2 Defence, you have nobody. We will try to bring as much evidence so to disprove the
3 Prosecution's case.

4 Your Honours, we know that if evidence is withheld the Prosecutor submitted about
5 these commanders, the evidence relating to the charges is incomplete.

6 Dominic Ongwen in this case it must be understood is not charged as committing the
7 crimes alone. But Dominic Ongwen is being held responsible for crimes of
8 individuals who have not been charged and some who have been granted amnesty.

9 And the question we will ask your Honours clearly is this: The Prosecutor's
10 investigation obligations to investigate and procure evidence extends to getting the
11 evidence about these individuals' amnesty, not for the purposes of charging them, but
12 for the purposes of determining their contribution to the crimes for which Ongwen
13 stands charged before this Court. And the reason, your Honours, for this is this:
14 Without that evidence about those commanders, those individuals mentioned in the
15 charge, your Honours will not be able to ascertain the extent of the contributions of
16 Mr Ongwen. The spotlight is Ongwen and Ongwen alone. We found him. Even
17 the evidence about Joseph Kony, the Prosecutor has clearly suppressed it.

18 And the government of Uganda, I will come to the government of Uganda when I
19 start talking about the question of the investigation in this case.

20 And therefore, your Honours, we will bring evidence from the senior commanders
21 who were proximate to Kony, including the founding commanders who were with
22 Joseph Kony when Kony defined the roles regarding to women, regarding to children,
23 who were present. They were educated, some of them were members of the
24 Ugandan army. We will bring the evidence from them and submit it, your Honours,
25 because it was important for you to know exactly, not from other people's narratives,

1 but from the narratives of those who established the roles.
2 The Prosecutor has withheld it, a recorded statement they refused to call, who will
3 bring the evidence nevertheless back into the record and before your Honours.
4 Now, your Honours, another role we will bring to your attention is that, and this is
5 from the question of the informant. And remember the reason the government of
6 Uganda gave for us? It was for the protection of the informants or the ability to
7 gather intelligence in the future or the safety of their informant.
8 But for the purposes of understanding the power of Joseph Kony, the government of
9 Uganda declared that Joseph Kony had been defeated, the war has ended, and they
10 stopped military operations.
11 But if the government of Uganda can fear the shadow of Joseph Kony even in defeat,
12 to the extent of saying "No, we will not exploit the identity of our informants", you
13 can feel even in defeat, what about Dominic Ongwen and the child soldier whom,
14 even from the injuries that you saw here, from November 2002 to a time period early
15 maybe March 2004, he was in the hospital, in the sickbay.
16 And this brings me to one point, because I listened to the experts that the Prosecution
17 brought here and some of the victim testimony, and it does appear that everybody in
18 northern Uganda is afflicted by one form of trauma or mental defect, everyone, but
19 strange enough, according to their theory, apart from Dominic Ongwen.
20 How can they explain that Dominic Ongwen alone, even from the mere injury, the
21 mere injury he sustained that he was in the sickbay, the mere trauma of an encounter
22 with Joseph Kony, so even from that injury alone that you saw that incapacitated him,
23 just from that, the trauma alone on that attack, the circumstances alone, how can it by
24 one miracle, can Dominic Ongwen be the only victim, child victim for that matter
25 who does not suffer from the Prosecution's expert testimony from mental defect when

1 people who were physically, who were not even by the front, the cen affected them in
2 different forms.

3 Your Honour, my colleague was telling me we have just one minute, and I do not
4 know -- for a break, is it a break?

5 PRESIDING JUDGE SCHMITT: [13:00:09] I think we could --

6 MR TAKU: I can continue.

7 PRESIDING JUDGE SCHMITT: [13:00:11] No, no. I think we can stop here. But if
8 you want to simply finish your line of thoughts on this topic --

9 MR TAKU: I want to talk, your Honour.

10 PRESIDING JUDGE SCHMITT: Yes, please continue, but then we can have a break.

11 MR TAKU: [13:00:23] Yes, your Honours. I'm moving very fast, to leave more time
12 for my friend, but at 1 o'clock, yes.

13 PRESIDING JUDGE SCHMITT: [13:00:29] Yes, okay. So then we have the lunch
14 break now until 2.30.

15 MR TAKU: [13:00:35] Yes.

16 THE COURT USHER: [13:00:35] All rise.

17 (Recess taken at 1.00 p.m.)

18 (Upon resuming in open session at 2.30 p.m.)

19 THE COURT USHER: [14:30:09] All rise.

20 PRESIDING JUDGE SCHMITT: [14:30:34] Mr Taku, you have, of course, still the
21 floor and while the Chamber is mindful of the time allotted to the Defence, we would
22 appreciate it if you perhaps could finish 10 --

23 MR TAKU: [14:30:47] I will, your Honour.

24 PRESIDING JUDGE SCHMITT: [14:30:48] -- or 15 minutes' earlier, also together
25 with Ms Lyons, but we of course are mindful of the time we allotted to you.

1 MR TAKU: [14:30:54] Thank you, your Honour.

2 PRESIDING JUDGE SCHMITT: [14:30:54] Simply just a -- we will see, we will see.

3 Please continue.

4 MR TAKU: [14:30:59] Thank you, your Honour. Now, we have two of our interns
5 who are here, Rachel Bouwma, she's an intern and Bethany Adam, your Honour.

6 PRESIDING JUDGE SCHMITT: [14:31:08] Thank you.

7 MR TAKU: [14:31:12] Here, your Honour.

8 Just to make sure I use my time well.

9 Your Honours, in the course of this case and probably until when the -- some expert
10 came, we never heard the word moral choice. The Prosecutor talked about it in her
11 opening statement, we heard from this expert, but, your Honours, that was floated in
12 the abstract because there was no attempt by the Prosecutor to call any evidence in
13 order to confront which -- the charged crimes, any of the charged crimes, how this
14 moral choice would have been exercised; that wasn't done.

15 And in any case, I wanted to take the opportunity to say about -- they also talked
16 about or when, maybe, when he grew and became an adult. But you have adults
17 who were in the LRA, one of them is Brigadier (Redacted) who was, at the beginning,
18 one of the founders, who is said -- was provided evidence, we will submit, or which
19 have been submitted that he was given a wife by Kony, even though he was already
20 a senior military officer at the time, he and Kony, they form, and Kony threatening
21 with death. And when the girls were abducted in Lwala school, they brought the
22 girls again, and again, in that particular -- he was present with Kony. He was
23 present when Kony, gave the orders for the abductions. He was present with Kony
24 all the attacks that happened in the charged crimes and elsewhere. The food looted
25 were carried to Kony in Sudan, he distributed. And also, of course, you heard from

1 the Prosecution evidence, we will read the evidence, that Otti went there and Kony
2 superintended everything.

3 So the question of whether one is an adult, when the rules were consent and were
4 activated, he applied to everyone. If Kony distribute a wife, you don't accept, you
5 are gone. You see, "You are now UPDF," and they apply to everyone.

6 And also, your Honours, also, I am going to go to the question of also victim
7 perpetrator, which I will talk about. The Prosecutor has not presented a single
8 witness or evidence to show someone who was in the coercive environment with
9 Kony, in the circumstance of Ongwen, and who disobeyed Mr Kony and survived.

10 It is not enough to float these concepts in the abstract. You must be able to bring
11 them within the context of the case that your Honours are hearing.

12 I just wanted to make that clear before I go towards what the Prosecutor says about
13 Ongwen and I will be able to respond because I am trying to respond to some of
14 the allegations the Prosecutor said in her opening statement. This is the opportunity
15 for me to respond with particular focus on the charges on Mr Ongwen.

16 Your Honours, one of the reasons -- you probably heard the evidence about Ongwen,
17 the alleged perpetrator, but the Prosecutor has not presented to you the evidence
18 about Ongwen, the alleged -- the victim. Why is it important?

19 The Prosecutor has created a duality, which we say does not exist. As it was already
20 said, once a victim, a victim. And from the overwhelming evidence of most of the
21 people themselves who came here to testify, Prosecution witnesses who were victims,
22 who were conscripted, and they say, "We're still suffering from the trauma. We are
23 still victims." Their own evidence defeats the argument, but I agree that this duality,
24 victim/perpetrator, you lay out the evidence consistently when -- the perpetrator.

25 Where is your evidence Ongwen, the victim? Why is it important? They should

1 lay it before so you can look at the balance and to see whether the victim situation
2 Ongwen outweighs the prejudice, the trauma of the victim, who the Prosecutor
3 admits he was, was such, so significant that Ongwen could not control his actions,
4 would not control. We don't have that and therefore we have only a one-sided story.
5 These theories of moral choice of victim/perpetrator is floated in the abstract and they
6 don't even tell us how the same institution, LRA, that the Prosecutor describes in
7 detail, that abducted Ongwen and others, traumatised all these people, how Ongwen
8 can be a victim and perpetrator within that particular structure.

9 Now, in order to explain, I said the Prosecutor quoted the case of a gang leader, you
10 can remember, that one can be a good father, a good mother and become a gang
11 leader. But the answer is very simple, your Honours, there is no alternative
12 structure here. The alternative structure was that Ongwen, although you were in the
13 LRA, but you went out and created your own unit in which you pretended you
14 controlled and everything and you committed crimes. They are saying that he is
15 a perpetrator of his crimes for which he is a victim within the institution that had
16 enslaved him.

17 Now the mere fact of -- they are saying there are other people who were abducted
18 and put in the LRA, the mere fact in being -- is that he had been abducted and the
19 trauma of being there in itself, they themselves have laid out that case very clearly for all
20 other people and all the people who came here as victims because of our time, even if
21 you were there six months, will have the trauma, we cannot -- even those who have
22 been conscripted into the UPDF, in other words, what did they do? The
23 people Kony released because of the pressure of Iron Fist, the intention of Iron Fist,
24 Kony devised two things: In order to lessen the pressure on him, and we have
25 evidence to show people who were present, he sent the LRA back to Uganda to divert

1 attention and the UPDF now followed him to Uganda.

