

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 Closing Statements - Courtroom 3
8 Tuesday, 10 March 2020
9 (The hearing starts in open session at 9.30 a.m.)
10 THE COURT USHER: [9:30:21] All rise.
11 The International Criminal Court is now in session.
12 Please be seated.
13 PRESIDING JUDGE SCHMITT: [9:30:55] Good morning, everyone.
14 Could the court officer please call the case. Thank you.
15 THE COURT OFFICER: [9:31:00] Good morning, Mr President, your Honours.
16 Situation in Uganda, in the case of The Prosecutor versus Dominic Ongwen, case
17 reference ICC-02/04-01/15.
18 And for the record, we are in open session.
19 PRESIDING JUDGE SCHMITT: [9:31:15] Thank you.
20 I would like to welcome everyone in the courtroom for these closing statements over
21 three days.
22 And I invite the parties to introduce themselves. We start, as always, with
23 the Prosecution. I assume, Mr Gumpert.
24 MR GUMPERT: [9:31:30] Thank you, your Honour.
25 Ben Gumpert for the Prosecution. With me today, Adesola Adeboyejo, Colin Black,

1 Beti Hohler, Pubudu Sachithanandan, Colleen Gilg, Hai Do Duc, Nikila Kaushik,
2 Shkelzen Zeneli, Yulia Nuzban and Grace Goh.

3 PRESIDING JUDGE SCHMITT: [9:31:48] Thank you.

4 And for the Legal Representatives of the Victims, Ms Massidda first.

5 MS MASSIDDA: [9:31:53] Good morning, Mr President, your Honours. For the
6 Common Legal Representative team appearing today, Mr Orchlón Narantsetseg,
7 Ms Caroline Walter, and I am Paolina Massidda.

8 PRESIDING JUDGE SCHMITT: [9:32:05] Thank you.

9 And Mr Manoba.

10 MR MANOBA: [9:32:06] Good morning, Mr President, your Honours.

11 Today with me is Listowel Atto and Francisco Cox and Anushka Sehmi. Thank you.

12 PRESIDING JUDGE SCHMITT: [9:32:16] Thank you very much.

13 And for the Defence, who is rising? Mr Ayena is rising.

14 Then for the Defence, Mr Ayena.

15 MR AYENA ODONGO: [9:32:24] (Microphone not activated) Good morning,

16 Mr President and your Honours. Today I am accompanied by Chief Charles

17 Achaleke Taku, Beth Lyons, Kifudde Gordon, Thomas Obhof, Tibor Bajnovic.

18 We have Eniko and Michael Rowse and Madam Morganne. And in court we have
19 our client, Mr Dominic Ongwen.

20 PRESIDING JUDGE SCHMITT: [9:33:03] Thank you, Mr Ayena.

21 And as a short reminder for the schedule for the public for this week, we will have
22 this week every day closing statements; today, the whole day, the Prosecution.

23 Tomorrow, the representatives of the victims will have each one session. And on

24 Thursday for the whole day we will hear the Defence's closing statements.

25 We give now the floor to the Prosecution for their closing argument statements. And

1 I assume I give the floor to Mr Gumpert.

2 MR GUMPERT: [9:33:37] Thank you, Mr President.

3 I want to make it plain that, in the submissions that we'll be making today,

4 the Prosecution isn't going to attempt to encapsulate the whole of its case against

5 Dominic Ongwen. The Prosecution case is set out in the 200-page written brief

6 which we have filed, and that brief is available to the public.

7 The principal purpose of the remarks that I'll be making today is to deal with issues

8 which arise out of the written brief which the Defence have filed.

9 Let me briefly describe the structure of the Prosecution's submissions today.

10 First, Mrs Adeboyejo will be speaking about some of the issues arising from

11 the Defence brief concerning the crimes which the Prosecution allege Mr Ongwen

12 committed of which the victims are the seven women whom he regarded as his wives

13 during the charged period, women who've given evidence about their experiences of

14 forced marriage, rape, sexual slavery and other sexual and gender-based crimes at

15 Mr Ongwen's hands.

16 Next, I shall speak about the allegations that the Defence have made concerning the

17 alleged unfairness of this trial. I'll speak about their observations concerning the

18 modes of liability which may attach to Mr Ongwen, about their suggestions that

19 the Chamber shouldn't rely upon evidence of the LRA's intercepted radio

20 communications, and about their submissions concerning mental disease or defect

21 and about duress.

22 Lastly, Mr Black will deal with submissions the Defence have made concerning the

23 crimes which the Prosecution alleges were committed during the four charged attacks

24 on the camps of Pajule, Odek, Lukodi and Abok and about wider evidential issues

25 which arise from those submissions.

1 Your Honours, in order to put those remarks in context, I am first, very briefly, going
2 to outline the nature of the Prosecution evidence which is before the Chamber as it
3 relates to the 70 charges which the Prosecution brings against Mr Ongwen. And I
4 think it may be helpful to start at the end of that list of charges and I am going to start
5 with counts 69 and 70, which relate colloquially to crimes involving child soldiers.
6 The Prosecution say that the evidence in this trial has proved that, at the time of the
7 crimes which the Prosecution allege against Mr Ongwen, the Lord's Resistance Army,
8 led by Joseph Kony, was engaged in a non-international armed conflict with the aim
9 of overthrowing the government of Uganda. The LRA's fight was not only against
10 government soldiers, it included, say the Prosecution, widespread and systematic
11 attacks on the civilian population.
12 The LRA had a long-standing policy of abducting and conscripting children,
13 including children under the age of 15 years, into its ranks. That policy was
14 implemented in all its units and in the Sinia brigade between 1 July 2002 and
15 31 December 2005. That, of course, is the charged period on which this trial is
16 focused. That period was no exception. Boys were abducted to become LRA
17 fighters, and girls were abducted to become forced wives and domestic servants or
18 babysitters known as *ting tings*.
19 Every unit in the Sinia brigade had children under 15 in its ranks during the charged
20 period and abductions were a standard part of Sinia brigade's operations. Children,
21 including children under 15, were abducted to fill the ranks of the brigade during the
22 charged period. The preferred age for the abduction of boys was around 12 years,
23 although boys sometimes as young as eight or nine were abducted as well.
24 After abduction, boys usually underwent a ritual and were beaten as part of their
25 initiation into the LRA. They were trained with weapons. They were taught about

1 LRA rules. They were assigned to particular fighters, often the ones who had
2 abducted them.
3 When they were deemed sufficiently reliable, abducted boys, including boys under 15,
4 were armed with guns. They were used as escorts to commanders in the
5 Sinia brigade. They were placed in observation posts, they acted as guards and
6 carried food, weapons, and ammunition. They took part in attacks on civilians in
7 ambushes and in battles with the Ugandan army, the UPDF, and they were used to
8 kill, to pillage, and to abduct.

9 Mr Ongwen was a member of Sinia brigade's leadership throughout that charged
10 period of 42 months, first as a battalion commander, and from March 2004 onwards,
11 as the commander of the whole brigade. Together with his perpetrators,
12 co-perpetrators, other members of Sinia brigade leadership and Joseph Kony, he
13 pursued a common plan of abducting children in northern Uganda and conscripting
14 them into the Sinia brigade to ensure a constant supply of fighters. As a result,
15 children, including children under 15, were conscripted and used to participate
16 actively in hostilities. Mr Ongwen, amongst other things, ordered abductions,
17 monitored the training of children, himself, used children under 15 as escorts or part
18 of his entourage, and deployed children on military operations. He regularly
19 interacted, as your Honours have heard, with those children. On occasion, he even
20 specifically enquired about their ages. He knew full well that amongst them there
21 were those who were under 15.

22 I want to turn now to the charges which relate to the attack on the Pajule camp, that's
23 counts 1 to 10.

24 The Prosecution say that the evidence in this trial concerning the attack on Pajule has
25 proved beyond reasonable doubt that in the days leading up to the attack,

1 Vincent Otti, deputy commander of the LRA, ordered other commanders to meet him
2 in Pader in northern Uganda. Mr Ongwen responded to that call and he joined Otti
3 on 5 October 2003.

4 Shortly before 10 October 2003, Otti, Mr Ongwen and other senior commanders
5 agreed to attack the IDP camp at Pajule. LRA fighters converged about 10
6 kilometres east of Pajule near a place called Wanduku, and it was there that the
7 fighters were selected to participate in the attack. Mr Ongwen instructed some of his
8 subordinates to select LRA fighters to form part of the attacking force.

9 At dawn on 10 October 2003, LRA fighters attacked the camp. They were divided
10 into four groups. The overall commander on the ground in charge of those groups
11 was a man called Raska Lukwiya. Mr Ongwen's role was to lead a group to attack
12 the trading centre at Pajule. The attack caused havoc. Civilian inhabitants were
13 murdered and they were abducted in their hundreds.

14 LRA fighters in Mr Ongwen's group broke into shops and civilian homes. They
15 pillaged a variety of items. They abducted civilians at gunpoint and forced them to
16 carry those looted items. Civilians who were unable or unwilling to carry items
17 given to them were either beaten or ultimately killed. And Mr Ongwen was present
18 at the centre of the camp when this occurred.

19 After the attack, Mr Ongwen and the LRA attackers returned to a rendezvous point,
20 we've referred to them consistently as "RVs", and they took with them the items they
21 had pillaged and a large number of civilian abductees. Ultimately, the LRA released
22 most of the abducted civilians, but they kept the younger ones to serve as new LRA
23 fighters or forced wives, or for the younger girls to act, until they grew older, as
24 domestic servants known in the LRA as *ting tings*.

25 I turn now to the crimes which arise out of the attack on the camp at Odek, that's

1 counts 11 to 23.

2 The Prosecution say that the evidence in this trial has proved beyond reasonable
3 doubt that in April 2004, Joseph Kony ordered the LRA to attack his own birthplace,
4 Odek, which is in southeastern Gulu district. Why? Because the people there did
5 not support the LRA.

6 On 28 or 29 April of 2004, Mr Ongwen, commander of the LRA's Sinia brigade, gave
7 orders to fighters under his command to attack the Odek IDP camp and to kill and to
8 abduct civilians and to pillage their food.

9 After briefing the fighters, Mr Ongwen personally led the attack on the camp on
10 29 April, accompanied by other senior Sinia brigade commanders. They split into
11 groups as they approached the camp. One group attacked the barracks, killing
12 soldiers and burning the building. A second group moved through the camp to the
13 trading centre. They murdered civilians. They burned civilian homes. They
14 abducted civilian men, women and children to carry away the pillaged food and
15 other goods. Some of those abducted civilians were later killed by the LRA, others
16 were conscripted into the ranks of the LRA as fighters or distributed as forced wives
17 or *ting tings*.

18 And on 30 April and 1 May 2004, Mr Ongwen reported the results of the Odek attack,
19 by radio, up the chain of command to Joseph Kony and Vincent Otti. His voice can
20 be heard describing the results of the attack and answering questions about how
21 complete the destruction had been.

22 I turn now to the charges arising out of the attack on Lukodi, counts 24 to 36.

23 The Prosecution say that the evidence in this trial has proved beyond reasonable
24 doubt that some time before 19 May of 2004, Mr Ongwen ordered LRA fighters to
25 attack the camp at Lukodi and to target civilians. The orders he gave included

1 instructions for killing the inhabitants and burning and looting civilian properties.
2 In preparation for the attack, Mr Ongwen handpicked and briefed fighters from the
3 Sinia brigade which he commanded. He also obtained a smaller group of fighters
4 from the sickbay of a different brigade, the Gilva brigade, and commandeered them
5 to join the attacking group. He selected Captain Alex Ocaka from his brigade to lead
6 the attack as the overall commander, but he did not go to the attack site himself on
7 this occasion.

8 It was the early evening when the attack began. Fighters under Mr Ongwen's
9 command attacked Lukodi camp and committed a series of crimes against its civilian
10 residents. These included the murder of civilians, the destruction of their homes, the
11 pillage of their belongings, and torture and enslavement of camp residents. Some of
12 those abducted were later killed by the LRA others again were conscripted into the
13 LRA ranks as fighters or forced wives.

14 And after this attack too, on 21 May, Mr Ongwen made a preliminary report to
15 Joseph Kony, Vincent Otti and other LRA leaders over the radio. His voice can be
16 heard telling them that he had attacked the camp at Lukodi. He told them about the
17 killing and the burning of homes which his fighters had carried out. And on 24 May
18 2004, once he'd received a first-hand report from his commander on the ground and
19 his fighters had returned from the camp, Mr Ongwen made a supplementary report
20 on the radio and confirmed his responsibility for that attack.

21 Next I turn to the charges arising out of the attack on the camp at Abok, counts 38 to
22 49.

23 Prosecution say that the evidence in this trial concerning the attack on Abok has
24 proved beyond reasonable doubt that on 8 June 2004, at the Atoo Hills, Mr Ongwen
25 appointed one of his subordinate officers, a man called Kalalang, to select and lead

1 LRA fighters from the Sinia brigade in an attack on the camp at Abok. Mr Ongwen
2 ordered the attackers to shoot anyone found there, to abduct people, to collect food,
3 and to attack and burn down the camp and the barracks.

4 Kalalang did indeed lead the fighters chosen for that attack. He ordered them to kill
5 civilians by burning them or smashing their heads with clubs. He wanted to save
6 ammunition.

7 And armed with guns and pangas or machetes, the attackers descended on the camp
8 in the evening at about half past seven. The Ugandan government soldiers and the
9 local armed forces stationed at the camp were unable to protect the civilians living
10 there and they were chased away by the LRA fighters.

11 And those fighters did just as they were ordered: they shot, stabbed, beat, and burned
12 civilians to death. They injured others. They pillaged civilian property and food,
13 they destroyed civilian homes and property by setting them on fire.

14 Civilians were abducted and forced to carry the loot which LRA fighters had pillaged.
15 And under threat of death, abducted civilians were taken out of the camp by their
16 captors, some were beaten, some killed, and others later recruited by the LRA in the
17 ways that I have described previously.

18 In the early hours of the following day, government soldiers pursued the LRA
19 fighters, but they managed to rescue only a few of the abducted civilians.

20 Mr Ongwen later met those fighters and the civilians they'd abducted at a rendezvous
21 point at the Atoo Hill, where he was informed of the results of the attack.

22 And on 9 and 10 June 2004, Mr Ongwen reported the successful attack that his
23 fighters had carried out over the radio to Raska Lukwiya, Vincent Otti, and
24 Joseph Kony. Again, his voice can be heard on the recorded radio communications
25 confirming having sent out a deployment that was shooting at anything that was

1 moving.

2 Your Honour, there are four counts, 10, 23, 36 and 49, which are associated with those

3 attacks, they are counts of the crime of persecution.

4 The Prosecution say that the evidence in this trial has proved that during that charged

5 period, 1 July 2002 to the end of December 2005, the LRA were targeting for attack

6 civilians in northern Uganda whom they considered to be supporting the Ugandan

7 government. They didn't need to be showing overt partisanship. It was enough, so

8 as far as the LRA was concerned, for them to reside in the government-established

9 camps for the LRA to consider them to be supporting the government. Kony and

10 other senior LRA commanders issued regular orders that civilians in those camps

11 should be targeted.

12 And Mr Ongwen, the evidence establishes, was well aware of the LRA's persecutory

13 campaign. His position of authority gave him regular access to radio

14 communications. He endorsed that campaign, and that's demonstrated by his words

15 and actions throughout the charged period. And of course, of particular relevance to

16 this trial, Mr Ongwen, say the Prosecution, furthered the persecutory campaign of the

17 LRA during those four charged attacks. And taken together, the Prosecution say,

18 this evidence leads to the inevitable inference that Mr Ongwen acted with

19 discriminatory intent in respect of the attacks on the four camps at Pajule, Odek,

20 Lukodi and Abok, thereby committing the crime of persecution in each case.

21 I want to turn now to crimes which Mr Ongwen committed, the Prosecution say, in

22 a rather different way, in a very much more direct way. I want to turn to the sexual

23 and gender-based crimes which the Prosecution say he directly perpetrated. And of

24 course this is counts 50 to 60 in the Document Containing the Charges.

25 Prosecution say that the evidence in this trial has proved beyond reasonable doubt

1 that during the charged period Mr Ongwen directly perpetrated sexual and
2 gender-based crimes. The victims of those crimes were the seven witnesses whose
3 evidence is before the Chamber in this trial. Some of them were distributed to him,
4 others he personally abducted. He enslaved all of them, he subjected them to
5 domestic servitude, he tortured them, he raped them, and he sexually enslaved them.
6 He forcibly married, confined, and continued to rape them for the period they were
7 under his control, sometimes resulting in their forced pregnancy. Although the rape
8 and enslavement of some of these witnesses occurred outside the charged period,
9 their evidence, the Prosecution say, provides vital context for the Chamber's
10 understanding of the coercive environment that existed in Mr Ongwen's unit during
11 the charged period.

12 Those witnesses didn't freely consent to take Mr Ongwen as their sexual partner, they
13 didn't consent to the subsequent activity. They had no choice. Any act of resistance
14 resulted in beatings and threats of death.

15 None of them was allowed independently to determine her marital partner or to
16 exercise her choice in starting a family. None of the traditional rituals of marriage
17 was observed. These girls and women had no reproductive autonomy, and the
18 forcible imposition of marriage has contributed to the stigma they have suffered since
19 escaping from Mr Ongwen and from the LRA.

20 And finally, your Honours, I turn to other sexual and gender-based crimes which
21 Mr Ongwen did not perpetrate directly but through others under his command.
22 That's counts 61 to 68.

23 The Prosecution say that the evidence in this trial has proved that sexual and
24 gender-based crimes of which the victims were women and girls was a defining
25 feature of the LRA as a whole. You have heard evidence about how over decades,

1 but including the charged period of three and a half years, thousands of women and
2 girls, often when they were still children, were abducted, distributed to LRA fighters
3 and commanders, and subjected to the LRA's regime of sexual and gender-based
4 violence.

5 The Prosecution's case is that, just as in other LRA units, hundreds of women and
6 girls were abducted, forcefully kept, and victimised in Mr Ongwen's Sinia brigade
7 throughout the charged period. Women and girls in his brigade were abducted,
8 distributed to fighters and commanders with no choice on their part. According to
9 their age, they were either enslaved to carry out household tasks until they were older,
10 or raped, and sexually enslaved as the forced wives of fighters under Mr Ongwen's
11 command. They were unable to refuse these roles that were forced upon them.

12 Resistance resulted in violence or death. These crimes were committed in an
13 environment of fear, threat, and coercion. And again, many of those victims
14 continue to suffer the consequences and stigmatisation to this day.

15 The Prosecution say that the evidence has clearly demonstrated that Mr Ongwen was
16 at the heart of those crimes committed in the Sinia brigade. As the commander first
17 of the Oka battalion and later of the entire brigade, he facilitated, sometimes actively
18 ordered the abduction of women and girls. He played a key role in their distribution,
19 sometimes he chose them for his own use. More often, he distributed them to his
20 subordinates as a reward or as an incentive.

21 Your Honour, before I hand over to Mrs Adeboyejo, I want to respond to what
22 the Defence has said about Dominic Ongwen's own victimhood. In the closing brief
23 they put this in various ways. In paragraph 6 they assert that "The case of
24 Mr Ongwen is a case of conflict between the Government of Uganda ... and the LRA ...
25 Mr Ongwen is only a victim." In paragraph 12 they state boldly, "Mr Ongwen is

1 a victim, not a perpetrator." And in paragraph 20 they say, "once a victim always
2 a victim".

3 So, what does the Prosecution say about this? Have we charged the wrong man?
4 How come we are picking on an individual who was himself abducted somewhere
5 between the ages of 9, as the Defence have contended for, or 14, as Mr Ongwen
6 himself told this Court when he first appeared before it.

7 Your Honours, when we opened this trial, the Prosecutor of the court addressed this
8 matter head on, in clear terms. And the Prosecution's position is still, perhaps, best
9 captured by what she said three years ago. But in the light of the Defence's
10 observations, it may bear restating, and briefly I will set out the Prosecution's
11 position.

12 We are not here to deny that Dominic Ongwen was a victim of abduction. And no
13 doubt his treatment when he was first abducted was similar to the atrocious
14 treatment that we have heard was handed out to young abductees in the units that he
15 himself conducted many years later.

16 But the Defence line that this should somehow make him immune from being held to
17 account for the atrocities which he himself committed is untenable.

18 The phenomenon of the victim who becomes a perpetrator may be a novel one in
19 international criminal courts, but for those who practice criminal law in a domestic
20 setting, it's mundanely familiar. Sometimes the connection is quite direct, such as
21 when criminal sex offenders turn out to have been themselves the victims of sex
22 abuse as children. It's a tragedy, no one disputes that, but equally no one suggests
23 that they are therefore relieved of responsibility for their own crimes.

24 Violent criminals have also often been victims of violence themselves, whether as
25 children or as adults. And again, that is not to be ignored on a human level, or even

1 when determining punishment. But it can't be the case, as the Defence seems to
2 suggest, that such people have a lifetime free pass to commit crimes just because
3 crimes were committed against them at some point in the past.
4 In the end, the focus of a criminal trial, whether it is held here at the ICC or in a small
5 district court in one of the States Parties, is not on the goodness or the badness of the
6 accused person, it's on the criminal acts which he or she has committed. The focus
7 isn't on whether one side or the other characterises that person as a victim or
8 a perpetrator, or perhaps more realistically recognises that many wrongdoers answer
9 to both descriptions. The Prosecution has proved what Mr Ongwen did and why
10 the law should hold him accountable. He wasn't the victim of those crimes, and the
11 court has heard about the impact of those crimes on the many people who were their
12 victims.

13 The Court will decide whether he is guilty of the crimes with which he stands
14 charged. If he is, then the question of his victimhood a decade or more before those
15 charged crimes is one which may have to be considered again on the day of sentence.
16 Your Honours, I hand the floor to Mrs Adeboyejo.

17 MS ADEBOYEJO: [10:04:09] "He shut the door ... He asked me to undress ... He
18 undressed me as well. He asked me to spread open my legs. He ... took hold of his
19 penis ... he put it in my vagina and he started forcefully ... having sex with me. I
20 started crying. I was screaming and my voice was really loud. He asked why I was
21 crying ... He told me that if I continued crying, he showed me his gun. The gun had
22 something sharp on top of it like a bayonet ... I felt like my whole body was being torn
23 apart ... he was actually having sex with me in the anus as well ... for a very long time".
24 The testimony of Mr Ongwen's forced wife P-227.

25 Mr President, your Honours, the evidence that Dominic Ongwen personally

1 committed sexual and gender-based crimes against civilians during the course of
2 violence by the Lord's Resistance Army in northern Uganda is compelling. The slide
3 before you is an example.

4 But the Defence, who challenged this witness, mainly on the anal penetration aspect
5 of what she said, argue that Mr Ongwen is not guilty of crimes against this witness, or
6 any of the other six witnesses who gave similar account of how they were the direct
7 victims of his attacks on them.

8 They argue that he did not intend to commit these crimes; they appear to argue that
9 he cannot be blamed for what he did because of his poor mental health when he
10 raped these witnesses. They also argue that he was acting under duress; that the
11 hearings at which these women testified were procedurally defective; that the
12 geographical parameters of the charges were not clearly specified; and that
13 the witnesses were confused during the Article 56 proceedings. Your Honours, I
14 want to look at these various aspects of the Defence's claims.

15 The Prosecution's case is that Dominic Ongwen personally committed different types
16 of sexual and gender-based crimes, including rape, forced marriage, sexual slavery
17 and forced pregnancy against seven women: P-99, P-101, P-214, P-226, P-227, P-235
18 and P-236.

19 He not only personally committed these crimes, but he also made fighters of his
20 Sinia brigade, of which he was commander, carry out similar brutal crimes. For his
21 acts of enslaving, torturing, humiliating (Overlapping speakers)

22 THE INTERPRETER: [10:08:15] Mr President, could the Prosecution slow down to
23 allow for interpretation, the Acholi booth.

24 PRESIDING JUDGE SCHMITT: [10:08:19] I get a notice from the interpreters that
25 you are a little bit too fast, so please slow down a little bit and take your time.

1 Thank you.

2 MS ADEBOYEJO: [10:08:26] Thank you, your Honours.

3 The Prosecution is also charging him with enslavement, torture and outrages upon
4 personal dignity.

5 The Defence suggest that Mr Ongwen lacked the intent to carry out these crimes and
6 that he only carried them out under duress because he was afraid of Mr Kony.

7 Nothing could be further from the truth. The evidence of P-226 makes it clear that
8 the Defence suggestions are untenable.

9 P-226 was a 7-year-old child still in his school uniform when she was abducted by
10 soldiers under Mr Ongwen and was taken to Sudan.

11 In Mr Ongwen's home, P-226 was a *ting ting*. As you heard, *ting tings* are young girls
12 assigned to help run households and care for children. As a *ting ting*, P-226 was
13 made to carry out domestic chores such as fetching water, digging the garden and
14 collecting vegetables for cooking. There is no doubt that this was her role. She was
15 not challenged about it and Defence Witness D-13 confirmed her presence as a forced
16 wife to Mr Ongwen during the charged period.