2 And you will find that within this time Kony devised certain rule, he said: "Look,

3 the political objectives will change, we are no longer interested in going to conquer

4 power or Ten Commandments. Iron Fist is now survivor. I have to flee." And he

5 was on the run to (indiscernible) Africa, we will grow about 20 people and a number

6 of people. And the rest, the evidence will show, your Honours, he released many of

7 the victims, the vulnerable people and the women, including his own wives and his

8 own children and said this would be a freeze on the abduction.

9 Now you ask, but why, if there was a freeze, why did they go to Lwala, Teso, why

10 was there abduction? Kony ordered the abduction in Teso in order to also lessen the

11 pressure on Acholiland. And the evidence will show from who were with him that

12 he was taken to Teso far away from Acholiland, the UPDF will follow you there and

13 as you will look at the evidence from the victims themselves of the Lwala attack, what

14 happened in that particular case, the girls were brought to Kony, some of them were

15 brought to Kony, some of them were released, and some of them are there in Uganda,

16 the Prosecutor did not bring them, but some of them were there. And some of

17 Kony's wives were released, including some of the Article 56 wives and the children,

18 they were released by Kony.

19 And your Honour will also have evidence that today the Prosecutor is saying, oh,

20 many people themselves, they surrendered, but the evidence will show that most of

21 these people were released or were captured in combat, many, many of them, because

22 the Prosecutor has not been able to demonstrate from the witnesses in the Court here

23 to say "I fled. This is what happened".

24 There were a quite a number of people who fled who were just newly abducted and

25 they were sent to look for food, and some of them managed at the lower ranks were

1 among the commanders. Only a few, a few have been able to testify. But one of
2 them who testified said that "when they were leaving, I knew that Ongwen would be
3 dead". And the question: Why did you say this? He said, "The way Joseph Kony
4 was talking about him, that's why".

5 So this question of victim/perpetrator, your Honours, is in the abstract, it is a theory,
6 they didn't call. Agreed, even if they wanted to develop, they didn't even call even
7 expert evidence to explain what it is; can it put in that context of the LRA. So we are
8 asking the Court that the example of the gang leader does not just apply here. And
9 Ongwen wasn't a gang leader.

10 And as lead counsel has said, in the structure, you see how the structure changed.
11 This question about rapid promotion, your Honours, itself is not correct even because
12 the reports which we will tender, we will submit, by the UPDF in March 2005 showed
13 the command structure was, and Ocan Labongo was brigade commander number
14 two, but there were about more than 12 other commanders in Control Altar. And
15 since Kony emphasised assignment in the matter of rank, Kony and Kony alone.

16 You heard the evidence how Kony was purported to be interpreting promotion from
17 the spirits. He never asked Ongwen. Ongwen was not one of the people who -- he
18 was not a spirit medium. If he was a spirit medium, I mean.

19 So, Your Honours, it is very, very, very clear that the evidence will show that the
20 charges as led against Ongwen are completely misconceived. These charges are
21 about Joseph Kony, it's about LRA. And the Prosecutor's opening statement, for
22 purpose of time, I did not want to belabour the Court, you will read it, in which when
23 I am developing what the Prosecutor says about Ongwen, then you will understand
24 that the Prosecutor was well aware about Mr Ongwen, they wanted Ongwen to be
25 here.

1 Your Honours, the Prosecution set out the upstanding distinctive characteristic of
2 Dominic Ongwen as a commander within the LRA. The Prosecution stated that
3 Dominic Ongwen could be kind and was loved by everybody. In her words
4 the Prosecutor said "people following this case against Ongwen may do so with
5 mixed emotions" and the Prosecutor continued, quote, "as a child he, Mr Ongwen,
6 must have undergone through the trauma of separation from his family, brutalisation
7 by his captors, and initiation into the violence of the LRA way of life. He has been
8 presented as victim rather than a perpetrator ... the evidence of many child victims in
9 this case, in other circumstances, may be the story of the accused himself ... Ongwen
10 was a good man who would play and joke with boys under his command and was
11 loved by everyone."

12 This, we agree. but we disagree with the gang leader analogy, because
13 the Prosecutor did not present an alternative structure in which Ongwen created and
14 set rules, or Ongwen (indiscernible) or whatever crime were not -- allegedly
15 committed, whose participation within an alternative structure, was still the very
16 structure that she has described as being very, very brutal. The rules did not pity
17 anyone. I do not know of any other one, anybody who survived the rule. And the
18 Prosecution have not presented a single individual here before your Honours to say
19 here was a victim, but because he participated, obeyed Kony, he survived, he stood
20 here. Let that champion come here and the world and ourselves will celebrate him.
21 But we haven't seen any.

22 Now, your Honours, the Defence agree with the Prosecutor that the people following
23 this case against Ongwen may do so with mixed emotions. Indeed, the Prosecution
24 of Ongwen poses a legal and moral dilemma.

25 Rwot Oywak, Rwot Oywak, an Acholi traditional leader and Prosecution witness,

1 whom the Defence demonstrated was a double informant in this case, this is what he
2 had to say, your Honours. He went to see the deputy leader, Vincent Otti, transcript
3 of 09/06/2017, page 16, and this is what he says about Ongwen, quote:
4 "I said he (Dominic Ongwen) showed his bitterness to everyone who went there".
5 He couldn't know what exactly -- "We couldn't know what exactly he wanted because
6 he indicated that his education had been ruined. If you go to your child and your
7 speaks like that, wouldn't he be showing his bitterness to you, if you go to your child
8 and your child says 'Daddy, this and that has already happened to me'. He
9 indicated to us that his education had already been ruined".
10 Your Honours, when Rwot Oywak testified, referring to him as "your child",
11 presenting your child before this honourable Court and before the world and to the
12 full glare of the religious and traditional leaders of Acholiland, it's because they know
13 that Ongwen is still a child as he is in this court, because Ongwen's childhood was
14 stolen. Ongwen still has to grow up to a man. Ongwen is a child. And that's why
15 a Prosecution, noted Prosecution witness was saying "your child". He said, "Daddy",
16 that's Ongwen saying to daddy, he knows Ongwen is a child.
17 And for all purposes and intents and for this case Ongwen is on trial as a child soldier,
18 Ongwen is a child and from all other evidence and every indication and from the
19 results that your Honours will see about the test of Ongwen and his traumatic
20 situation and the trauma of the LRA.
21 And I told your Honours very clearly here that from the informants that the
22 government of Uganda is trying to seal, that even in defeat, purported defeat,
23 Joseph Kony is still very, very present. The mere thought of Joseph Kony, dream of
24 Joseph Kony terrorises the victims of northern Uganda. They came here, you heard
25 their story. Ongwen cannot be the only exception or the Prosecutor has not

1 demonstrated what they may call the Prosecution exclusionary theory that Ongwen is
2 the only one. Even in northern Uganda when you heard about cen, people were not
3 there, they were affected by cen.

4 Ongwen's parents were killed when he was abducted by the LRA. The sister, one of
5 them was abducted by Joseph Kony and forced into his own matrimonial, conjugal
6 union, to use the word, Ongwen of course with the case of Brigadier General Salim
7 Saleh that you know about and many other instances from even the Prosecution's case.
8 How could Ongwen have had more (indiscernible) how could Ongwen be a double
9 status, this duality?

10 So I just want to bring to the attention of the Court that new theories have been
11 brought here. It would have been more interesting if they brought more evidence,
12 including expert evidence, to explain about this moral choice and how it affected and
13 put in the context of the charges against Ongwen, each of them, and the modes of
14 liability or the duality as victim/perpetrator within the structure of the LRA they
15 themselves have presented here. That has not been done. It is floating in the air. It
16 is in the abstract. Maybe it is for academics and others to test to see whether it works,
17 but it's not in this -- it doesn't belong to this Court, which is a court of law and fact
18 and which is a court of justice, to do justice to Mr Ongwen.

19 Mr Ongwen is not a guinea pig by which with new concepts in criminal law will be
20 floated and applied to this case. No, no, no, no, no. Your Honours have
21 determined very, very serious cases on which I have participated and you look at the
22 law, the Rome Statute and the law as it is and the facts in the case. And that is for
23 your Honours to uphold the spirit of the Rome Statute in regard to Mr Ongwen.
24 Your Honours, I will now move quickly to the question of Mr Ongwen having the
25 opportunity to escape.

1 Your Honours, I don't think I should belabour this because lead counsel talked about
2 it and I have talked about it and time is of the essence, and my learned colleague, I
3 know her eloquence for 15 years, when she gets up and I know what she has, so I
4 have to give some time for her.

5 Now, your Honours, the assumption of extreme, something that really of concern to
6 me in particular and should concern everybody in the judicial process before this
7 Court of international law, about the participation of many UPDF officers in the
8 investigation in this case. One of them, P-78, in his own statement and in the report
9 submitted by the Prosecutor, which we will also submit, they said he was an
10 intermediary and he was a liaison, but he was an active counterintelligence officer of
11 the UPDF persecuting the war, he had this war mandate.

12 The protocol on intermediaries was completely ignored and violated, because even
13 the Prosecutor who investigated him, when witnesses alleged that he had extorted,
14 used the security to extort money from them, the Prosecution investigated. In
15 fairness to the Prosecutor, they didn't just sit back.

16 But what is even surprising here is that the disclosed evidence shows that while our
17 intermediary and liaison, he is the one who located and got over 40 witness as the
18 Prosecution investigation report will show, 40 of the Prosecution witnesses, most of
19 them within the witness pool, a former LRA who surrendered or were captured in
20 combat.

21 But they came here, your Honours notice, as victims, child soldiers. You get them
22 from one question that remains: Were they are forced into combat for all your years?
23 And you conscript them back into the UPDF to consider the trauma to continue; or
24 others were released to the camps, including the women, and these in the camps were
25 also, some of them were conscripted into LDUs, and the women were exploited by

1 the UPDF officers because of the economic situation.

2 Now, the victims' evidence that was laid out here stopped short of bringing the
3 conditions of these people, how the UPDF exploited them, and the people, former
4 child soldiers, while still victims - because they came here and said they still suffer
5 from trauma.