17 When the time came for P-226 and her fellow abductees to be distributed, Mr Kony, as
18 the supreme LRA commander, sent his escorts to fetch her. Mr Ongwen refused to
19 release her. He hid her under his bed. He said he found her and he gets to keep
20 her. It's either she is divided in two or he would kill her rather than let her go.

21 Mr Ongwen wasn't under any duress, he was boldly defying Joseph Kony.

22 Mr Ongwen did not hide P-226 under his bed for one day or two. No. He hid her
23 for a whole month until he was able to transfer her to another location. The
24 suggestion that his action was lacking in intention is unrealistic. He kept her, he hid
25 her and eventually raped her when she was 10 years old. He was not afraid to set

1 his will against Mr Kony and oppose him.

2 And the manner of the rape is equally eloquent concerning the intentional nature of

3 Mr Ongwen's conduct towards P-226. He first demanded sex with her when she

4 was about 10 years old. According to her testimony, she had seen girls coming out

5 of Mr Ongwen's house crying but she did not understand why, because she was too

6 young to understand. Mr Ongwen asks her, a 10-year-old child, for sex. She

7 refused because according to her, quote, "she was disgusted" end quote. He then set

8 his escorts to beat her continuously for a week until she capitulated. She was so

9 young and so small that he had to lift her onto the bed to rape her. And when she

10 started to scream, he threatened to kill her if she continued to cry.

11 In the aftermath of the rape the witness stated, quote, "I could not get up ... I went and

12 I had a bath because I was bleeding. I was bleeding a lot." End quote.

13 Your Honours, those are not the actions of a man who had no intent or who was

14 afraid of Mr Kony. If that was the case, he could have kept her in the room and not

15 raped her, but he did rape her. He planned it, had planned it for some time, fully

16 intended to carry it out, and he did.

17 This account and the testimony of other women whom Dominic Ongwen regarded as

18 his wives were hardly disputed in cross-examination. I have drawn your attention

19 to the dispute concerning the details of P-226's rape. In the Defence closing brief,

20 they deal with the counts concerning these seven women in a scant 11 paragraphs,

21 para 472 to 482. No dispute with the accuracy or honesty of their testimony is raised.

22 Instead, in para 480 they portray Mr Ongwen as the victim of rules and regulations

23 concerning sexual relationships.

24 But it was Mr Ongwen who had the power to release the women he regarded as his

25 wives from the misery of their enslavement as wives in the bush. Indeed he did

1 release one of the forced wives, P-101, after she had spent about eight years in
2 captivity as a forced wife and borne him three children.

3 Your Honours, I am going to ask a picture to be put on the scene, but it's not to be
4 shown to the public. It's just going to be in the courtroom, because it's confidential.
5 So on the screen, your Honours, is a picture of Mr Ongwen between two women.
6 P-101 testified that she is the woman carrying her first child by Mr Ongwen. P-101
7 appeared on Dwog Paco radio programme shortly after her release and thanked
8 Mr Ongwen for releasing her, but she plainly thought he could have and should have
9 done more to release more of the women he regard as his wives. She calls some of
10 the forced wives by name, she described their horrendous suffering and urged him, in
11 fact begged him, to do so.

12 There was clearly no doubt in her mind, as she directed her appeal at him, that it was
13 Mr Ongwen and not Joseph Kony who had this power.

14 This was a contemporaneous account, powerful evidence that Mr Ongwen had both
15 the knowledge and the intention to commit the crimes he did by his continuing
16 conduct towards these women.

17 Your Honours, still on the subject of intention, the Defence argue that
18 Dominic Ongwen's capacity to control his conduct had been destroyed by his mental
19 illness. More will be said about this later today. But for now I just want to note
20 something which is nowhere acknowledged from the beginning to the end of the
21 Defence closing brief.

22 Specifically, there is no evidence on the record to support that Mr Ongwen's state of
23 mind was affected at the time of the sexual and gender-based crimes. Not even the
24 evidence on record from the Defence mental health experts supports this assertion.
25 Instead, D-42, one of the Defence mental health experts, made it clear that the Defence

1 experts were not instructed to and did not explore Mr Ongwen's state of mind at the
2 time of the alleged sexual and gender-based crimes. He said, and I quote:

3 "The brief given to us was not sexual offences. The brief was given to us for
4 nonsexual offences." End quote.

5 So in respect of these crimes, the notion that Mr Ongwen did not act with the
6 intention required by the law because of mental illness simply does not and cannot
7 succeed.

8 So where are we? The dispute about the facts has to fall away as we have seen and,
9 because we oppose their claim that Mr Ongwen be excused from criminal
10 responsibility by virtue of mental illness, the Defence have now fallen back onto the
11 claim of duress.

12 They want to persuade your Honours that after having caused these young girls to be
13 beaten into submission and then having brought them to the privacy of his tent, it
14 would have been impossible on the pain of death for him to have said quietly to them,
15 "Actually, I am not so wicked and monstrous as to rape a young girl like you. I have
16 only done this to satisfy Joseph Kony. But if you lie here quiet and safe, we can
17 pretend in the morning that we had sex." He didn't do that.

18 He didn't say anything like that. He was not compelled to rape them. If it was so,
19 Mr Ongwen would not have told one of his subordinate officers that two other female
20 witnesses whom he later rapes were, quote, "growing very well ... and were almost
21 ready for trying". End quote.

22 The witness explained, quote: "When he said they were almost ready for trying, that
23 meant they were almost ready for having sex". End quote.

24 Your Honours, Mr Ongwen carried out these sexual and gender-based crimes
25 knowingly and intentionally to gratify his own desires.

1 I will now turn my attention to the challenge to the Article 56 proceedings discussed
2 by the Defence in their brief. The Defence are well aware that they have no
3 meaningful challenge to the sexual and gender-based crimes directly perpetrated by
4 Mr Ongwen, as we have seen. The testimonies of the brutal rapes, sexual slavery,
5 forced marriage and forced pregnancy of the forced wives were never effectively
6 challenged.

7 The Defence now seek to challenge these testimonies through technicalities, even
8 though these allegations of procedural unfairness were addressed by the Single Judge
9 when raised before the Pre-Trial Chamber.

10 They allege that at the time of the Article 56 hearings, Mr Ongwen was not put on
11 notice of the charges for which the evidence of the forced wives were taken.

12 This is not a new complaint, your Honours. The Defence raised it in filing 259, when
13 they objected to the Prosecution's application for the Article 56 hearing. But
14 the Defence challenge, if upheld, would undermine Article 56 and render it
15 ineffectual. It would mean the article is only operative in the brief window between
16 the confirmation of charges and the start of the trial. And this is precisely why
17 the Single Judge of the Pre-Trial Chamber rejected the Defence submissions, just as
18 the Prosecution is urging you to reject it now.

19 The purpose of Article 56 is to permit the evidence of witnesses to be used in trial
20 proceedings which may take place years after the testimony was given. It is for each
21 Trial Chamber in the circumstances of the particular case to decide whether it is fair to
22 have regard to such testimony.

23 The circumstances here are very clear. Mr Ongwen and his lawyers had ample
24 notice of what the witnesses were going to say because their statements were
25 disclosed to him prior to their testimony.

1 These seven witnesses were testifying about brutal and painful events which
2 personally involved Mr Ongwen. He was in a position, perfect position in the
3 courtroom, with his lawyers, when they testified, to challenge their accounts and to
4 suggest that their testimonies were faulty or false. He did not do so.
5 The Prosecution therefore submits that the knowledge of the precise legal
6 characterisation of the charges against him would not have helped him, and it was
7 not required by law.
8 The other Defence challenge I wish to address is that the geographical parameters of
9 the charges related to P-99, P-101 and P-214 were not clearly defined.
10 Your Honours, the charges related to these three individuals, all of whom were
11 directly victimised by Mr Ongwen himself, are crystal clear not only with regard to
12 the temporal scope but also, contrary to Defence submissions, their geographical
13 scope as well. For each of these three individual victims, the Confirmation of
14 Charges decision, having incorporated the factual allegations regarding the
15 contextual elements in paras 66, 72 and 81 of the dispositive part of the Document
16 Containing the Charges, clearly specified the geographical scope of the charges.
17 With regard to P-99 at paragraph 67 of the Confirmation of Charges decision,
18 the Chamber specified, and I quote, "the conduct alleged below continued
19 uninterrupted in northern Uganda after 1 July 2002 until P-99's escape
20 in September 2002." End quote. Similar language was used with regard to P-101
21 and P-214 in paragraphs 73 and 82 respectively of the confirmation decision.
22 The Defence presents no plausible explanation on how the above wording is not
23 specific or clear enough. Furthermore, not only are the Defence's arguments without
24 any merits, they are also blatantly incorrect.
25 At paragraph 37 of their filing, file 1603, eight out of the 10 counts listed by

1 the Defence are incorrect. The charges confirmed against the accused, in as far as
2 P-99 is concerned, only relate to forced marriage and enslavement, which, as the
3 Confirmation of Charges language clearly specifies, continued uninterrupted in
4 northern Uganda within the charged period.

5 Your Honours, this leads me to the other Defence challenge and the third point I wish
6 to address, that the Single Judge's alleged failure to determine the status of the
7 witnesses violated Mr Ongwen's Article 67(1)(e) rights. They allege the Single Judge
8 misled and confused the witnesses when he said, and I quote:

9 "I think a witness is a witness. It is not a prosecution witness; it's not a defence
10 witness but just a person who has come to tell the truth."

11 And yet, your Honours, the Defence has taken exactly the same view as the
12 Single Judge in these proceedings.

13 Your Honours, the Single Judge was merely echoing the sentiments of
14 Trial Chamber VII in Prosecutor v. Bemba, 4 September 2012, paragraph 23, when
15 the Chamber stated, and I quote:

16 "At the outset, the Chamber notes that the parties and participants do not 'own'
17 the witnesses they call to testify. Indeed, the witnesses do not 'belong' to parties or
18 participants ... witnesses 'are the property neither of the Prosecution nor of the
19 Defence and ... should therefore not be considered as witnesses of either party, but as
20 witnesses of the Court' ..." End quote.

21 Your Honours, at the time when the issue was first raised, the Defence themselves
22 were fully in agreement. They said they were, I quote, "highly impressed", unquote,
23 with the direction and ruling of the Court. The Defence said, and I quote them:
24 "It doesn't matter whether it is for the Prosecution or for the Defence. All that is
25 important is that the truth has been told and it is for the purpose of helping Court to

1 arrive at the correct decision." End quote.

2 Your Honours, counsel was referring to Witnesses P-235 and P-236 who were said to

3 have been expressing concern about appearing as witnesses before the Court.

4 Counsel for the Defence confirmed this.

5 Again let me quote the Defence:

6 "Because from what I glean from what has been said here, it would appear ... they

7 seem to be under the impression that they are coming to give evidence against the

8 accused -- or I mean the suspect and yet this is not what the Court is about.

9 The Court is about evidence in its own right telling the truth, what the witness has to

10 say. It doesn't matter whether it is for or against the witness." Counsel meant

11 Mr Ongwen, of course.

12 "It's just about what the witness knows about the case." End quote.

13 Mr President, your Honours, that was the Defence position five years ago. They

14 emphasised the truth-seeking function of the Court. They said they appreciated the

15 collegiality with which both sides had conducted the proceedings. They even

16 offered in that same spirit of collegiality to contact the witnesses and persuade them

17 to testify. The Defence cannot now be heard to try and revise history by suddenly

18 alleging that they were deprived of being the party to bring these witnesses to Court

19 or that the witnesses would have given a different testimony, presumably they mean

20 less damning testimony for their client, if they had appeared under the label of

21 Defence witnesses.

22 The witnesses, forced wives of Mr Ongwen, came before this Court, told the truth

23 about their experiences and their evidence proves beyond reasonable doubt that

24 Mr Ongwen committed these sexual and gender-based crimes.

25 I thank you, your Honours, for listening.

1 MR GUMPERT: [10:34:17] Your Honours, I want to address five topics arising from
2 arguments made by the Defence in their closing brief.
3 I want to address the allegations the Defence makes that Mr Ongwen's fair trial rights
4 have been violated.
5 I will speak about submissions of law which they have made concerning modes of
6 liability which describe Mr Ongwen's involvement in the crimes alleged against him.
7 I will deal with Defence suggestions that the LRA radio transmissions which the
8 Ugandan authorities intercepted and recorded in logbooks or sometimes on cassette
9 tapes are unreliable, mostly irrelevant, unauthenticated and inadmissible. And I will
10 demonstrate the falsity of those allegations.
11 I will tackle the Defence's confusion about the relationship between mental illness and
12 duress and note a number of other errors in their assessment of the expert medical
13 evidence.
14 And lastly I will deal with the Defence's bold assertion, in the light of the fact that
15 the Chamber has heard from dozens of witnesses who escaped from the LRA, that it
16 was effectively impossible to do just that.
17 I note that there are 25 minutes to our normal break. I shall certainly be speaking for
18 longer than that period of time. May I pick a convenient point when we are
19 approaching 11 o'clock?

20 PRESIDING JUDGE SCHMITT: [10:36:10] Do so as you wish.

21 MR GUMPERT: [10:36:12] I am very grateful.

22 So I turn first to the question of whether this trial has been fair or not.
23 Defence devoted about 20 per cent of their 200-page brief, about 40 pages, to alleged
24 fair trial violations and, for the most part, they are complaining about decisions which
25 the Trial Chamber has already made.

1 And I am not going to spend much time revisiting the Prosecution's submissions in
2 respect of those matters, or rehearsing the reasons for the Chamber's findings. I am
3 going to focus on two topics:

4 First, the Defence's allegation that the Trial Chamber has discriminated against
5 Mr Ongwen on the basis of a purported mental disability, that's at paras 120 to 146;
6 and second, the purported violation of Mr Ongwen's right to counsel and right to
7 remain silent prior to his handover to the ICC, that's at paragraphs 41 to 62.

8 The Defence say that each of these purported violations means that, rather than
9 continuing on to reach a verdict, based on the evidence that you heard, the Chamber
10 should now -- sorry, should never have started hearing that evidence and should now,
11 as the lawyers have it, stay the proceedings and leave the trial in suspended
12 animation.

13 So, is there any merit in the Defence's claim that the Chamber has, and I quote,
14 a "disability blind spot"? That's at paragraph 146.

15 There is none.

16 First, the Defence has not established that Mr Ongwen is indeed mentally disabled.

17 There has been no judicial finding on whether he currently suffers from a mental
18 health condition at all. And the evidence in this regard is mixed. At least two of
19 the Prosecution experts were not satisfied that the evidence supports the diagnoses
20 attributed to Mr Ongwen. Those experts suggest that there are strong reasons to
21 believe that Mr Ongwen is malingering, or to put it more bluntly, "faking bad". They
22 suggest that the doctors who have made those diagnoses have failed to test that
23 possibility in any serious way. They note that, until the intervention of the doctors
24 called as witnesses by the Defence, the opinion of the psychiatrist who was caring for
25 him in the detention unit was that, and I quote, "his perception is clear, there are no

1 cognitive disorders".

2 And your Honours will recall that elsewhere that same psychiatrist noted that,

3 although he exhibited some symptoms of post-traumatic stress disorder,

4 Mr Ongwen's condition was, and again I quote, "stable with no mental health

5 condition".

6 In the closing brief the Prosecution have set out in detail the reasons why

7 Mr Ongwen's own account of his mental condition, which is almost exclusively the

8 source used by the Defence experts to come to their conclusions, is unreliable.

9 And second, even if Mr Ongwen is currently suffering from mental illness, or from

10 the symptoms of such illnesses, the Defence has failed to establish in any concrete

11 way what prejudice he has suffered. Mental illness, by way of depression, anxiety,

12 personality disorder and other conditions is rife amongst those who appear before the

13 criminal courts. The courts make, as this Chamber has, accommodations to allow for

14 this. But the possibility that they are suffering from mental illness doesn't function

15 as some kind of protective cape to shield an accused person from all of the rigours of

16 a criminal trial. It's for that person's doctors and lawyers, and Mr Ongwen is

17 plentifully equipped with both, to bring to the Court's attention specific ways in

18 which disorders from which he suffers may impact on the process. And it's for

19 the Court to make such accommodations as are necessary.

20 The Defence raises three specific issues as examples of the Chamber's purportedly

21 discriminatory approach. None of them, the Prosecution submits, is valid.

22 The first example is the purported illegal plea. Essentially, they are arguing that

23 the Chamber's finding that Mr Ongwen understood the nature of the charges was

24 wrong and that its subsequent action in permitting him to enter pleas of not guilty is

25 therefore, as they describe it, illegal.

1 And the Defence's position appears to be that -- in fact, I quote, "a mentally disabled
2 defendant cannot enter a plea because he lacks the capacity to understand the
3 charges". And here we see an example of what might be termed the Defence's
4 "concept creep". They start from the premise that Mr Ongwen --

5 THE INTERPRETER: [10:42:22] Mr President, could the Prosecution slow down to
6 allow for interpretation.

7 PRESIDING JUDGE SCHMITT: [10:42:27] I am again reminded that you perhaps
8 speak a little bit slower.

9 MR GUMPERT: [10:42:34] The Defence start from the premise that Mr Ongwen is
10 mentally disabled. But they present no evidence to persuade the Court that his
11 capacity to understand the charges is lacking. And it's important to recall that, while
12 they rely on diagnoses provided by their own experts and by the Court-appointed
13 expert, Professor de Jong, they actually wish the Court to ignore the findings which
14 Professor de Jong made about Mr Ongwen's condition. Professor de Jong reported
15 on Mr Ongwen's condition as follows, it's at page 4 of his report, and I quote:
16 "Consciousness is clear, and he is orientated in time, orientated vis-à-vis his
17 environment and himself. He has a good attention span and maintains his
18 concentration after hours of interviewing. ... Conscience and superego functions are
19 developed."

20 Those were the findings of the independently appointed Court expert.

21 The Defence is suggesting that the Chamber must ignore those findings. For them,
22 any person diagnosed with a mental health condition or symptoms of a mental health
23 condition is mentally disabled, and therefore a person with a mental health condition
24 is *de facto* automatically incapable of entering a plea in criminal proceedings without
25 any consideration of that issue separately. Not for the first time the Defence adopts

1 a position which is at odds both with the law, with the evidence in this case and,
2 frankly, with commonsense. Mental illness doesn't prove that a person is unfit to
3 enter a plea any more than physical illness does. The existence of illness is just the
4 first part of the issue. Far more important is whether that illness prevents the
5 accused person from understanding the essence of the case against them and from
6 giving instructions to their lawyers.

7 The Defence argues, paragraphs 75 and 76, that Mr Ongwen's words at the outset of
8 the trial were a demonstration of the fundamental lack of understanding which he
9 had of the charges. Your Honours will recall what he said, but I am going to quote it,
10 it's brief. He said:

11 "I do understand -- I did understand the Document Containing the Charges, but not
12 the charges, because the charges -- the charges I do understand as being brought
13 against [the] LRA, but not me, because I am not the LRA. The LRA is Joseph Kony,
14 who is the leader of the LRA."

15 And paragraph 5 of the Defence closing brief echoes that language. It says, and I
16 quote, "[T]he Defence starts from the premise that this case is against the LRA, not
17 Mr Ongwen."

18 Well, I won't spend time disputing the accuracy or otherwise of that statement, but I
19 do remark that your Honours will be familiar with the phenomenon of accused
20 persons denying charges, blaming another person, or an organisation, or perhaps the
21 society that they live in, blaming those persons or bodies for being the real criminal.
22 Mr Ongwen's remarks don't betray any lack of real understanding. They are an
23 attempt to shift the blame. And the Trial Chamber was quite right to understand
24 those remarks as his way of disputing his responsibility for the alleged acts, rather
25 than any indication that he didn't understand what he was being accused of. He

1 clearly did and he was clearly telling the Chamber that they'd got the wrong man.
2 Let me move on to the second example which the Defence uses, their claim that the
3 sitting schedule which the Trial Chamber adopted is unfair. They argue that the
4 Trial Chamber adopted a discriminatory approach to Mr Ongwen in that way.
5 Specifically, they say that the Chamber failed to implement a recommendation of the
6 ICC detention centre medical officer for eight months during the trial because
7 the Chamber didn't guarantee a time-out day on Wednesday.
8 Prosecution's submissions are this was no discrimination. In deciding to adopt
9 a flexible four-day schedule, the Trial Chamber acted clearly within the scope of its
10 discretion and took into account the medical officer's recommendation, as well as
11 other pertinent factors.
12 It's the Trial Chamber, of course, we would say, that has the ultimate responsibility
13 for ensuring that proceedings are both fair and expeditious. In managing a trial,
14 courts are inevitably required to balance a number of different, often competing
15 considerations. The health status of the accused is just one of those factors. It's
16 a very important one, no doubt, but it is not one which trumps all other
17 considerations.
18 The input of the medical officer is important for the Trial Chamber, but the
19 Trial Chamber isn't bound by every recommendation that's made in that regard. The
20 medical officer didn't specify in which particular ways Mr Ongwen's capacities would
21 be affected by the Court occasionally sitting on Wednesdays, rather, he referred in
22 general terms to a potential possibility of, and I quote, "alleviating the pressure
23 experienced by Mr Ongwen." The essence of the recommendation was based not in
24 Mr Ongwen's particular case but in the medical officer's general experience, and again
25 I quote, "five court days in a row is generally too much for a detainee with serious

1 mental or physical health issues."

2 In fact, the Trial Chamber's departure from the Wednesdays off suggestion was
3 minimal, and the Chamber -- I beg your pardon, and the Defence has plainly
4 established no real prejudice. During the relevant period, firstly, the Trial Chamber
5 never sat for five days in a row. In fact, it sat on just five Wednesdays in total over
6 those eight months, and on one of those occasions the Court only sat two days in the
7 week.

8 It's relevant to note that three of the Wednesdays concerned were days when
9 the Court had scheduled the testimony of expert witnesses, all three of whom
10 themselves were medical professionals with complicated schedules and
11 responsibilities to their own patients.

12 The Defence has made no concrete showing of harm to Mr Ongwen's ability to
13 prepare and to conduct his defence. What is it, I would ask rhetorically, that he has
14 been unable to do or to do less well than he would have done if there had been no
15 sitting on those Wednesdays? If Mr Ongwen was impacted by sitting on those days,
16 if the questions asked of those witnesses would have been different or better had they
17 been asked on another day and if this was something which the Defence considered
18 as a significant defect in the presentation of their defence, no doubt they would have
19 sought to recall those witnesses, perhaps through electronic means, to ensure that all
20 matters had been fully dealt with.

21 Lastly on this topic of the sitting schedule, I would submit it's important to look at the
22 surrounding context. Given the measures taken throughout this trial, it's clear
23 the Chamber didn't discriminate against Mr Ongwen on the basis of any ill health.
24 Among other things, the Trial Chamber appointed Prof de Jong to examine
25 Mr Ongwen and to provide specific recommendations on the necessary treatment or

1 measures to be taken. The Chamber has cancelled sitting days when the medical
2 officers in the prison have indicated that Mr Ongwen isn't feeling well. And perhaps
3 most significantly, the Chamber has established a screening mechanism in
4 collaboration with the Registry in whose care of course in the detention unit
5 Mr Ongwen sits, a screening mechanism to ensure that Mr Ongwen's health is
6 monitored on an ongoing basis throughout the trial.

7 The third example to which I want to turn, and I think I will deal with this and then
8 pause, if I may, is the Chamber's rejection of a request to order a second examination
9 under Rule 135. Just to explain to the audience, Rule 135 gives the Chamber the
10 power to order a medical examination and is the order the Chamber deployed when
11 it asked Prof de Jong to report, as he did, in the terms that I have described.

12 Perhaps not surprisingly, given his observations about Mr Ongwen's clarity of
13 consciousness, well-regulated social orientation, excellent attention span, at no stage
14 in that first report did the professor suggest that Mr Ongwen, despite the mental
15 illness which he had diagnosed, was unfit to take part in the trial which the professor
16 knew was about to begin immediately.

17 But the Defence asked for a second examination under that rule shortly before
18 Mr Ongwen might have chosen to give evidence. And the Chamber refused that
19 request. The Prosecution has addressed that issue in writing. I am just going to
20 touch on it only briefly. In sum, we say the Trial Chamber correctly and fairly
21 concluded that there was no new basis on which to order an additional examination,
22 no new evidence that Mr Ongwen was unable meaningfully to exercise his fair trial
23 rights.

24 The Defence assertion that Mr Ongwen's right to testify has been violated by the
25 Trial Chamber's decision not to order this second examination under Rule 135 is, we

1 would suggest, in essence, an attempt to relitigate the question of fitness to stand trial.

2 The Trial Chamber pointed out, and I quote, "the fact that the accused has to decide
3 whether he wishes to testify is not a new circumstance."

4 In any case, the question of whether to testify or not is one of litigation strategy, not
5 medicine. What the Defence was really aiming for, the Prosecution suggest, is
6 a procedural ground to which they could ascribe the tactical choice by Mr Ongwen
7 not to testify so as to bolster the claims they make more generally about his poor
8 mental health.

9 Your Honours, we submit that the fact that Mr Ongwen or his lawyers assert that his
10 poor mental health prevents him from being tried fairly is not enough. There has to
11 be evidence to that effect. Mr Ongwen at all times has been under the care of mental
12 health professionals at the ICC detention unit. They have expressed their concern at
13 various times and the Chamber has weighed those concerns carefully and acted
14 appropriately, sometimes suspending proceedings.