6 Now, to ascertain this trauma, you must be able to ask: Where is the trauma coming
7 from? Yes, it could be and it must be because of the abduction into the LRA. But
8 the continuation of people, prisoners of war (indiscernible) surround that, through all
9 the combat, who are also protected by international law, for you to conscript them
10 now and send them to combat.

11 And I say so, your Honours, and I will give you the reference, because the
12 assassination of Raska Lukwiya, both Raska Lukwiya and Ongwen were under the
13 warrants of the ICC. And this intermediary and liaison had the mandate as
14 intermediary to capture him or to provide information with which he could be
15 captured.

16 It was during the peace process, the negotiation for safe passage, and he himself said,
17 your Honours, and let me say before I give you a reference, in his own statement he
18 says he got information that Dominic Ongwen and Raska Lukwiya were moving to
19 RV in Mucwini, that was during the peace process. And he sent former LRAs, these
20 are people within the victim, the witness pool that the Prosecution brought to testify
21 in this case. He sent them and UPDF to lay an ambush and kill them. They laid an
22 ambush. Ongwen missed it. Raska Lukwiya was killed. And the question is:
23 Why kill him when you are an intermediary?

24 When they kill him, they themselves gave a report. They found on him a telephone
25 and a notebook. There were only five of them. He was not in combat. It was

1 possible to arrest him and bring to ICC or let him proceed to the safe passage. In
2 order to save the peace process, this: kill him.

3 And I will give you the reference quickly, your Honours, but let me make other points,
4 I give you the reference of what he himself said.

5 Now, the problem arises during the safe passage, the commander of the fourth
6 division came here to say: I gave Ongwen the opportunity to come, release the
7 children, Ongwen declined.

8 But if you know that this officer, this counterintelligence officer who deployed here to
9 kill Ongwen and Raska Lukwiya was working directly under the supervision of the
10 fourth division commander asking Ongwen to come.

11 You now know why Ongwen could not when he knew that they had missed killing
12 him and killed his superior commander. Raska Lukwiya was number three in the
13 LRA at the time. He was number three.

14 The second point is that another witness, a civil administrator, a senior administrator
15 who was a double informant, because he himself said that, he supplied Otti with
16 equipment, including gumboots and other things of military value. In one other
17 instance he put a bomb, an explosive in the torch to kill Otti when Otti got it. Otti
18 did not get it. One of the commanders took it, opened it, it exploded and killed him.
19 Otti was number two in the LRA.

20 Could Dominic Ongwen, hearing these people, the same people who wanted to kill
21 his number two and failed, wanted to kill himself and killed his number three, would
22 he have surrendered to them or cooperated with them?

23 And again, and more important, when they were putting pressure on Ongwen,
24 release the children or you yourself, there was a journalist on the spot who called Otti
25 and said: They are putting pressure on Ongwen to surrender.

1 And Otti said: Give the phone to the fourth division. He gave it to him. He
2 talked to him. Let Ongwen come. And he let Ongwen.

3 The evidence will show in particular from the Lwala schoolgirls, from the Lwala
4 schoolgirls, one of the victims of Otti, that when Otti was going to attack Pajule, Otti
5 called a commander in the UPDF camp in Pajule and said, "I'm coming." And he
6 called a number of other people, politicians, journalists, senior military officers in the
7 UPDF who were all working, lead counsel clearly says it, they purported to be
8 fighting Otti or permit the war, because the war had become a cash cow and also
9 because the overflow, the overflow of support and of aid, assistance, to the victims in
10 the camp never reached the intended recipients. It never reached the intended
11 recipients.

12 And that is why you ask: Where did he go to? Of course, we submit
13 United Nations reports and reports, other studies conducted to show, including
14 Ugandan parliament, the Hansard, it was debated in parliament, that indeed the
15 question of the extermination of the Acholi, their victimhood, they prolonged the war
16 in order for benefit. And above all, and that's why Ongwen, it is a cover-up for
17 Ongwen to be brought here. Oh, no, at the end of the day they can say, well,
18 Ongwen was 70 counts; there is no need to look elsewhere. We are there with this.
19 But of course as your Honours asked: Is the government of Uganda cooperating
20 with this Court in order to provide all the evidence that you will need in order to do
21 justice, I mean to do justice to all?

22 The answer is no. We have request for assistance filed by the Office of the
23 Prosecutor itself, including one by Ms Fernandez, who was the chief of staff for
24 Mr Ocampo. She wrote so well as Ocampo's assistant asking for specific evidence
25 related to this case, specific evidence relating to this case, a lot of it.

1 And you know what, the government of Uganda stonewalled, even by the joint
2 intelligence committee that P-17 says that it was formed specifically by the
3 intelligence, national intelligence service under the control of the head of state - it's
4 a concealed organ by the president of Uganda - to investigate the case against the
5 LRA crimes and over to the Office of the Prosecutor.

6 Even that material, what happened? We have P-38 now in the middle. He himself
7 said he was not a member, he was there temporarily. They get the material and try
8 to subject it to some scrutiny, remove part of it throughout, conceal most of it.

9 But the Prosecutor clearly said: I wanted the report. And when I cross-examined
10 him: Where are the reports?

11 He said: Those reports were not for this case. They were for UPDF war operations.
12 But the evidence will show, and some of the evidence already on record, that that
13 commission was formed, that evidence was for this case, not for anything else. He
14 misled this Court. He could not be -- the chain of command, and the chain of
15 custody through him cannot be effective, because his involvement was just to dilute,
16 control the report, which the Prosecutor has been looking for, asking for consistently,
17 of the joint intelligence service, he has been looking for them in order to ensure that
18 they don't get to this court.

19 But more important also, your Honours, apart from that is the case that the
20 government of Uganda has asserted national securities interests, the national security
21 interests of the government of Uganda.

22 But, your Honour, I don't have any time, I have the jurisprudence from the European
23 Court of Human Rights. Once they have disclosed to the Prosecutor or to a third
24 party outside, they cannot.

25 And why this blanket national security interest at this point of time? Had they not

1 formed an international committee to investigate the cases to help the Court? They
2 did not investigate. They do not have the report, including even intercepts of all the
3 information which Ms Fernandez and others requested that should be sent here and
4 the originals, including the UPDF officers who were in Lukodi and people were on
5 the spot, to make them available to the Prosecutor and to this Court?

6 And of course, your Honours, we also have, I requested and went to Uganda to
7 contact Paddy Akunda, and Tinyefuza he talked about. The reply of the government
8 of Uganda: Paddy Akunda is a serving officer of -- is a serving officer of the UPDF
9 and Tinyefuza is a serving officer of the UPDF.

10 Not being members of the LRA, the normalcy about the command structure of the
11 LRA, the normalcy about the intent of the LRA, "They have absolutely no information
12 to provide you, so we are sorry, you cannot meet them."

13 It is submitted in evidence for your Honours to see and ask whether the government
14 of Uganda is cooperating, whether these individuals -- Paddy Akunda was the
15 spokesman for the UPDF in Gulu during the charged period. Of course, Tinyefuza
16 as you know was the coordinator of intelligence services, member of parliament for
17 UPDF, he was a deputy minister. So you cannot understand.

18 And, of course, you had Lapolo, who was the district commissioner for Kitgum, he is
19 the one that was a double informant as we pointed out who tried to kill.

20 One minute, and Paddy Akunda participated in these peace talks. So now for the
21 government of the Uganda for the purposes of this case, whereas one of their agents is
22 now intermediary for the Prosecutor, bringing up to 40 witness from the LRA to
23 testify against Ongwen, now their own superior commanders who persecuted the
24 war, who were in the peace talks, and they were the highest level of command, they
25 now tell us they know nothing about the command structure of the LRA. They

1 know nothing about this case. Absolutely, they don't know what they're talking
2 about, so don't try to attempt to approach them again.

3 So, your Honours, you made a determination in this case, what is national security
4 and when can it be asserted? It is an issue that is important, because the government
5 of Uganda has written again a blanket refusal to cooperate with us in this case or in
6 some instances, as the Prosecutor will say, even with the Office of the Prosecutor.
7 Even with the Office of the Prosecutor they stonewalled.

8 So the intention is are there trying in any way to sabotage this case? Are we looking
9 in the direction in which it is becoming discomfoting to them and, therefore, they
10 thought that Mr Ongwen will come here and immediately will be convicted. But
11 that is not the case.

12 Your Honour, let me move very quickly to two other areas before I hand over to my
13 colleague.

14 Now, we are bringing to you, we submit into evidence the evidence by Mr Kony
15 himself, Mr Kony explained exactly the reason for why they abducted young boys
16 and girls.

17 In the news publication of the LRM/A, Mr Kony says that one of the weapons that the
18 government UPDF had deployed to fight the Acholi, to exterminate Acholi is
19 HIV/AIDS. They gave soldiers orders who were fully blown to go and that there
20 was a genocide of the Acholis.

21 And therefore he said, before the end of the war, he, Joseph Kony, believes that the
22 Acholis will be dead and therefore - and this is in their own publication, what Kony
23 says, and also the evidence of one of the senior commanders, one of the senior
24 commanders who were with him from the inception when he made the rules, it was
25 that he declared that he should abduct young boys and girls, he will nurture them,

1 and they will grow and he, Joseph Kony, will be able to put them in conjugal unions.
2 They have no say in it, both the men and the women. They are just there for this
3 experiment to procreate.
4 It is not it has nothing to do with Aryan race. And I say this because, although it is
5 not the Prosecution's case, but Professor Musisi talk about Aryan race, which is most
6 unfortunate, your Honours, that that was not what Joseph Kony said, and that we
7 brought the document where Joseph Kony's ideas are so your Honour will know that
8 it is Joseph Kony saying. It's not what some other person -- it is lies to invent out
9 there.
10 And before I hand over quickly to my dear friend, that is the quote, Ugandan, an
11 official bulletin, The Ugandan, an official bulletin of LRM/A, volume 26. It will be in
12 evidence, your Honours, we will submit it in evidence so there is no need to go into
13 details for this. And also, with regard quickly to the -- of course, I don't want to go
14 back to the camps, but let me finish quickly by addressing one issue of extreme
15 concern to your Honours.
16 Your Honours, I must say one thing about myself. I hate to talk about myself the
17 entire proceedings, this is about Mr Ongwen and Mr Ongwen must take the centre
18 stage in this case. And Mr Ongwen will take the centre stage because you will
19 remember, the evidence will show the very first statement he made to the ICC when
20 he was surrendered to ICC, Mr Ongwen said, "I was abducted from the hands of the
21 government of Uganda to Joseph Kony. I was there, I was not myself. I have no
22 control over myself. Joseph Kony controlled everything about me.
23 Now, he says I escaped." By the time he escaped, he had been reduced to a private
24 and this is to challenge the idea of rapid promotion because he was now a private.
25 But Mr Ongwen now says, "I did not know anything that I was doing, that was the

1 only way I knew, fighting I didn't know." That statement will be submitted into
2 evidence, your Honours, for that.