15 But if those professionals had ever provided reasoned expert opinions explaining
16 why Mr Ongwen was unfit in the long term to be tried, then the Chamber would, no
17 doubt, have taken action to investigate the matter further. And so far as has been
18 made known to the Prosecution, no such opinions have been provided.

19 I will pause there, if I may?

20 PRESIDING JUDGE SCHMITT: [10:57:22] You may. We have now a break until
21 11.30.

22 THE COURT USHER: [10:57:28] All rise.

23 (Recess taken at 10.57 a.m.)

24 (Upon resuming in open session at 11.35 a.m.)

25 THE COURT USHER: [11:35:09] All rise.

1 Please be seated.

2 PRESIDING JUDGE SCHMITT: [11:35:22] Mr Gumpert, you rightfully assume that
3 you still have the floor.

4 MR GUMPERT: [11:35:32] I'm grateful. Sorry, I'm incompetently looking for my
5 earphones.

6 Your Honours will be aware that the Defence also allege that Mr Ongwen's fair trial
7 rights have been violated even before he came into the physical custody of the ICC,
8 and in particular, the Defence complain about breaches of his right to counsel and of
9 his right to remain silent in relation to a video interview that he gave to the press at
10 the UPDF headquarters in the Central African Republic just after he had come into the
11 custody of the Ugandan army.

12 The Defence argues that these alleged fair trial violations are part of a series of
13 violations so grave that they warrant a stay of proceedings. Failing that, they seek
14 the exclusion of an item, the video interview or an extract from it used by the
15 Prosecution and further exclusion of the conclusions of one of the Prosecution's
16 mental health experts because she purportedly relied upon that video interview in
17 coming to her conclusions.

18 The first point I would make is this: The Defence themselves acknowledge, to be fair,
19 that it was on the very same day that Mr Ongwen was handed over by national
20 authorities to the Court that the Court's representatives introduced him to duty
21 counsel. In other words, as soon as he was in the custody of the ICC, as soon as we
22 had the power to act - we, I mean here the Court in general, not the Prosecution - we
23 provided him with legal assistance.

24 So I would submit that even if procedural irregularities occurred before Mr Ongwen
25 came into the custody of the ICC and even if those irregularities can be attributed to

1 the ICC, Mr Ongwen still had an obligation to mitigate any ensuing prejudice by
2 pursuing a timely remedy. He didn't do so. The Defence made no mention of this
3 issue at any time till it appeared in the closing brief. It's true that they sought to
4 oppose the Prosecution's submission of the video evidence, but they did so on entirely
5 separate grounds from those they now advance.

6 But what demonstrates the lack, I hope it's not too much to say, of seriousness about
7 these submissions made by the Defence is that the Defence themselves made use of
8 video material from that same interview before Mr Ongwen was provided with the
9 assistance of counsel. The Defence registered a portion of that interview in the
10 evidential database. They made it available to the Chamber and the parties by
11 disclosing it in the eCourt disclosure system. They arranged for a translation of
12 Mr Ongwen's words in that video interview and they played it in this courtroom.
13 They showed it to the Prosecution's very first witness, the anthropologist,
14 Professor Allen. They asked him what he thought about it, and he answered. I
15 won't summarise the answer here. And immediately following that testimony
16 through the procedure which the Chamber has laid down, they submitted that
17 interview, or a portion of it, in evidence, so that the Chamber could rely upon it in
18 coming to their conclusions.

19 If admission of Mr Ongwen's video interview at the UPDF headquarters truly
20 threatened the integrity of the proceedings, the Defence would never have made use
21 of any part of it. The submissions they make now are a late-coming procedural
22 device in an attempt to derail the trial, apparently having forgotten or perhaps hoping
23 the Chamber and the other parties have forgotten, their previous reliance on some of
24 the same material to which they now purport to object.

25 Your Honours, finally on the subject of fair trial perhaps we -- perhaps I can invite the

1 Court to step back just a little.

2 The Prosecution says, it's disputed of course, but the Prosecution says there is
3 overwhelming evidence that Mr Ongwen, both personally and through his
4 involvement in crimes which were physically perpetrated by the fighters under his
5 command, has committed the very crimes of the type that this Court was set up to
6 deal with.

7 The lawyers defending him want to prevent the Chamber from coming to conclusions
8 on that evidence. First and foremost, they are not asking for verdicts of not guilty.
9 They are saying the trial should never have happened and that even at this late stage,
10 it should be stopped in its tracks. They're saying that the Court cannot and should
11 not do justice. If I can use the phrase, that's a massive ask. To quote Judge Fulford
12 in the first case that this Court ever heard, a stay of proceedings is only appropriate
13 where the trial process has, and I quote, "been ruptured to such a degree that it is now
14 impossible to piece together the constituent elements of a fair trial."

15 This Chamber has been able to observe Mr Ongwen throughout the proceedings.
16 His lawyers have conducted vigorous cross-examination of the witnesses against him.
17 They've made voluminous submissions on all of the legal issues arising. They've
18 called over 60 witnesses to provide exculpatory testimony. If the Defence are now to
19 succeed in arguments that all of this has been for nothing, they must provide evidence,
20 not mere assertions, that the trial process is broken beyond repair. No reasonable
21 person with all the facts at their command could come to that conclusion.

22 Your Honours, I want to turn now to a discussion slightly more technical and legal in
23 its nature of what is said in the Defence brief about the modes of liability whereby the
24 Prosecution invites the Chamber to find Mr Ongwen guilty of the charged crimes.
25 In its opening statement, and now throughout its closing brief, the Defence has

1 repeatedly returned to a single flawed proposition, essentially that Mr Ongwen
2 cannot be held individually responsible for his conduct because he was not the
3 most senior leader in the LRA. Only Joseph Kony, say the Defence, could be liable
4 for the LRA's crimes.

5 And they argue that Mr Ongwen therefore cannot be found guilty of the crimes with
6 which he is charged by way of indirect co-perpetration, indirect perpetration,
7 ordering, or command responsibility.

8 If the Defence's arguments are to be accepted, the Court would be being put in
9 a position that only the person at the very apex of a criminal organisation could be
10 held responsible for crimes committed through that organisation. The Prosecution
11 submits that that is not the law.

12 I take indirect co-perpetration first. It's charged, as I understand it, on the basis that
13 a group of perpetrators sharing a common criminal plan have joint control over an
14 organised power apparatus and that apparatus is used to pursue a common plan.
15 And the accused must have made an essential contribution to that common plan
16 which led to the commission of the crimes through its implementation. In this trial
17 that mode of liability applies to counts 1 to 23 and counts 61 to 70.

18 The evidence at trial has demonstrated the existence of a series of common plans to
19 commit the charged crimes through the LRA's organisational structure. And to
20 make that case, we have led extensive evidence about the way in which Mr Ongwen
21 and his co-perpetrators - Joseph Kony, Vincent Otti, amongst others - formed those
22 common plans. There is evidence about how they communicated orders through the
23 LRA's chain of command and how the orders were implemented by the rank and file.
24 The Defence is arguing, in essence, that an indirect co-perpetrator must exhibit
25 a greater degree of control over the organisation than Mr Ongwen ever did. At

1 paragraph 181 it is suggested by the Defence that in order to be held liable,
2 Mr Ongwen must himself have been the person who issued orders. And ten
3 paragraphs later, 191, the Defence argue that Mr Ongwen's control over the LRA must
4 have been, and I quote the adjectives they use, either "great" or "absolute".
5 This reveals, we submit, a fundamentally flawed understanding of indirect
6 co-perpetration. And furthermore, it runs against the Court's case law. There is no
7 requirement for the Prosecution to establish that Mr Ongwen had absolute or great
8 control over the LRA. It's enough to establish that the co-perpetrators jointly
9 exercised control over the organisation and that he was assigned an essential role in
10 the implementation of the common plan and that that in turn resulted in the
11 commission of the crimes.

12 The Defence's attempt to draw a distinction between a person's ability to cause an
13 organisation to commit crimes and his control over the organisation demonstrates, we
14 would say, that the Defence is losing its grasp on what the real meaning of the word
15 "control" is. The Prosecution submit a person's ability to cause an organisation to
16 commit crimes is essentially the sort of evidence that will convince a Chamber that he
17 or she has joint control - what else does that word mean? - joint control over the
18 organisation and the crimes committed through it.

19 I turn to indirect perpetration. And the Defence makes similar submissions here.
20 And this applies to counts 24 through to 49 in this case.

21 We suggest the Defence is placing misguided emphasis on Mr Ongwen's formal rank
22 within the LRA. They suggest - it's at paragraph 201 - that in order to be found
23 responsible through this mode of liability, Mr Ongwen must have been the, and I
24 quote, "highest authority" in the organisation.

25 Well, that's wrong in law, we say. The Katanga trial judgment which the Defence

1 cites at this paragraph as authority for its proposition, in fact runs directly contrary.
2 The Trial Chamber in that case dismissed the suggestion that an accused person has
3 to be the topmost authority within an organisation to be held responsible for its
4 crimes. As a matter of law, an accused person can be held liable under the theory of
5 indirect perpetration for crimes committed by a discrete portion of the organisation
6 that he controls, even if he doesn't control the entire organisation. And that, the
7 Prosecution would submit, exactly matches the facts as demonstrated by the evidence
8 in this case.

9 In any event, the Court is of course looking to substance, rather than formality. It's
10 the conduct of an accused person, what he does, and the results of that conduct,
11 rather than any formal position or rank that determines the degree of control they
12 exert over an organisational structure, or part thereof.

13 Turning to the mode of liability of ordering, which the Defence attacks in a similar
14 way. It's as an alternative to being found guilty as a participant, of course, that the
15 Prosecution suggests Mr Ongwen is guilty or may be guilty of some of the crimes
16 alleged against him by means of ordering that they be carried out. The Defence
17 suggest that that is impossible, because the Prosecution are required to have
18 demonstrated that a superior had a level of control akin to effective
19 control - a familiar concept from command responsibility - over his subordinates.

20 But again, that submission has no legal basis. For a conviction by way of ordering,
21 it's sufficient to show that the accused issuing an order was in a position of authority
22 vis-à-vis the person who received the order. According to the case law, that doesn't
23 require proof of control resembling effective control. It's sufficient if there's proof of
24 some position of authority on the part of the accused that compels the perpetrator to
25 commit a crime pursuant to the accused's order.

1 It's perfectly sufficient that the people who actually carried out the crimes regarded
2 Mr Ongwen as speaking with authority, that they perceived his words as orders to
3 perform acts, or omissions, that they felt obliged to comply. There's no need for any
4 separate showing of effective control, and there is certainly no basis for the Court to
5 interpret effective control in the way that the Defence urges in relation to command
6 responsibility, the last mode which is attacked, to which I shall now turn.

7 Let me make something which is no doubt abundantly clear to your Honours, but
8 may perhaps help those listening to follow. We are now in the realms of what the
9 Prosecution does not allege. We don't say that Mr Ongwen is guilty because of his
10 responsibilities via Article 28 of the Statute, we say that he was at the heart of the
11 commission of these crimes. He wasn't somebody who found out they'd been
12 committed later and failed to take steps to discipline the perpetrators or to prevent it
13 happening in the future. But nonetheless, by way of various alternatives, we arrive
14 at the remote possibility, we would say, of guilt by way of command responsibility.
15 It's a mode of liability that captures a superior's failure to exercise proper control over
16 subordinates. And, of course, it has to be proved that the superior's failure to act
17 occurred when he had material ability to prevent or to repress the crimes.

18 The Defence suggests that, in this case, only Kony, only Joseph Kony, and not
19 Mr Ongwen, could be held responsible by way of command responsibility. The
20 Defence suggests that Mr Ongwen doesn't meet the threshold for having - that phrase
21 again - effective control over the fighters who physically perpetrated the crimes. The
22 Prosecution emphasises that once again the Court is looking here at the material
23 ability to prevent or repress the commission of crimes, something going beyond mere
24 influence, mere ability to exercise influence over perpetrators.