3 But permit me, your Honours, to conclude quickly, as you said, and I really apologise
4 to talk about myself, I should not, and I make this comment with a very heavy heart.
5 I am not used to doing that, but I must make it, your Honours, because I am a media
6 practitioner and I have an investment in the sector. The press brings accountability
7 and transparency in judicial proceedings. Freedom of the press is a fundamental
8 right worth celebrating. We would, therefore, not blame news organs that have
9 demonstrated interest in this case and the judicial proceedings in this court.

10 However, we will blame counsel when they express views in the press that violate the
11 fair trial rights of Mr Ongwen and the fairness of the trial. Mr Ongwen is presumed
12 innocent. He is entitled to a free and fair trial guaranteed by the Rome Statute and
13 internationally protected human rights.

14 On 14 September 2018, just four days to the opening -- this opening statement, an
15 interview was published in the International Justice Monitor in which Legal
16 Representatives for Victims, and not my distinguished friend, Ms Massidda, for
17 whom I have the highest respect, she is not the one. To make things very clear, I
18 have the highest respect for her. They made the following statements about
19 Mr Ongwen and the trial process, "... for many of them" -- many victims -- "it doesn't
20 make sense that the trial drags on ... because in their view Dominic Ongwen is guilty
21 from the very first day. So, this trial shouldn't even be happening."

22 And -- end of quote, and he continues, "And they themselves say, 'Well, among us
23 there was a lot of people that escaped as soon as they wanted,' and what this show is
24 that Dominic Ongwen wanted to go up in the ranks. They question about the rights
25 and due process."

1 Your Honours, you will remember that during the status conference when I first
2 appeared before your Honours in this case, I brought up this issue and I said that to
3 ensure -- I quote my words, "I am sure that this trial should not be made into a media
4 circus."

5 And I take -- I have the honour of taking that the obligation of counsel, especially the
6 way we are representing the victims and the accused person before this Court, these
7 victims are vulnerable. Even if you get information from them, in the context of
8 your professional obligations, it is not for you to propagate them (indiscernible). It is
9 wrong and it's wrong. And when I brought it up, your Honour's said, "I am sure
10 that my colleagues would join me, the Chamber will of course do everything that this
11 does not happen".

12 Your Honours, the imputation of guilt casting a shade over the opening statement
13 before we start this case is a matter of grave concern. However, your Honours, I
14 would like to say, your Honours, that reassured with the statement you made, and up
15 till now you've kept, made sure these proceedings are dignified, you've made sure
16 there have been no incidents, apart from these we are bringing to your Honours about
17 discussing the guilt of somebody who is presumed innocent. That presumption of
18 innocence is one of the pillars, one of the pillars, one of the blessings of international
19 justice because we know very well that Ongwen has to explain his case. Even those
20 of us who are Christians, even when Adam and Eve committed their crime, the Lord
21 gave them the opportunity to defend, "Why have you done this?" We humans must
22 do like the Lord did, "Why have you done this?" Not to say that he must be guilty.
23 So, your Honours, and I ask the question, guilty from the very first day in an
24 international court by counsel participating in the proceedings? Your Honours, you
25 have the opportunity in this case where the matter has arisen to answer the question

1 and to set the standards for our generation and generations unborn. That is what this
2 case is about.

3 Thank you for your attention.

4 PRESIDING JUDGE SCHMITT: [15:11:06] Thank you, Mr Taku. And I understand
5 that now Ms Lyons will also have some observations, submissions.

6 MS LYONS: [15:12:01] The material comes to me, whatever this is. Okay.

7 Your Honours, it is a privilege to follow my eminent colleagues, my eminent and
8 eloquent colleagues; that's the advantage of being last, but the disadvantage is I have
9 listened and I am tired, so let me proceed.

10 I will try to stick to one hour, if that's okay with the Court --

11 PRESIDING JUDGE SCHMITT: [15:12:42] That's fine.

12 MS LYONS: [15:12:45] -- because -- and that's okay with Mr Ongwen, all right, and if
13 it isn't, I will be glad to stop if Mr Ongwen needs -- if he needs a break at all.

14 PRESIDING JUDGE SCHMITT: [15:12:52] I think it will be okay. Please continue.

15 MS LYONS: [15:12:55] Okay. What I am going to talk about for the next hour is
16 fair trial. I don't have the opportunity to do the explanations I would have done
17 about different rights and different legal sections I'm referring to, but I would -- not
18 these people in the courtroom, but would refer the members in the audience who are
19 not familiar with these ideas to take a look at the Rome Statute, Article 67 which
20 delineates the rights of the accused. I will be talking about that.

21 Take a look at Article 30, which deals with mens rea, which is the mental element of
22 the charges, and especially take a look at 31(a) and 31(d). We are putting out (d) as
23 duress as a complete defence, a defence through a prism through which we look at
24 the other allegations and defend them. 31(a), mental disease or defect is related to
25 31(d), and I will talk about that, but I understand that it may be difficult for those of

1 you who have not spent most of your time studying this or working with it to follow.
2 So please bear with me.

3 I want to talk a little bit about, first, why a fair trial is important. And Chief Taku
4 alluded to one issue which is, it is important in terms of helping us find the truth and
5 make the historical record. So that fair trial in a sense and fighting for the rights of
6 fair trial, which includes, notice of the charges to the client as well as disclosure
7 obligations, information from the OTP to us et cetera, is really part of the struggle for
8 the truth, the struggle for fairness and the truth. That's what this is about.

9 Fair trial rights are also human rights. This is recognised in the Rome Statute under
10 21(3) and it is also obviously recognised in international human rights law,
11 particularly in the Vienna Declaration from 1993 which said that all human rights are
12 universal, indivisible, interdependent and interrelated.

13 My colleagues have talked a lot about Mr Ongwen being a substitute or a surrogate
14 for Mr Kony. I am not going to go into that now, but I will say about this in opening
15 is, it is our position that the OTP should dismiss all of the charges, the allegations of
16 crimes and modes of liability against Mr Ongwen who is a victim.

17 On 12 February of this year, the OTP issued a statement on the International Day
18 against the Use of Child Soldiers, and the statement said, "It is my hope such
19 efforts" -- of the OTP -- "send a clear message: crimes against children in conflict,
20 including forcing them to bear arms, to kill and get killed, are unacceptable. They
21 are grave crimes, for which there must be accountability ... A crime against a child is
22 an offence against all of humanity; it is an affront to our basic tenets of human
23 decency. Only with collective and unified action can we truly make a difference."
24 And it is our suggestion that the Office of the Prosecution can start implementing its
25 intent now by dismissing the charges against Mr Ongwen, who is a child soldier

1 forced to kill or be killed by Joseph Kony.

2 In 1990, Uganda signed and ratified the Convention on the Rights of the Child. This
3 was while Mr Ongwen was being indoctrinated and forced to carry out the orders of
4 Joseph Kony. In 2002, Uganda acceded to or ratified the Optional Protocol to the
5 Convention prohibiting the use of child soldiers. We ask the question, what did
6 Uganda do to protect, save or rescue Mr Ongwen from the hands of the LRA as
7 a child soldier? Based on my knowledge, the answer is nothing.

8 We believe that Mr Ongwen is entitled to the protections under international law and
9 that these should be instituted now based on their application to the time period of
10 the charged allegations. In addition, as my colleagues have said quite eloquently,
11 Uganda must be held accountable for its role and its responsibilities in both the
12 crimes that have been alleged and the failure to protect Mr Ongwen consistent with
13 the international documents and covenants it signed.

14 Now the first issue I want to deal with is the issue of the plea. It is our position that
15 it was a fair trial violation to proceed in this case because the taking of the plea in
16 December 2016 was illegal.

17 Let me explain this. We are not contesting the right of the Trial Chamber to take
18 a plea under Article 64(8) or 65; that's not the issue. But we believe that a plea
19 should be voluntary, knowing or informed and, thirdly, unequivocal.

20 Now these standards were developed in cases by courts dealing with objections to
21 guilty pleas, and when I looked, honestly, I could find no standards for a not guilty
22 plea, which was the plea of Mr Ongwen. However, logically, it occurred to me that
23 they should be the same. So that's our position, that a plea of not guilty, as well as
24 one of guilty, should be voluntary, informed or knowing and unequivocal. But
25 based on reading the record, this does not appear to be the case.

1 It is our view that the plea taken in December 2016 was hardly unequivocal. Even
2 a Trial Chamber acknowledged that the conclusion of the exchange, which I will read
3 below, Mr Ongwen did not give an unqualified affirmation that he understood the
4 charges.

5 Mr Ongwen was asked by the Presiding Judge at the hearing whether he read and
6 understood the Document Containing the Charges. His response: "I understand
7 the document, I understand the Document Containing the Charges, but not the
8 charges, because the charges I do understand as being brought against LRA, but not
9 me, because I am not the LRA. The LRA is Joseph Kony, who is a leader of the
10 LRA".

11 We understand this statement to be that Mr Ongwen did not understand the charges
12 against him. He understood a translation he was given, maybe, but he did not
13 understand the charges as being against him, which is the essential piece of
14 understanding you need before you take a plea.

15 And he later confirms this. It was a quote that Chief Taku read "In the name of God,
16 I deny all the charges in respect to the war in northern Uganda".

17 Now, in Mr Ongwen's words were, he is quite clear, he was clear he didn't
18 understand why he was being charged. And we asked the question, it's been raised
19 a number of times: Why isn't the person accountable, Joseph Kony, in the dock on
20 trial?

21 But as we looked at this record many, many times and discussed it, we concluded
22 there is simply no way that a Chamber could be properly convinced that Mr Ongwen
23 was aware of all the charges and the modes of liability which were confirmed in the
24 decision of the Pre-Trial Chamber against him.

25 The first problem is that Mr Ongwen did not receive a complete translation of the

1 104-page confirmation decision in Acholi until mid-December, seven days after the
2 plea proceeding and approximately 630 days from the English version.

3 Secondly, there was a separate opinion of Judge de Brichambaut who agreed with the
4 CoC, the confirmation of charges decision, but he had a criticism of it. In any case,
5 this was not translated until 623 days after the June 6 English version.

6 The other problem is, or the other issue is that obviously not having the document
7 violated Mr Ongwen's right as an Acholi speaker to be informed, according to Article
8 67, in the language he fully understands and speaks, Acholi. And it was late.

9 The second problem we have, although it was consistent with previous rulings in this
10 Trial Chamber, we are still critical that the Presiding Judge did not request the
11 reading of the eight modes of liability for the 70 charges. Modes of liability is
12 important because it explains to the defendant the role he is alleged to have played in
13 the various crimes. So logically there was no way that Mr Ongwen could be
14 informed of the charges without knowing what his participation was alleged to be.
15 It just doesn't make sense.

16 And I think that minimally we would have expected the Trial Chamber to at least
17 make a more specific enquiry as to what he exactly understood and would have taken
18 the time to read.

19 Now these are issues that we have litigated. The Trial Chamber has rendered its
20 decisions, you know, they are public decisions on this, but I am raising it here because
21 that plea, a plea, not guilty plea was a basis on which we are in this room now. So
22 that is why I am raising it as a predicate issue at this point.

23 I would add also that at least there was one substantive, in my view, but substantive
24 modification in the confirmation of charges decision which is listed in that decision in
25 paragraph 158 which deals with the timing of the allegations. And whatever

1 Mr Ongwen read back in January at the confirmation of charges hearings, it wasn't
2 the same document. At that point there were no confirmed charges, so this is also
3 a problem.

4 So to sum up on this, basically our position is that Mr Ongwen indicated to both the
5 Pre-Trial Chamber in January and also in December, that he did not say, he did not
6 understand the charges as being against him. That didn't change.

7 I also note that the statement of his understanding from January at the CoC hearing
8 which was relied upon by the Court was in the context of waiving the reading of the
9 charges. What this means is I say, okay, there are 70 charges against me, I,
10 Beth Lyons, waive the reading of the charges, you don't have to do it, okay. Now
11 that's very different than saying, "Do you, Beth Lyons, plead guilty to these 70
12 charges?"

13 So that's the difference. And based on these factors, we still ask how it could be
14 understood that the plea was voluntary, knowing and informed and unequivocal.
15 To borrow an analogy from horse racing, where it's basically saying that, you know,
16 out of the gate, so to speak, this trial has suffered from a fundamental fair trial
17 violation that permeates the whole proceeding. That's our position.

18 The other point I wanted to raise in conjunction with this is that the problem of the
19 plea in December, and this was at the pretrial hearing, is compounded by the fact that
20 the Trial Chamber had notice that there were some issues regarding Mr Ongwen's
21 mental health status and that could affect his understanding and ability to enter
22 a plea.

23 On the day before we made a filing, the day before this hearing we made a filing
24 under Rule 135 and asked the Trial Chamber to order a psychiatric or a psychological
25 examination to ensure his fitness to stand trial. And in that pleading the Defence

1 stated we received a preliminary report from the experts saying that Mr Ongwen does
2 not understand the charges brought against him at the International Criminal Court.
3 Nevertheless, given the problems of the plea and given this added issue of -- the
4 question about psychological status, of which the Court was apprised, it's our
5 position that the taking of the plea should have been postponed until these issues
6 were resolved. It is clear that the mental health problems could impact on any plea
7 and it is clear he didn't understand the charges as being against him.

8 Now, this violation prejudices the Defence because here we are, and it is a continuing
9 fair trial violation as to what Mr Ongwen's understanding is of the charges against
10 him.

11 The next issue I want to talk about is in Article 67, it deals with the issue of the right
12 to translation - one moment, please - a right to translation.

13 Article 67(1)(f) keeps using the phrase that, and Article 67 keeps repeating the phrase
14 an accused needs to understand the charges in a language which the accused fully
15 understands and speaks. Now the Defence has litigated the translation issue in
16 respect to a number of documents and pieces of evidence and, frankly, we've been
17 losing the battle in this Trial Chamber. I mean, we have been on the losing end of
18 this. But it's still our position that a defendant who is not provided with the notice
19 of the charges and modes of liability cannot enjoy the right to a fair trial, and when he
20 is deprived of this fundamental right, he can't assist and he can't instruct his counsel
21 in the preparation of his defence. Full stop.

22 Related to this is the issue of translation and scheduling. Now, those of us who have
23 worked for a while in international courts understand that translation always just
24 takes up a lot of time, right. And, you know, it is translation of documents,
25 translations of -- and the interpreters and translators work extremely hard to make

1 sure everybody understands everything. But our concern is that the scheduling that
2 takes place in this court take account of the issue of translation and the rights of
3 Mr Ongwen and make sure that the proceedings are scheduled in such a way that is
4 fair. This is not about fast tracking, it's not about finishing by X date. It's about
5 fairness.

6 We have two small issues -- two brief issues, rather, they are not small, two brief
7 issues I want to raise as examples. One is that this Trial Chamber has fixed the
8 directions for the end of the case, the closing briefs and the statements. And we have
9 been litigating this and basically the decision gives us two weeks between filing
10 closing briefs and giving our closing statements.

11 Now, our problem is that there is no way in that very short period of time that
12 anything can be translated for Mr Ongwen. Now, the Trial Chamber decision
13 basically considers that the information is out there, that closing statements are not
14 a -- and closing briefs are not new evidence, they are non-evidentiary. Nevertheless,
15 this is the last time that all of the parties in this case, the Prosecution, the Defence and
16 the victims, will be addressing the Trial Chamber. And it is important to look at
17 these documents and analyse them to understand what are the key points that are
18 going to be raised by each party, and each of us respectively has to figure this out
19 with our teams.

20 So our position is that the two weeks is insufficient for the translation, for the client to
21 digest and discuss with counsel these issues, and to comprehensively review the long
22 documents that will be coming. Prosecution has 200 pages, the victims have 120
23 pages to share between two teams. By my calculations, that's 320 pages to review in
24 two weeks. For an under-resourced team, with a client who fully understands and
25 speaks Acholi and who is not available 24/7 to read and analyse legal documents,

1 there are problems.

2 And there is clearly the -- these factors lead up to a recipe of violation of fair trial
3 rights in respect to the scheduling translation paradigm.

4 There is also one other issue that is related here I want to raise quickly. And we are
5 litigating this issue. It concerns the sitting schedule, in other words, the days in
6 which this Court meets. Towards the last session, Wednesdays have been a, quote,
7 "day off" for Mr Ongwen to deal with other needs and while the Chamber may be
8 open to this further down the line, right now it has rejected the Defence request that
9 this policy be continued and it is our position that it needs to be continued.

10 PRESIDING JUDGE SCHMITT: [15:35:37] Ms Lyons, I have to shortly interrupt you.

11 MS LYONS: Okay.

12 PRESIDING JUDGE SCHMITT: Now, these are matters that, especially the last one,
13 that have been resolved by way of decision of this Chamber, or the Presiding Judge,
14 for example, and I think it is not appropriate to bring this up in an opening statement,
15 in this environment of an opening statement.

16 This is clearly the scheduling. We have been very accommodating to the Defence
17 and we will be so in the future. And I really think you should refrain from attacking
18 in such a general manner, and which the audience does not understand really, these
19 kind of issues, because it is really absolutely not necessary, especially referring to the
20 last issue.

21 You know, just one, one phrase to that, we know about these needs and we have
22 accommodated them, and it simply doesn't matter if it is a Wednesday or a Monday
23 or a Tuesday, Thursday or a Friday which is free, and we have said this clearly and
24 we will follow this. So this is not an issue I think to discuss here during an opening.
25 I would really be happy, so to speak, if you would be a little bit less argumentative in

1 your wording here.

2 MS LYONS: [15:36:55] Your Honours, for the record, my intent was not to upset
3 the Court or to attack the Court, but to raise these issues in the context of fair trial. I
4 understand how I was heard and I am moving on. Okay.

5 Thank you. I am going to move on now to the issue of affirmative defences. As my
6 colleagues have said, there are two principles which are fundamental to fair trial, the
7 presumption of innocence of the accused and proof beyond a reasonable doubt, and
8 these are enforced in Article 66 and 67 of the Statute, as well as 67(1)(j), which states
9 that there is no reversal of the burden of proof or any onus of rebuttal on the
10 defendant.

11 And consistent with these tenants, as my colleagues have said, the accused or
12 defendant has no burden to do anything. Now we are obviously arguing and
13 participating and presenting opening statements with leave of the court. However,
14 we don't -- the Defence can sit here mute because the Judges will be making
15 deliberations based on whether the proof presented for each of the elements of the
16 crimes charged and the modes of liability needs the proof beyond a reasonable doubt
17 standard.

18 However, we have raised, as lead counsel mentioned, we are raising an affirmative
19 defence. When an accused raises an affirmative defence, the Prosecution's burden is
20 to prove -- the Prosecution's burden to prove each and every element does not change.
21 And the burden does not shift to the accused. The affirmative defence is new and it
22 is a separate issue.

23 But for this Trial Chamber the issue is this: Who should bear the burden of proof in
24 respect to an affirmative defence and by what legal standard should it be proved?