25 Your Honours, the Prosecution has introduced extensive evidence of Mr Ongwen's

1 effective control over his subordinates. I picked some examples:
2 The Chamber heard from P-0142, a witness who led the Lukodi attack under
3 Mr Ongwen's command.
4 From P-145, an officer from another brigade, who also took part in that attack.
5 From P-0205, a senior officer in Sinia brigade with detailed knowledge of three of the
6 four attacks.
7 You heard from a witness who told the Court that he and Mr Ongwen had been like
8 brothers during their time in the Sinia brigade together.
9 And from another witness who was Mr Ongwen's second in command of the
10 Oka battalion in the Sinia brigade.
11 You've heard from Defence witnesses:
12 D-26, who had personal knowledge of Mr Ongwen's organisational abilities as
13 a brigade master.
14 D-27, who knew Mr Ongwen when they were in the sickbay together.
15 And D-75, the officer in charge of support weapons while Mr Ongwen commanded
16 the Sinia brigade.
17 The sum of those witnesses' evidence made it crystal clear, we submit, that first in his
18 battalion, and later in his brigade, Mr Ongwen was a vigorous, effective commander,
19 who insisted on strict adherence to the rules and whose word was law for those
20 serving under him. He had the material ability to prevent or repress the commission
21 of crimes by his subordinates.
22 The Defence suggestion that this testimony falls short of proving effective authority
23 and control over his subordinates flies in the face of the evidence that I've
24 summarised.
25 And their suggestion that because the LRA was irregular in structure and that only

1 Kony was able to exercise effective control suffers from familiar defects. Once again,
2 we see the Defence attempting to tie Mr Ongwen's liability to the structures of the
3 LRA, rather than the control he actually exercised as a matter of fact. Assessment of
4 effective control turns on the reality of a relationship, not on the formal structures.
5 And frankly, in any case, the suggestion that the LRA was nonhierarchical simply
6 doesn't accord with the evidence that the Chamber has heard.
7 The hundreds of questions which Defence counsel have asked about LRA procedures
8 in general, over a period of 20 years or more, provide, I accept, some support for the
9 proposition that Joseph Kony was a mercurial commander who might at any time, on
10 a whim, break the chain of command when he had the opportunity to do so, and
11 order fighters many rungs down the chain of command below him to carry out, or to
12 refrain from, certain conduct. But the evidence about the crimes that Mr Ongwen is
13 alleged to have committed contains no suggestion of any such interventions.
14 To conclude on this subject, the suggestion underlying each of the Defence's
15 arguments about the charged modes of liability is that Mr Ongwen was not the most
16 senior figure in the LRA, true, and so cannot be responsible for the crimes committed
17 by fighters under his command, demonstrably false.
18 That simply isn't the law. For each of the modes of liability charged, the Court's
19 focus will be on Mr Ongwen's actual control over, and therefore culpability for, the
20 charged offences.
21 And regardless of Joseph Kony and his role in issuing orders, the Court can be
22 satisfied, we submit, on the evidence we've heard, that Mr Ongwen shared
23 responsibility for planning criminal activities, and used his position of control and
24 authority to ensure that his subordinates implemented policies which resulted in the
25 commission of crimes.

1 If the Defence's arguments were accepted, the Court would be forced to conclude that
2 only the most senior person in a criminal organisation could be held responsible for
3 its crimes.

4 It's flawed as a matter of law, and it's fundamentally at odds with the Court's most
5 basic imperatives. Formal titles or ranks can't insulate an accused person from
6 criminal liability, when all the other indicators of responsibility are present.

7 I want to turn to a new topic, if I may, and that is the reliability of the evidence
8 concerning intercepted radio communications. I am moving away from the pastures
9 of the law, into the thickets of the evidence.

10 There are going to be some visuals to accompany this, I hope that may liven up my
11 presentation. Can I just check that, as they say, we have the floor?

12 Yes? Grateful.

13 The Defence suggests to the Chamber that, for the most part --

14 PRESIDING JUDGE SCHMITT: [12:01:10] No, I would have said you have the
15 monitor, but okay.

16 MR GUMPERT: [12:01:16] Yes, I think that's probably correct. I'm grateful.

17 The Defence is saying that we don't have any idea who is talking on most of the 600
18 sound recordings which are in evidence. We don't have any idea what they are
19 talking about. Most of the material hasn't been transcribed or translated. And they
20 complain that we have cherry-picked, to use the slang, picked the best bits, and they
21 ask the Chamber to disqualify this whole approach.

22 It's just worth summarising the scale of this evidence:

23 There are approximately 22,000 pages of logbooks. I had in mind that I might at this
24 stage get the trial support assistant dramatically to wheel all the logbooks in on
25 a trolley, but I recognise that I'm not in a theatre so I must restrain myself.

1 22,000 pages, about 700 pages of shorthand rough notes, the working materials as the
2 interceptors were listening to the LRA radio and scribbling down on their pieces of
3 paper.

4 There are about 300 Ugandan army, UPDF, intelligence reports based on the
5 logbooks.

6 And there are about 600 cassette tapes containing sound recordings of LRA radio
7 transmissions that's in evidence, and it's been in evidence since the beginning of the
8 trial.

9 The Prosecution's purpose in adopting this comprehensive approach was to ensure
10 that, as the evidence developed over what's turned out to be three years of litigation,
11 material which could be of relevance to both parties, the participants, the Chamber
12 itself, would be available as and when issues arose.

13 And the extensive use which both parties have made of reference to logbook entries
14 concerning issues of high relevance - Mr Ongwen's injury, his time in sickbay in late
15 2002 is an example which springs to mind - demonstrates that that was, on the
16 Prosecution's part, entirely the right decision. The Defence themselves have made
17 significant use of the intercept material in their submissions, for example, about the
18 Pajule attack, and about the duress to which Mr Ongwen is alleged to have been
19 subjected, the very same material to which they are objecting. The Prosecution
20 would observe that they can't reasonably have it both ways.

21 But of course the large majority of the material has remained unused. The Defence's
22 position appears to be that it's unfair for the Prosecution to have looked for, and to
23 have found, a few needles in the haystack unless the Prosecution can demonstrate
24 that they have described and analysed every blade of grass in that haystack. And
25 failing to do that, say the Defence, the Prosecution should be debarred from using the

1 relevant material.

2 The Prosecution would say there is no principle of law or of common sense which
3 suggests that the Chamber should do as the Defence ask.

4 In fact, says the Prosecution, we've gone to pains to help the Defence and the other
5 participants by creating two documents which provide a key to the intercept material.

6 And an example of the first of those is on the screen in front of me, but not I think
7 available to the public, which is slightly disappointing.

8 PRESIDING JUDGE SCHMITT: [12:05:27] I think we can fix that soon.

9 And, by the way, it is not only not available for the public; also not available at the
10 moment, at least I think, here in the courtroom too.

11 MR GUMPERT: [12:05:42] Evidence 2?

12 PRESIDING JUDGE SCHMITT: [12:05:44] No, now I have it, yes.

13 MR GUMPERT: [12:06:01] Yes. Sorry for the delay.

14 The first of the two documents which the Prosecution has created is the Intercept
15 Logbooks Timeline. This is an example of just one page relating to one source.

16 Your Honours will remember there are logbooks from three separate sources: The
17 internal security organisation, the army, and the police. Very often recording
18 interception of radio transmissions on the same day about the same events with, on
19 the face of it, the same people talking.

20 The timeline helps to identify how many and which written records cover a particular
21 date so that if we just concentrate on the top line, we can see that in relation to one
22 particular date there are - and this is just the internal security organisation, leave aside
23 what there is from the army and the police - there are four separate sources relating to
24 the one event on the particular day.

25 For the most part, it's three separate sources. So we've provided similar documents

1 for all of those three sources. Some considerable assistance, I would submit,
2 provided at an early stage.

3 But there is a second navigational aid, as well, we call it perhaps rather grandly the
4 Intercepts Master Table. But it is quite masterful, I respectfully submit. It links the
5 sound recordings, those 600-odd cassettes, which you see in the left-hand -- second to
6 left-hand column and the date in the extreme left-hand column. And then as one
7 progresses across from left to right, it helps the reader by telling them in which
8 document and at which page the interception on a cassette tape is dealt with in
9 parallel form in the various logbooks.

10 And again, we are dealing here at first with the ISO, then with the UPDF, and then
11 with the police. It isn't always the case that there is an entry in every record made by
12 every organisation.

13 But just take the second row down, we see the sound recording. We see that there is
14 a corresponding page, this is the seventh column, in the ISO logbook, a corresponding
15 page in the UPDF logbook, a corresponding page in the ISO shorthand rough notes.

16 Then there was -- there were copies made for the purposes -- this is back in 2002, I
17 think I'm right in saying, in the days of faxed transmissions, copies were made,
18 handwritten copies were made so that it could be faxed through to the people in
19 Kampala.

20 And then, in the right-hand columns one learns where the sources of the sound
21 recording are, what the serial number was, and whether there are any notes written in
22 respect of the sound recording.

23 These documents were provided to the Defence long before the trial began, within
24 a short time of the Prosecution creating them. And in addition to that, the
25 Prosecution carried out extensive analysis of the intercept evidence. Logbooks were

1 analysed page by page. Audio recordings summarised by language staff and
2 compared where relevant to the logbooks to assess whether the audio was of
3 sufficient quality and relevance for transcription and translation. And where it was,
4 we did just that, and we disclosed those translations to the Defence. Where there
5 was no formal translation, the Prosecution provided the summary, known as the scan,
6 to the Defence.

7 If we weren't in the dog-eat-dog world of the courtroom, I might confess myself a
8 little bit hurt by the inaccurate and unfair criticism which is contained within the
9 Defence's brief on this score. The reality is the Prosecution took extensive - I was
10 going to say unprecedented, but that's rather too bold a claim - in any event, perfectly
11 satisfactory steps to analyse this intercept evidence and share the results and the tools
12 for further analysis with the Defence.

13 The Defence's next criticism is -- and I think we can take the table down from the
14 screen, it distracts perhaps. The Defence complain about the bias of Prosecution
15 Witnesses P-003 and P-0059. Well, the Chamber will make its own assessment of the
16 motives and the reliability of those witnesses. I'm not going to talk them up or down
17 now. It's an entirely fair observation that they are and they were at the relevant time
18 members of the Ugandan government's military and security forces. They regarded
19 Mr Ongwen and the whole of the LRA as their enemy. We accept that.

20 The Defence suggests that even at the time these records were created the Ugandan
21 authorities were seeking to cast their opponents in the worst possible light - they use
22 those words at paragraph 248 - and that because the records were created as part of
23 an intelligence gathering operation, in the midst of a civil war, they lack what they
24 call forensic fair trial safeguards.

25 The Prosecution has observed in the past, and I touch on it again, exactly the opposite.

1 The people making these records were fighting a war, people's lives were on the line.
2 The idea that instead of recording the actual information which was being transmitted,
3 they would go to the trouble of creating false records in the hope that years later they
4 might pervert the course of justice and bring an innocent man down is faintly
5 ludicrous.

6 And the sheer scale of the material, the very large number of witnesses who testified
7 to its creation make this an unrealistic suggestion. Effectively the Defence is
8 suggesting that some malevolent criminal mastermind in the Ugandan government
9 decided, while the LRA was still a genuine threat to civil stability in the nation, that
10 they would create a vast reservoir of false material on the off-chance that one day in
11 the uncertain future they might be able to incriminate one of or more of the LRA
12 commanders who might survive to be arrested in years to come.

13 The next criticism is perhaps more technical. The Defence observe that the sound
14 recordings have not been authenticated. They suggest that they could have been
15 tampered with or perhaps in a less malign way altered by the enhancement process.
16 And they complain that they haven't been subjected to expert analysis. In particular,
17 they complain that the sound recordings haven't been compared with Mr Ongwen's
18 voice using specialist software which is available. They assert that the chain of
19 custody is murky and the documents haven't been certified by the relevant authorities.
20 They observe that many of the tapes show indicia of being copies, rather than the
21 originals.

22 Well, your Honours, of course it is true there has been no digital comparison carried
23 out in this case by either side. No doubt the Defence, like the Prosecution, learned
24 that the poor quality of the sound recordings meant that that would not be a practical
25 proposition in creating evidence which would approach the necessary degree of

1 certainty. But the suggestion that absent such comparison, the identification of
2 Mr Ongwen's voice on the sound recordings can't be made by any other means is
3 without a foundation in law or fact.

4 The Defence -- sorry, the Chamber will be aware that the Prosecution relies on the
5 evidence of 18 individuals involved at various levels of the three different
6 organisations - the security organisation, the army, the police - which were
7 conducting simultaneous and often complementary interception of LRA radio
8 transmissions. And each of those witnesses provides similar, detailed evidence of
9 their organisation's interception operation.

10 They give corroborative accounts of how their operation started. They name the
11 same colleagues. They describe the same interception process. They confirm what
12 records were produced. They identify samples of the material, the logbooks and the
13 cassette tapes. Your Honours have seen witnesses have those items in their hands
14 and say, "yes, I was making this". And those items have been submitted in evidence.

15 When examples of key communications, key radio transmissions were played to
16 former LRA fighters, P-16, P-440, and to the people on the other side, P-59, P-3, they
17 all, irrespective of which side they had been fighting on, confirmed that those were
18 sound recordings of LRA radio communications, and they recognised the voices of
19 the speakers and the content of the communications. The Prosecution witnesses
20 were not alone in that. Defence Witness D-100 did likewise.