25 The Statute provides no guidance on this issue, and nor do the ad hoc jurisprudence,

1 because the ad hocs are basically not united and not uniform in their holdings.
2 However, based on our research, we would conclude that this issue is unsettled for
3 this Court and the honourable Judges here have the opportunity to set the standard.
4 We believe the standard should be applied for an affirmative defence should be
5 in sync with Articles 66 and 67 and that we should -- we should not adopt -- or you
6 should not adopt a standard which shifts the onus of the burden from the Prosecution
7 to the Defence or somehow minimises or undercuts the principles of proof beyond a
8 reasonable doubt.

9 Now, appellate courts in some common law jurisdictions have affirmed the same
10 beyond a reasonable doubt standard for the Prosecution when an affirmative defence
11 is raised by a defendant. For example, Canada, the UK, Hong Kong and also
12 Australia. And in the UK, I believe, the defendant has an evidentiary burden to raise
13 duress, for example, but once it is raised, the Prosecution has the onus to disprove it
14 beyond a reasonable doubt.

15 So that in terms of summing up our approach, we would suggest a two-step process:
16 The initial evidentiary burden on the Defence to raise an affirmative defence with
17 some evidence, and a shift to the Prosecution to disprove the affirmative defence with
18 proof beyond a reasonable doubt. And we will be submitting later a brief on this
19 issue, but I wanted simply to raise the issue now because it is an important legal issue
20 in terms of our defences.

21 Now, I am going to talk a little bit about the elements of the defence, affirmative
22 defences.

23 Now, the Defence has given notice of two affirmative defences, as lead counsel has
24 discussed:

25 31(a), that Mr Ongwen suffers from a mental disease or defect that destroys his

1 capacity to appreciate unlawfulness of conduct or capacity to control his conduct to
2 conform with the requirements of law.

3 And 31(d), that the conduct was caused by duress resulting from a threat of imminent
4 death or of continuing or imminent serious bodily harm against Mr Ongwen or
5 another person and that Mr Ongwen acts necessarily and reasonably to avoid this
6 threat, provided that he does not intend to cause a greater harm than the one sought
7 to be avoided.

8 Now it is difficult to go through each of these elements, so that I will try to at least
9 talk about some points about some of them here. And then, as I said, we will brief
10 them in more detail for your Honours.

11 Now, first, there is obviously an interrelationship between 31(a), mental disease or
12 defect, and 31(d). The elements of both address the capacity of the person raising
13 the Defence, whether due to mental disease or defect, or to duress, to control his or
14 her conduct.

15 Now, the defences are totally interrelated. They both talk about this common
16 element of control. Perhaps a little bit differently, but it is there. 31(a) talks about
17 capacity of the person to control his or her conduct. I'm sorry, 31(a), the capacity of
18 the person to control his or her conduct refers to control by the mental disease or
19 defect.

20 In 31(d) there are a lot of specifics about the threat to the person may be made by
21 other persons or constitute by other circumstances beyond that person's control.

22 When we put these elements together, the questions before us are: Who controlled
23 the situation that led to the mental disease or defect? And who made threats or
24 created circumstances which were beyond Mr Ongwen's control?

25 The answer to both these questions, in our view, is the same: Joseph Kony.

1 Under 31(a) can a person with mental disease and defect form the required criminal
2 intent? Our answer is no. Can a person with mental disease and defect form an
3 intent to impose a greater harm than the one avoided under duress? The answer is
4 no.

5 Our position is that Mr Ongwen acting under duress could not form the intent
6 required for the crimes alleged and could not intend to cause a greater harm than the
7 one sought to be avoided.

8 My colleagues have talked a lot about the control of Mr Kony and what I would
9 describe as the misuse or perversion of spiritualism by Joseph Kony in the LRA.
10 This resulted in the mental control over the minds of the soldiers in the LRA by
11 Joseph Kony. As my colleagues have said, Mr Ongwen's mind was not his own.
12 Now, under the duress issue, let me say a little bit more about the threat piece of it.
13 The threats required under duress are threat of imminent death or continuing or
14 imminent serious bodily harm. We submit that the threats against Mr Ongwen were
15 imminent and continuing. The threats also talked about are against another person
16 or that person. And we recall the testimony of P-205 who talked about the collective
17 punishment for escapees, for escapes, the fear that family, clan, villages would be
18 punished, there would be collective punishment if a person escaped. So this is
19 something that needs to be considered.

20 I have already talked about the defendant could not form the intent because he had
21 no control over his mind and actions. But in defining a threat under 31(d) it's said it
22 can be made by other persons or constituted by other circumstances beyond that
23 person's control. In the case of Mr Ongwen our position is both conditions are met.
24 The threats were emanating from the orders of Joseph Kony and enforced in
25 a coercive environment over which the defendant had no control.

1 Duress is the fundamental defence in this case. Duress, as I said earlier, is a prism
2 through which to assess the criminal allegations against Mr Ongwen. To put it
3 another way, distress is an umbrella under which the 70 criminal allegations and
4 eight modes of liability are situated.

5 Now the Rome Statute is clear, the drafters of the Statute made the determination that
6 duress is a defence and not merely mitigation.

7 Now, the mitigation position is a position that appears to us to be supported by
8 the Prosecution and victims. Nevertheless, if the language of the Statute on duress is
9 found to be unclear, Article 22(2) mandates an interpretation of strict instruction in
10 favour of the accused.

11 The support for the idea that duress is a complete defence is found in the separate and
12 dissenting opinions in Erdemović from ICTY case, the separate and dissenting
13 opinions of Presiding Judge Cassese and Judge Stephen. Now, in both of their
14 decisions they basically hold that under stringent conditions duress is a complete
15 defence in international law with regard to war crimes and crimes against humanity.

16 I won't go through the stringent conditions, but let me say they are very close to,
17 conceptually they are very close to what exists as the conditions in 31(d).

18 Now, Judge Cassese also recognised that duress can be a defence even against the
19 most heinous crimes, such as the killings of innocents. He said where there a high
20 probability the person under duress will not be able to save the lives of the victims,
21 whatever he does, then duress may succeed as a defence. He stressed that the
22 Trial Chamber should decide with all the facts before it, before it.

23 What this means in other language is that in a situation where the person did -- the
24 duress is applicable in a situation where the person did not pull the trigger when
25 somebody else would. In other words, if not Dominic, if not Dominic Ongwen, then

1 it would be somebody else who was forced to carry out the criminal orders of JK.
2 We believe that the situation of Dominic Ongwen based on these legal holdings is
3 even stronger than in Erdemović, because in the case of Erdemović, he volunteered to
4 be a soldier. Mr Ongwen did not volunteer to join the LRA.
5 As P-379 testified, P-379 was a witness who was abducted by the LRA: Nobody
6 willingly joins the LRA, nobody willingly goes to the bush. I have not met anybody
7 who has gone willingly all the time I was in the bush.
8 I am paraphrasing the last phrases, but you get the point.
9 Now, I wanted to talk a little bit about resources and fair trial, basically the inequality
10 of arms between the Prosecution and the Defence. I am going to make very brief
11 bullet points, as we say, and refer - the Trial Chamber has read and studied, I
12 know - but refer others here to document 1098. It is a public document on the
13 website. It's the Defence request for additional resources and observations on fair
14 trial from December 2017.
15 All right. One second, please.
16 Now, first it is clear from looking at a number of criteria that there is no level playing
17 field in this case between the Prosecution and the Defence. To us, that's what
18 equality of arms means, equality of arms under the Statute. Equality of resources,
19 equality of personnel, equality in terms of investigations, in terms of information, in
20 terms of technology, et cetera, it doesn't exist.
21 Now, in terms of investigations, the fact is the OTP had an 11-year headstart on
22 the Defence and considerably more resources to use during this 11-year period. The
23 details can be found in a report from the OTP on the website called "Report on the
24 activities performed during the first three years covering the 2003-2006 period", which
25 is relevant particularly to the crimes charged in this case.

1 More recently, at the Assembly of States Parties, at the Assembly of States Parties at
2 the 16th session, the OTP indicated that in a one-year period, between September 2016
3 and 2017, the OTP conducted 31 missions in three countries against Mr Ongwen. In
4 comparison, the Defence investigations did not commence until March 2015, when
5 counsel chosen by Mr Ongwen accepted his position.

6 Now let's talk about the issue of personnel.

7 Personnel involves not just who is sitting in the courtroom. It involves what I refer
8 to as invisible team members who are sitting in the offices and different divisions of
9 the Office of the Prosecutor.

10 Now, as of December, this is December 2017, to be accurate, we made a comparison of
11 the visible members in the courtroom between the Defence and the Prosecution.

12 And at that time there were at least 13 persons at Prosecution tables who basically
13 could question, who were counsel who could question witnesses. At that time, in
14 comparison, just for the, as I said, for comparison sake, on this side we had four
15 persons, and now we have five. But you can begin to look at these numbers, check
16 the reports to make the comparison of the inequities.

17 Now, what about the invisible resources? The invisible resources of the specialised
18 units which are institutionalised in the Prosecution office, the Gender and Children's
19 Unit, specialised advisers, the Special Gender Adviser to the Prosecutor, I think there
20 are two people now. And there is a planning unit, a planning operations, there
21 a strategies unit, operations support unit, and there a unit to deal with witnesses.

22 No such apparati exists on the Defence side, either through the Office of the Public
23 Counsel for the Defence and certainly not on the individual Defence teams.

24 Thirdly, the issue of outmoded technology. I am informed by those on my team, not
25 I, but others who know, that the Ringtail, which is a system through which evidence

1 is catalogued and analysed on all the teams, that the version that we had at least in
2 December was 2008, about 2008, and the Prosecution was using a version from 2012
3 to 2015.

4 In any case, what does this translate to? It means more people having to do, it takes
5 more people when you are under-resourced with old technology to do the same task.
6 So all these problems merge.

7 Now, what is the prejudice? So what? Who cares? It is prejudicial in a case with
8 the 70 charges and 8 modes of liability just because every point has to be investigated,
9 the evidence has to be analysed, and that's the problem.

10 Now, the Defence also contends that a lot of our requests have been forwarded to or
11 suggested we forward them first to the Registry, and then they are dealt with by the
12 Trial Chamber if we can't find some kind of resolution. And our position is that
13 these fair trial issues, and we have said this, but these fair trial issues are judicial
14 issues first. And it is the Registry under the articles in the Rome Statute that
15 implements the decisions. That's why we have been coming here first for
16 determinations to see if we can resolve these issues.

17 And lastly, Mr Ongwen is a recipient of legal aid. And I'm sure that no one
18 consciously in this courtroom would say that a legal aid recipient should have his or
19 her right to a fair trial circumscribed by the legal aid system.

20 I have worked in legal aid systems for too long, and I know what happens. It doesn't
21 make it right. But I firmly believe an international court should set the best, highest
22 standards for a legal aid system and what it should provide in terms of equality of
23 resources, not follow the worst practices that I have seen in New York City and that
24 colleagues have seen, no doubt, in many countries that have legal aid or public
25 defender systems.

1 Now, the last issue I want to deal with in this section is the issue of disclosure
2 violations. I hesitate to make a generalisation, but I will because of time and go
3 through a few specifics. But we have had a problem consistently, and we have
4 litigated as certainly the Judges are aware, the Prosecution is aware, those who read
5 publicly redacted versions of our positions are aware, we have litigated late
6 disclosures, missing pieces of disclosure and exculpatory violations.
7 Now, to date, let me just give you a few statistics. To date, out of approximately
8 25,000 items of disclosure we've received from the OTP, and that includes Rule 77
9 material to the Defence disclosure and your category of incriminatory, only 45 items
10 have been identified as within the exculpatory category.
11 Now, these items were disclosed in 10 packages, and if our arithmetic or the
12 calculator's arithmetic is correct, these 45 items represent only 0.18 per cent of
13 disclosure.
14 Now, the question or the quandary for us is: Where did all the exculpatory
15 disclosure go? Now, I have to say empirically the percentages run counter to other
16 international cases either I have litigated, my colleagues have litigated or I have been
17 informed about. But I don't want to speculate. All right. I didn't do a whole data
18 chart of this.
19 Defence can't clarify or answer these queries, but we raise them because it raises
20 a question of: Is there more? And we also raise it as a question to the
21 Trial Chamber, because under 68(2), as the Chamber and everyone else here is aware,
22 there is a mandate to disclose exculpatory material as soon as possible, which has
23 been the ruling of this Chamber -- as soon as practicable, rather.
24 Now, in terms of late disclosure, we had a recent, here a recent example. There was
25 a meeting note disclosed about, there is a witness number P-27, there was a meeting

1 note from 2005 that was just disclosed in August, early August this year, 13 years
2 after it was taken.

3 Now, I don't know where it was. Maybe it was hiding, it got lost. I mean, who
4 knows? But the point is that it is late disclosure, and in this case it is late, but it also
5 is prejudicial because the contents of the information was clearly relevant and
6 material to the Defence of duress.

7 The second point is, this was a witness who we interviewed a year ago, and the OTP
8 was present in the interview, and they had notice of the interview. Had we had the
9 note at the time a year ago, we would have been able to ask questions dealing, for
10 example, with LRA function, its infrastructure, how Joseph Kony maintained control,
11 details of his internal spy network, a number of elements that are, as I said, material
12 to the Defence of duress. Not having that note deprived us of that opportunity and
13 it was prejudicial.

14 Also, I just want to call the Court's attention to the fact that there is an
15 Appeals Chamber ruling in the Karemera case in ICTR that says that exculpatory
16 material cannot be buried by the OTP in general disclosure obligations.

17 Now, here it was disclosed as exculpatory, but generally we are not supposed to have
18 to look through 19,000, 20,000 documents to pick out what's what. It has to be
19 marked as exculpatory, and if it isn't, this is a violation of fair trial.

20 There are other recent examples of investigative meetings from 2004 and 2005, late
21 disclosures, this is a problem. It is not a problem, it is a fair trial violation, and it
22 prejudices our preparation and Mr Ongwen's rights.

23 So and thirdly, I would say -- I'm sorry, it's not thirdly. But in addition, it raises for
24 us a question, these numbers of the 25,000 versus the 45 of whether in fact the OTP is
25 carrying out, is implementing its obligation under Article 54(a) that Chief Taku talked

1 about of its duty to investigate equally exonerating and incriminatory evidence.
2 We have had a similar type problem with requests for assistance, the cover letters the
3 OTP sends to the Ugandan government for information. And the situation here has
4 been that, although the OTP let us know that they had found everything, they have
5 disclosed everything, this was in September 2016, a year later we are reviewing all the
6 materials and we found that there was a failure to disclose several of these requests
7 for information, requests for assistance that were related to responses from the
8 Ugandan government that led to the collection of evidence against Mr Ongwen.
9 These cover letters are not just "Dear so-and-so, we want something", they contain
10 information. And the responses to them, important, because they contain
11 information. And basically there are a number of examples which we have raised in
12 our pleadings to illustrate what we are missing, what we don't have and how it
13 prejudices our preparation.

14 Now, according -- I believe I have 25 more minutes? I'm okay?

15 PRESIDING JUDGE SCHMITT: [16:05:32] Make it even a little bit quicker, we would
16 appreciate it.

17 MS LYONS: [16:05:36] Yes, yes, I know. I understand.

18 Okay. The last, the last issue I want to deal with is actually the first element of
19 Article 67, it is the right to notice. And I would have dealt with in the beginning, but,
20 as you will hear, it is a somewhat complicated issue and I wanted to kind of save it
21 until the end.

22 As has been said, Mr Ongwen - sorry - faces the most criminal charges and modes of
23 liability prosecuted against a single accused defendant in any criminal case here and,
24 most likely, in any international court and tribunal.

25 The Trial Chamber recognised this at a status conference in May 2016 and

1 acknowledged this was a considerable case and said -- the Presiding Judge said,
2 "nobody in this courtroom needs to be overwhelmed or intimidated by its scope. In
3 any case, the Chamber is not." I think I correct, "Chamber is not". Okay.
4 The Defence is neither overwhelmed nor intimidated, but we want to emphasise that
5 the right to notice, the right to be promptly informed of the charges against you in
6 a language you fully speak and understand is even more important because its
7 violation is exponentially increased because of the numbers. We are not dealing
8 with one charge, one mode of liability; 70 charges, eight modes of liability.
9 Now this proceeding is not the buffet approach to criminal proceedings. Notice
10 isn't -- like a smorgasbord of charges and modes of liability. As lead counsel said,
11 Prosecution is expected to know its case before proceeding to trial and it cannot
12 mould the case against the accused in the course of the trial depending on how the
13 evidence unfolds.
14 Now, if I were back at legal aid a few decades ago, Defence counsel would argue that
15 the OTP on the other side of the aisle have overcharged this case. But it is not just
16 a question of overcharging by an overzealous Prosecution's office. As we have said,
17 the Prosecution's office is using this case as a showcase for the Prosecution of LRA
18 crimes. The only problem is, as we said, Joseph Kony isn't here. Mr Ongwen is the
19 person in the dock. He is an individual here. And Mr Kony is not being held
20 accountable.
21 We have no problem with investigating all the crimes committed during the war in
22 northern Uganda on both sides. But as lead counsel eloquently said, we have
23 a problem with one-sided justice, it is called victor's justice, selective prosecution,
24 selective investigation. That's our problem. And for the legitimacy of this
25 institution it is our position that both sides have to be investigated and, if sufficiency

1 of the evidence is found, then prosecuted.

2 Now, I am going to skip over - I assume everybody here knows about what

3 fair - knows the jurisprudence on fair trial, et cetera, some people better than I. Okay.

4 I am skipping all of that. But the one piece I want to say is that there is a

5 requirement - and this is important because we need to understand this when we look

6 at where notice is lacking -

7 There is a requirement that an indictment - I am using that term, I come from

8 common law, but an indictment or a - okay, well, that argument afterwards - an

9 indictment or a confirmation of charges decision, as indictment is used here, must,

10 must, must plead the Prosecution's case with sufficient detail for there to be notice.

11 Now, if it doesn't, there is a material defect. The legal standard is an indictment is

12 defective if it fails to plead required material facts. So what are the material facts?

13 No mystery. Judge Dolenc in Ntagerura said it is the who; who is the alleged victim?

14 The where. The when. The what was committed or omitted? Whom, to whom;

15 the victim. By what means. The why; the motive. Answers to these seven

16 questions are necessary in order to individualise the accused, the alleged crime, the

17 mode of the accused's participation, and the form of his criminal responsibility.

18 And by charges we mean both the crimes and modes of liability.

19 Now, unfortunately, the notice in this case, we believe, is defective. I will not be able

20 to go through all of my arguments about this and will raise this in writing, but let me

21 just briefly explain some of the ideas.

22 Where do we look for notice?

23 First we look at the Confirmation of Charges Decision. As Trial Chamber VII held in

24 its decision in the last case I litigated here, the Article 70 case, the CoC, the

25 Confirmation of Charges Decision constitutes "the authoritative document informing

1 the accused of the charges 'as confirmed"', and the Trial Chamber is bound by them.
2 Other documents is a pre-confirmation brief and there a pre-trial brief. These are
3 auxiliary documents. And sometimes they can fill in the gaps, but they don't
4 substitute for the confirmation of charges decision.

5 Now, it is our position that - and we agree with Judge Brichambaut on this - that the
6 reasoning of the Confirmation of Charges Decision and the charges, there have to be
7 some kind of connection to make a well-reasoned opinion. And this is important
8 because he criticised -- he agreed with, but he also criticised in a separate opinion the
9 decision from the Pre-Trial Chamber saying it does not provide the Defence with
10 details of what evidence was relied on and how the Chamber defined the crimes.