21 And as for tampering, the Prosecution could have called a hundred witnesses rather
22 than a mere 18 to say they hadn't tampered with the evidence before it was handed to
23 the Prosecution, we still would not have succeeded in disproving the negative in that
24 respect. But again, the tampering would for much of the material have had to take
25 place back in 2004, or even earlier, before it was collected by the Prosecution, at a time

1 long before Mr Ongwen's arrest warrant itself was issued and became public. And
2 the tampering would have had to be on a gargantuan scale given the volume of the
3 material.

4 What about enhancement? Is it possible that by some process that is, I submit,
5 frankly, fanciful that in making the voices to be heard in the sound recordings louder
6 and in reducing the background crackle and pop, the Prosecution has
7 accidentally - perhaps the Defence is saying on purpose - managed to make the voices
8 of speakers who weren't Mr Ongwen resemble his voice to the extent that it has
9 deceived people who knew his voice well.

10 But in fact, witnesses were played at different times both enhanced and unenhanced
11 versions of the same material. Very often it is the case that when the Prosecution
12 first investigated the matter and spoke to a witness, there had been no enhancement,
13 they listened to what you might call the raw material, and then subsequently by way
14 of confirmation and in the courtroom the witness listened to an enhanced version
15 with exactly the same results in terms of identifying the voices of speakers, including
16 Mr Ongwen.

17 What about expert analysis? Well, the Prosecution did call an expert, Mr French.

18 It's fair to say that he examined only a fraction of the total number of sound
19 recordings. It would have been prohibitively expensive for him to conduct an expert
20 analysis of them all. The Defence themselves notified the Chamber that they would
21 be calling an expert in this field. And nothing prevented them from doing so. If he
22 had concluded that there was evidence of tampering, no doubt they would have done
23 so, but they chose not to. In any event, your Honours, all of this is speculation. The
24 Defence is asking the Chamber to concentrate on what evidence there might have
25 been. That's fruitless. The question of the tapes authenticity has to be determined

1 on the basis of the evidence that there is, not on the basis of speculation about
2 possibilities of other evidence.

3 And we say that the evidence there is is compelling and, if I may, I would like to take
4 your Honour in a visual sequence through just a couple of examples. They will
5 come up on the screen:

6 Prosecution allege that Mr Ongwen, after attacking Lukodi, reported that attack back
7 to his superiors. Let's consider the consistent evidence from diverse sources on
8 exactly that point.

9 The Court has heard the audio recording of Mr Ongwen reporting the attack. It was
10 recorded back in May 2004.

11 The Court has heard the testimony of former LRA signaller P-16, identifying the voice
12 of Mr Ongwen in that audio recording reporting the attack.

13 The testimony of ISO officer P-59, again identifying the voice of Mr Ongwen
14 reporting the attack, has been heard by the Chamber.

15 The testimony of UPDF officer P-3, also identifying the voice of Mr Ongwen in that
16 same transmission reporting the attack has been heard.

17 The Court has seen the contemporaneous records of intercepted communications in
18 the logbooks by the ISO in May of 2004, Mr Ongwen recorded as reporting the
19 Lukodi attack on the radio. That means that the persons making these records
20 recognised his voice, not now in 2018, not at the time they first made their statements,
21 perhaps in 2007, but at the time when it was transmitted in 2004. They'd been
22 listening to him and other LRA commanders speaking over the radio for months and
23 years. They knew the voices of those commanders; they knew Mr Ongwen's voice.

24 And the same goes for the report in the logbooks of the UPDF, the army. Quite
25 separately, Mr Ongwen's voice intercepted, recognised and his words summarised by

1 the Ugandan military.

2 And finally, you have heard from Mr Ongwen's subordinate officers, P-205 and the
3 other officer who was his deputy in the Oka battalion. They were present when
4 Mr Ongwen made his report over the radio. And that report was actually heard at
5 the time by LRA radio operator many miles distant, P-16. So, three people actually
6 heard it at the time on the LRA side.

7 These different items of evidence, from diverse sources, produced and obtained at
8 different times are all consistent on the fact that it was Mr Ongwen who reported
9 attacking the camp at Lukodi. The only reasonable conclusion, we suggest, is that
10 the evidence, taken as a whole, is reliable and credible.

11 I'm going to take a second example. I will try not to labour the point for too long.
12 The Prosecution alleges that Mr Ongwen attacked a camp known as Labworomor or
13 Palaro. This is not a charged attack. They allege that he attacked it on 23
14 November 2003. Again, let's consider the evidence, from diverse sources:
15 There's the audio recording of senior LRA commanders discussing how Mr Ongwen
16 had attacked Labworomor.

17 You heard the testimony of P-59, the ISO officer, he too said that the tape was
18 a discussion between LRA commanders of Mr Ongwen's attack.

19 You heard the testimony of former signaller, LRA signaller, so on the other side of the
20 conflict, P-16. He listened to the tape, yes, he said, senior LRA commanders talking
21 about Mr Ongwen's attack.

22 You have seen the contemporaneous records in the ISO logbook.

23 You have seen the records in the UPDF logbook.

24 And you have heard from former LRA fighter 309, who testified that he and his
25 fellow fighters attacked Labworomor under the command of Mr Ongwen.

1 Likewise Witness 372, who attacked at that place under Mr Ongwen's command.
2 Once again, the pattern is the same: Different items of evidence, diverse sources,
3 produced at different times, but they are all consistent about the fact that it was
4 Mr Ongwen who attacked this camp. Again, the reasonable conclusion, the only
5 reasonable conclusion, we submit, is that this evidence is reliable and credible.
6 And the pattern is repeated time and again, even when the source of corroboration is
7 evidence put before the Chamber by the Defence.
8 I mentioned their Witness D-100, he's an LRA signaller. Perhaps I can refer back to
9 what Mrs Adeboyejo said. In the end, it perhaps doesn't matter very much who is
10 calling a witness, the importance is the potential truth of what they have to say.
11 Well, what did Defence Witness 100 have to say? He listened to Mr Ongwen's voice
12 in audio recordings of intercepts making reports relating to the Odek attack.
13 Your Honours may recall the conversation about a diamond. And in doing so, he
14 corroborated the testimony of other LRA, ISO, UPDF witnesses who identified
15 Mr Ongwen and corroborated the contents of contemporaneous records.
16 The intercepted communications are even corroborated by Mr Ongwen himself.
17 When he was speaking to the Defence medical experts, he acknowledged to them that
18 he had led an attack at a location known as Koc Ongako. And in doing so,
19 Mr Ongwen himself corroborated the testimony of other LRA and ISO witnesses who
20 identified his voice reporting the attack on an audio recording of intercepted radio
21 communications. And he corroborated the contents of those communications as
22 well.
23 Whichever way you look at it, the Prosecution says, the only reasonable conclusion in
24 this case is that the evidence of the intercepted communications, whether it be sound
25 recordings, or logbook records, or the recollection of the individual witnesses who

1 have testified, taken as a whole, is reliable, credible and compelling.

2 I have two more sections in the remarks that I am going to make, they concern mental
3 health, what broadly I will put under the heading of Article 31(1)(a) of the Rome
4 Statute; and duress, Article 31(1)(d). But I also want to address your Honours about
5 how they do or don't overlap, because there are potentially significant submissions
6 made by the Defence in that regard.

7 And I shall start, if I may, with mental health, 31(1)(a).

8 The Defence experts assert that, at the time of every single crime, apart from the
9 crimes of a sexual and gender-based nature, as Mrs Adeboyejo reminded your
10 Honours this morning, that at the time of all the other crimes, Mr Ongwen's capacity
11 to understand the nature of his conduct, or to control his conduct, had been destroyed
12 by mental illness.

13 I pause, for a moment, to consider the Defence's understanding of the word destroyed.
14 To most people's ears, I'm prepared to venture - to my ears, in any event - I suggest
15 the word has an air of totality and permanence about it. Something akin to
16 Judge Fulford's description of a thing so badly damaged that it's impossible to piece it
17 together, that's what destruction sounds like to me. We don't expect something
18 which has been destroyed to be up and functioning a short while later.

19 We know a great deal, from Mr Ongwen's account, of his thought processes while he
20 was with the LRA through the various remarks that he has made to those medical
21 experts whom he permitted to examine him.

22 We know that his capacities to understand and to control his conduct were not
23 destroyed. He told the Defence experts when they first examined him in 2016, that's
24 at page 10 of their report, that one of the things that he liked least in the bush was the
25 atrocities.

1 He told the Defence experts that he had refused a direct order from Joseph Kony to
2 kill religious leaders and elders during the peace negotiations. He told them, this is
3 at page 15, that while in the LRA he didn't like the things that he saw or did.
4 Perhaps most startlingly of all, given the propositions made by the Defence on this
5 subject, he told the Defence experts that following his attainment of the highest
6 possible rank in the LRA he began openly to question the moral basis of the LRA's
7 war.

8 In the light of those remarks it's perhaps unsurprising that when the Court-appointed
9 expert, Professor de Jong, examined Mr Ongwen later in 2016, he concluded was that
10 Mr Ongwen had, and I quote exactly, "a functional conscience despite the cruelties he
11 committed." And all of this is simply based on what Mr Ongwen himself says. I
12 shan't begin to rehearse the copious evidence of the non-destruction of his mental
13 capacities from people who actually knew him at the time of the charged crimes,
14 people who consistently speak of his kindness, his clarity of thought and his capable
15 leadership.

16 Your Honours, I respectfully suggest that the proposition that at the time Mr Ongwen
17 was in the LRA and at the time of the crimes which he is accused of, his capacity to
18 understand his conduct and its potential unlawfulness, his capacity to control that
19 conduct, is simply flatly contradicted out of his own mouth, out of the observations of
20 the Defence experts themselves, and out of the mouths of the copious witnesses who
21 have testified about his behaviour and their knowledge of his character at the relevant
22 time.

23 I want to turn now to the relationship between the mental health issue under 31,
24 Article 31(1)(a), and the duress issue under Article 31(1)(d).

25 The Defence argue that it is only their experts who have taken the necessary holistic

1 approach in diagnosing Mr Ongwen's mental disease and that they are right, as
2 a result of this holistic approach, to come to the conclusion that LRA coercion left him
3 with no free will and that every action was under duress. I am summarising
4 paragraph 529 of the brief, and it segues from beginning on mental health to ending
5 up in the territory of duress.

6 The Prosecution's submission is that this cannot be. Mental illness sufficient to
7 satisfy Article 31(1)(a) and duress, we suggest, cannot co-exist. Duress requires that
8 the accused, when carrying out the conduct which is alleged to constitute a crime, acts
9 reasonably and does not intend to cause a greater harm than the one he is seeking to
10 avoid. But a person whose ability to understand what he's doing has been destroyed
11 won't be able to act reasonably and is incapable of carrying out that balancing act of
12 harms which is required of duress.

13 And oddly, a little later in their brief, the Defence themselves appear to acknowledge
14 this point. I'm looking at paragraph 602. They assert, and I quote:
15 "Mr Ongwen's mental disease - with his arrested child-like mental state - destroyed
16 his capacity to act reasonably and necessary". Those are the requirements of duress.
17 They can't both say that his capacity to exercise those characteristics of reasonableness
18 and necessary action have been destroyed, and also rely upon the Article 31(1)(d)
19 route for excluding criminal responsibility which requires him to be exercising those
20 characteristics. It's one thing or the other.

21 We would suggest that it's only if the Chamber is satisfied that the Article 31(1)(a)
22 incapacity doesn't apply that, realistically, the matter of duress can begin to be
23 considered. And of course, we would say, at that point, the expert medical opinions
24 of the Defence doctors, although they talk a lot about duress, ceases to be of any
25 relevance. They're medical experts, they're not experts in reasonableness, they don't

1 believe such a thing exists. They're not experts in duress, or in its other key
2 ingredient, necessity. Those are matters which the Trial Chamber will assess
3 without the need or, frankly, the possibility of any expert intervention because they
4 are everyday concepts and everyday matters.

5 The Defence repeatedly make reference, I quoted them just a moment ago, to
6 Mr Ongwen's childlike nature. And this feeds into a narrative which, as I
7 understand it, runs parallel to the statutory grounds for excluding criminal
8 responsibility on which they rely, mental illness and duress. Running through their
9 conduct of the trial, running through their brief, is the notion, not always clearly
10 expressed, that Mr Ongwen's age cannot be calculated by the mundane process of the
11 elapse of years. That, by some more psychological or spiritual calculus, he is still in
12 fact younger than 18 and, thus, in the spirit of the law, if not in its letter, he is a person
13 who should not properly be prosecuted.