11 Now, Judge Brichambaut makes a number of other points regarding the lack of
12 contextual elements; minimal, small amounts of elements from modes of liability; no
13 explanations by the judges for their decisions; no explanation of the underlying
14 crimes and their elements, et cetera. And I urge you to look at his separate opinion
15 because he can explain it better than I can, obviously, but it is an important overview
16 as a starting place for this.

17 Now, the issues of modes of liability which Chief talked about a little bit, this is
18 basically a legal quagmire. I am not going to be able to do it in the next 10 minutes,
19 obviously. It really is. But I want to talk about one mode of liability and its defects
20 and then highlight the other two.

21 I want to talk about the defective pleading of command responsibility, because
22 especially there are three elements. And I am going to make it -- I am going to
23 paraphrase: There is effective command and control, there is knowledge, there is
24 power to prevent or repress. In other tribunals it is prevent or punish. And
25 essentially these elements are repeated in the Confirmation of Charges Decision but,

1 in that decision, the elements for the mens rea, the knowledge and the elements of
2 power to prevent and repress are missing, it is missing the elements. You have to
3 look at the document and say are the elements there? And then look, are there
4 material factual allegations to support them?

5 It is difficult to find factual allegations when the elements aren't defined. Basically,
6 the paragraphs which purport to support these elements of command responsibility
7 essentially track the statutory language. And it has been clear that this tracking of
8 the statutory language has been found to violate fair trial standards.

9 This was a holding in the Bemba appeals judgment in respect to the element of
10 prevent and repress, and it is also a holding from the ICTR cases where the
11 Trial Chamber said the indictment was defective because it failed to plead any
12 specific conduct to support knowledge and failure to prevent or punish for command
13 responsibility or superior responsibility. And in full disclosure, that was a case the
14 Chief and I litigated, Military II, and didn't win until the appeals level, but that was a
15 holding of the Appeals Chamber on that.

16 The prejudice of this error is it doesn't provide detailed notice.

17 It also leads to a notion of strict liability which has been criticised by the Bemba
18 Appeals Chamber. They said specifically they held Article 28 here, command
19 responsibility, is not a form of strict liability.

20 This means that you have to plead every element. I am not even dealing with the
21 proof issues, we are not at that stage yet, we are dealing with defective pleading, that
22 is a fair trial violation, so that it is not even pleaded. Each of these have to be
23 pleaded, not presumed, and just because someone may be a military commander, a
24 military superior, it is against the rule of law, the laws -- sorry, it is against the
25 holdings in law here to argue that the elements of strict liability are there.

1 Now, common purpose liability is the next one. Essentially, the problem we have
2 with this is that the notion of contribution is listed under common purpose liability;
3 Article 25, individual criminal liability, but that there is no level of contribution
4 identified. The Pre-Trial Chamber says it doesn't have to be significant. We say
5 that means that anything goes, any kind of contribution made by someone involved
6 in some kind of joint perpetration or joint liability would be okay. That is against
7 criminal law. That isn't okay from our position.

8 Now I raise this here -- and I am not going to all the references, but I want to say that
9 this Court will have to decide, I believe, kind of the parameters of joint -- of common
10 purpose liability because I don't think it has been decided at the appellate level here.
11 And for those of us who have argued against and litigated joint criminal enterprise
12 we certainly take a strong position against this limitless kind of mode of liability
13 without legal parameters. And, as I said, I will continue those arguments in other
14 forms later.

15 In terms of the issue of mens rea and 25(3)(a), I only want to say that there is an
16 element -- the problem in the CoC as well as the auxiliary documents, the Prosecution,
17 is the elements aren't always listed and sometimes are missing. And I will be able to
18 support that in a different setting. I don't have the time now to go into that. But I
19 want to say one thing.

20 In terms of indirect perpetration, the element of the perpetrator's ability to frustrate
21 the commission of the crime - which has been held to be an element of mens rea in
22 Katanga, and in Lubanga, both acknowledged by the Pre-Trial Chamber - is missing,
23 it is missing that element. It is missing in the documents, it is missing in the CoC,
24 and that's an important element that has to be considered in terms of mens rea. The
25 fact it is missing means that the pleading is facially deficient.

1 Similarly in terms of persecution, there are issues as to whether - in our position this
2 doesn't happen - but whether the allegations are sufficient to link
3 an individual persecutory intent to Mr Ongwen who is charged here, as opposed to
4 the positions of the Pre-Trial Chamber and the Prosecution which talk about, in
5 various documents, some more, some less, the animus, the persecutory animus of the
6 LRA.

7 Based on our understanding that we can't find a criminal -- you can't, you can't
8 criminalise under international law Mr Ongwen's participation organisations. That
9 is not a sole basis on which to allege the animus for the crime, for the criminal
10 allegations.

11 Similarly on the issue of conscription of child soldiers, there, take a look at the issue of
12 common purpose liability. It is not pleaded. Take a look particularly, I think it was
13 paragraph 663 on that, but I will check it for you, but the problem is, this is a problem
14 of the, of the charges in counts 69 and 70 in terms of modes of liability.

15 Now, the last point I am going to make has to do with the issue of the sexual and
16 gender based crimes. And I will say that I know that my colleague, Abigail
17 Bridgman, eloquently argued the jurisdictional defect in the crime of forced marriage,
18 one of the crimes of which Mr Ongwen is accused, in the hearings on the confirmation
19 of charges decision. I am not going to go into those arguments here. You can read
20 them. They are from January 2016.

21 However, I want to say that, one, that forced marriage is not a crime in the Statute,
22 therefore, the issue for us is Article 22(2) applies; and secondly, it is only the ASP, in
23 our view, which has -- the Assembly of States Parties which has the power or
24 authority or legitimacy to amend the Statute to introduce new crimes. And there is
25 no jurisprudence in our view that supports that the Trial Chamber or the

1 Pre-Trial Chamber has an inherent jurisdiction in terms of this.

2 Now, the last issue is, I want to talk a little bit about the sexual and gender based
3 crimes from the position of who is forced and by whom. And I will do this very
4 briefly and I will end.

5 We heard the evidence from the women who testified in the Article 56 hearings,
6 the Prosecution witnesses against Mr Ongwen. The issue for us is how should the
7 evidence be characterised? If we characterise the conduct as crimes, then who is
8 responsible? Is it Mr Ongwen who is carrying out orders from JK, or is it -- sorry,
9 from Joseph Kony, or is it Joseph Kony, the ultimate maker of and enforcer of the
10 rules?

11 In order to do this, the evidence has to be assessed objectively and dispassionately
12 and we trust that as professional Judges this is -- you do this. We understand that.

13 But I raise it here because the Defence is also aware that the sexual and gender based
14 crimes are highly emotional, or, in the media parlance, a hot button item. So before
15 we even approach these crimes to analyse them in a legal form such as a court, we
16 have to look at what are the obstacles that may obstruct or prevent an objective
17 analysis of the evidence and the elements by all of us.

18 What makes it so difficult to look at sexual and gender based crimes dispassionately
19 and objectively? I am not going to speak for everybody, but I think there a sense of
20 unease when they are on the table.

21 These acts involved and these crimes are intimate and tied up with a lot of emotion
22 and feeling and there is a gnawing reality that criminal acts described are often
23 commonplace within relationships between people throughout the world, although
24 most do not find their way into a court of law.

25 We trust that the Judges will extricate the emotion and look at the allegations

1 dispassionately, but we want to raise this general point of perspective because we
2 think it is important and it is an important reminder to all of us in this room.
3 We also want the Judges to look at the charges and evidence and context. For
4 example, remember that Mr Ongwen, who was abducted as a young child, received
5 his sexual education in the bush from Joseph Kony and this has an effect.
6 My colleagues have already talked about the fact that Mr Ongwen couldn't form the
7 intent, but we want to say that neither Mr Ongwen nor the women could refuse,
8 could say no to the orders of Joseph Kony in respect to sexual relations without the
9 likelihood of death.
10 We submitted example of a witness, a senior LRA officer, who was told that if he did
11 not take a wife, he was forced to take a wife, he was a senior officer, he would be
12 killed. This is an example. Look, obviously there was sexual activity in the LRA,
13 but the underlying issue is, behind this allegation of forced marriage and the
14 allegation of forced pregnancy, who was forced by whom? And the examples that
15 we have read about, we have heard, we have talked to people about is both men and
16 women were forced by Joseph Kony. They were forced by the rules. No abductee
17 had any choice. So from this we conclude that both the men and women, boys and
18 girls abducted by the LRA, they are all victims who suffered harm through these
19 policies and orders of Joseph Kony. He was the singular person who had the power
20 to take advantage and to control the coercive environment of the LRA.
21 Now, we will later make the argument, but I will say for now that obviously based on
22 the facial deficiencies of the defects, we will argue that the modes of liability and the
23 criminal allegations should be dismissed. Under Ntagerura, they are trial issues
24 related to an indictment or in this case confirmation of charges decision can be raised
25 even post-conviction, and we will raise them.

1 I would like to ends with a quote -- two more minutes. I would like to end with
2 a quote, which I have to admit the quote is used by a colleague of mine, Professor
3 Lennox Hinds, a renowned criminal lawyer, human rights lawyer. He has used it in
4 his conversations about his Rwanda cases, so I didn't find it myself, but I think it is
5 à propos to the fair trial violations. "More than half a century ago on
6 21 November 1945, Justice Robert Jackson, chief counsel for the US, United States, in
7 his opening statement before the International Military Tribunal at Nuremberg,
8 acknowledged that Nuremberg was a victor's tribunal and he warned: 'We must
9 never forget that the record on which we judge these defendants today is the record
10 on which history will judge us tomorrow. To pass these defendants a poisoned
11 chalice is to put it to our own lips as well. We must summon such detachment and
12 intellectual integrity to our task that this Trial will commend itself to posterity as
13 fulfilling humanity's aspirations to do justice.'"

14 Thank you.

15 PRESIDING JUDGE SCHMITT: [16:28:37] Thank you, Ms Lyons.

16 This concludes today's hearing. We will resume on Monday, 1 October, with
17 Defence's first witness.

18 THE COURT USHER: [16:28:48] All rise.

19 (The hearing ends in open session at 4.28 p.m.)