14 And in part to bolster this notion they called Witness D-113, who told the Chamber
15 that a child abductee's mind is not his or her own. I'd invite your Honours to
16 consider that hundreds, probably thousands of child abductees retain sufficient
17 control of their minds to be able to plan and to carry out their own escape.

18 The Chamber has heard from dozens of such individuals. They'd undergone the
19 same experience of abduction and initiation that Mr Ongwen underwent. Many,
20 perhaps all of them, remain affected by those experiences. But are they all to be
21 treated as trapped in a childlike mentality, which prevents the authorities from
22 holding them to account for their actions later in life?

23 In any event, the Prosecution suggests, in the case of Dominic Ongwen, the Chamber
24 can decide for itself whether he does indeed have a childlike mind, by reading the
25 transcripts of his telephone calls with the Witness D-13 in 2015. I am not going to

1 quote from those documents, your Honours have them in evidence. But I hope I can
2 fairly summarise them by saying that he spoke at length, he is charming, amusing,
3 quick-witted, something of a schemer. Rapidly makes calculations between different
4 currencies. He boasts about how he can speak multiple languages, how he's
5 enjoying learning more. He plots with the witness as to how he is going to get visits
6 from all his wives and children - wives is his word - while he's in the detention centre.
7 He laughs with her about how his advice to Mr Kony concerning LRA operations was
8 always right and how Kony began to believe that Mr Ongwen had psychic powers.
9 He tells her that he's the cleverest man in Acholi.

10 Your Honours, that conversation gives the lie to the notion that Mr Ongwen has
11 a childlike mind.

12 I want to turn now to the claim that the Defence makes contrary to the proposition
13 put to the Defence experts, by me when I was questioning them, that in fact they did
14 properly consider collateral sources of information, that they undertook the process
15 which was referred to as triangulation, that is to say, seeking to find different sources
16 or means by which they might come to a firm and reliable conclusion.

17 Let's be fair. Back in 2016, before the trial began, the Defence experts did indeed
18 speak to four people who knew Dominic Ongwen at the time when these crimes were
19 committed, and of course thereby they acknowledged the importance of this kind of
20 information when coming to conclusions about his mental health at that time. None
21 of those four persons, and your Honours have the summary provided by the Defence
22 of what they said to the experts, none of them said anything suggestive of mental
23 illness. But thereafter, from that time onwards, once the trial started, the Defence
24 experts seem to have gone to pains not to make themselves aware of any of the
25 voluminous testimony about Mr Ongwen's behaviour given in the courtroom. They

1 remained unaware of it, it seems, until they were confronted with it in
2 cross-examination. They wilfully, or negligently, cut themselves off from a vital
3 source of evidence which could and should have guided them in their assessment of
4 the accuracy of Mr Ongwen's accounts to them and ultimately should have informed
5 their diagnosis.

6 Let's just look briefly at the other collateral sources to which the Defence refers in
7 defending their experts in their closing brief. They remind the Chamber that D-7,
8 this is at paragraph 619 and 620, D-7 who was with Mr Ongwen when they were
9 abducted in 1987 and spent the early months of their abduction together until they
10 were split, spoke about the atrocious events they witnessed together. He never saw
11 Mr Ongwen again until he testified at this trial. D-7 told the Court he was very
12 scared by what he witnessed and he thought that Mr Ongwen was really depressed
13 by what he'd seen. That was nearly 20 years before the charged period.

14 But that's it. That's the totality of what the evidence has got to say -- sorry, what the
15 Defence have got to say about the evidence from people who observed Mr Ongwen in
16 the bush at the time of these crimes, people who have testified in this trial about it, on
17 oath. The Defence make no attempt whatsoever to engage with the evidence from
18 Mr Ongwen's subordinate officers, his child escorts, the women whom he regards as
19 his wives about their testimony concerning his ability to make fine judgments, to
20 empathise, to push back against impractical orders, to argue with Kony about
21 morality, and his attempts to escape. All of this ignored, it's simply too inconvenient
22 for the Defence narrative.

23 What they do attempt to do, lumping all of this evidence together, is to suggest that
24 the Prosecution experts have ignored the possibility that what the witnesses with
25 Mr Ongwen in the bush saw were his good days, that's paragraph 624, and that there

1 must have been other bad days about which the Chamber hasn't heard. But this is
2 a false characterisation of the evidence. What the Prosecution experts pointed out is
3 that all the accounts they were presented with seemed to represent good days. They
4 were open to cross-examination by the Defence about contemporary evidence from
5 LRA insiders about the bad days. But no questioning took place because there is no
6 such evidence.

7 So how do the Defence tiptoe around this inconvenient truth?

8 Well, they rely upon Professor Ovuga's evidence, when he says that "in our part of the
9 world" psychological distress is sometimes "somatised" into physical symptoms and,
10 at other times, psychological stress is interpreted as spiritual possession. And
11 undoubtedly Professor Ovuga is an expert in a position to make such an observation
12 with authority. Let's assume that's correct. What is the evidence that Mr Ongwen
13 was somatising, was demonstrating physical symptoms which were an expression of
14 his psychiatric illness? There isn't any. None of the witnesses who knew him well
15 speak of his illness in that way. Sure he gets wounded in combat, but that's not what
16 the Professor was talking about. None of the witnesses who knew him well believed
17 that he was possessed by spirits. In fact, they all said what a normal, nice chap and
18 effective commander he was.

19 And in the alternative the Defence say, well, "the Prosecution haven't proved beyond
20 reasonable doubt the Defence evidence that mental illness can exist in a person who
21 may sometimes exhibit signs of happiness or sociability." That's a quotation from
22 Defence paragraph 636.

23 And that statement, I suggest, encapsulates the Defence approach to the position
24 regarding the application of Article 31(1)(a).

25 It makes a claim in the broadest general terms without relating it in any way to

1 Mr Ongwen's case, or the specific crimes that he is alleged to have committed.
2 It misstates the Prosecution case. Prosecution isn't arguing that mentally ill people
3 never show signs of happiness or sociability. What we do point to is the fact that
4 none of the people around Mr Ongwen at the relevant time speak of him being
5 anything other than happy and sociable.
6 And it fails to take into the account the question of capacity, the key question of
7 capacity. Mentally ill or not - and of course the people around him weren't in
8 a position to make a diagnosis, a point well made by the Defence experts and which I
9 accept - the question for the Chamber is, even if there is such illness, were his mental
10 capacities destroyed as a result thereof? If he'd been incapable of understanding
11 what he was doing or of controlling his behaviour, the people around him would
12 have noticed. That's precisely the kind of lack of capacity which leads people to
13 become concerned about people with severe mental illness because they begin acting
14 erratically and dangerously to other people and to themselves, because they can't
15 control themselves, because they don't understand the world around them. And of
16 course, that is exactly the opposite of the observations made by the people who knew
17 Mr Ongwen with the LRA.
18 Finally, your Honour, on this point, and it may be that I can leave the topic of duress
19 to deal with immediately after the lunch break and then handover seat to Mr Black.
20 Finally, I draw your Honours' attention to paragraph 637 of the closing brief. The
21 Defence accept there, indeed they positively assert in that paragraph, that
22 functionality, a person's ability to conduct their social and professional relationships
23 satisfactorily, and to get on with their work, they accept that it is not incompatible
24 with mental illness.
25 Accepting the Defence claim at face value, it is fatal for their case. In other words

1 they're saying, and the Prosecution agrees, that the key question isn't was Mr Ongwen
2 mentally ill, on which your Honours have heard diverse, indeed conflicting evidence,
3 but what effect did any such illness have on his mental capacities at the time of the
4 charged crimes. The Defence experts never even tried to find out in relation to
5 specific crimes, or perhaps specific attacks at which crimes were committed, what
6 Mr Ongwen's state of mind was. It appears they did not even ask him those kind of
7 probing questions.

8 The evidence from the witnesses who were with him at the relevant times chimes in
9 with the conclusion of the Prosecution experts. There is every reason to conclude
10 that he was in full possession of the capacities which the Chamber has to consider
11 when those crimes were committed.

12 I thank you for your attention. It's a little early, but I think it's probably sensible to
13 leave duress, which may last some 20 minutes or so, until after lunch.

14 PRESIDING JUDGE SCHMITT: [12:52:45] That sounds reasonable.

15 We will have now the lunch break until 2.30.

16 THE COURT USHER: [12:52:51] All rise.

17 (Recess taken at 12.52 p.m.)

18 (Upon resuming in open session at 2.33 p.m.)

19 THE COURT USHER: [14:33:53] All rise.

20 Please be seated.

21 PRESIDING JUDGE SCHMITT: [14:34:19] There seems to be an indication that

22 Ms Adeboyejo is continuing, or is Mr Gumpert continuing? No, because you are still
23 sitting, Mr Gumpert. Because of that I was a little bit -- but you have still the floor, of
24 course.

25 MR GUMPERT: [14:34:31] I'm grateful.

1 Your Honours, there are two matters related to duress, the workings of Article 31(1)(d)
2 of the Statute arising from the Defence's closing brief that I want to deal with.

3 First, the Defence's claim that escape was nearly impossible from the LRA and that
4 failed attempts would be punished by death.

5 And second, that at no stage in the brief do the Defence attempt what the Prosecution
6 say is necessary, a demonstration that there is evidence that Mr Ongwen was under
7 duress at the specific time when he is alleged to have carried out each of these alleged
8 crimes.

9 Let me deal with escape first. Why is it relevant to duress and was it, to quote the
10 Defence, nearly impossible?

11 The Prosecution submits that in order for the Chamber to avoid holding Mr Ongwen
12 responsible for crimes which it otherwise finds proven on grounds of duress, there
13 must be a showing that a person who carried out the *actus reus* of the crimes against
14 his own will, and only because he was under threat, and such a person, we submit,
15 can be expected to take steps to escape from that threat as soon as possible. No
16 reasonable person who has been forced to murder, rape, abduct innocent children
17 would voluntarily stay within the power of the person who had so forced them for a
18 moment longer than they had to.

19 The evidence demonstrates that there were many opportunities for Mr Ongwen to
20 escape. He could have escaped when he was on mission, during battles, or simply
21 when the units that he commanded were hundreds of miles away, for days and
22 weeks, from Joseph Kony and the LRA leadership.

23 Thousands of LRA members of various ranks left the group, escaping successfully
24 when the opportunity arose. Defence Witness D-134 testified, and I quote, "LRA
25 fighters would escape every day".

1 The escapees varied in profile. There were lower ranking fighters, senior
2 commanders, children, forced wives of LRA commanders. Your Honours have
3 heard directly from a total, as I calculate it, of 50 witnesses who escaped from the LRA
4 in a range of circumstances.

5 (Redacted). D-68, one of Mr Ongwen's former
6 escorts, escaped with a whole group of LRA fighters while they were on a mission to
7 collect food. Defence Witness 119, an abducted woman, attempted to escape three
8 times despite being severely beaten and threatened with death after two unsuccessful
9 attempts. Battalion commander P-245 escaped. Brigadiers Sam Kolo and
10 Caesar Acellam, senior in rank to Mr Ongwen at the time when he committed the
11 crimes we allege against him, they found their own ways to leave the bush.

12 Testimony from several trial witnesses and other evidence demonstrates that
13 Mr Ongwen was the most senior LRA commander remaining in Uganda in 2005.
14 There was by then no one in a position to prevent him from leaving the LRA. He
15 only left that organisation, we suggest, when he could see that there was no more
16 future for him in it.

17 The Defence have repeatedly claimed that failed escape attempts would be punished
18 by death. But the evidence demonstrates that although there were threats of that
19 punishment, they were not regularly implemented. The intercept evidence
20 demonstrates the reaction of Joseph Kony and his deputy Vincent Otti when escapes
21 were reported to them. It demonstrates their feelings of frustration and impotence in
22 the face of constant escapes. Joseph Kony is captured at one stage accepting that, in
23 reality, any punishment for escape would be, as he put it, in "the hands of God".
24 What of the Defence's claim that in the event of successful escape, the LRA would kill
25 the escapee's whole family? You have heard accounts of collective punishment

1 occasionally being implemented in the 1980s and the 1990s, but no suggestion that, by
2 the time Mr Ongwen was in a senior position, the escape of a senior commander
3 resulted in such punishment.

4 Many long-term members of the LRA testified about how their perceptions of the
5 LRA, of its disciplinary procedures, and particularly of the roles of spirits and the
6 powers of Joseph Kony changed significantly between when they were first abducted
7 and after they had stayed with the LRA for some time. Witnesses P-379, P-309, P-85,
8 P-209, P-200, Defence Witnesses D-92, D-56, D-27 all explained to your Honours how
9 they had grown increasingly sceptical of Joseph Kony's purported spiritual powers
10 and that they understood the consequences for violating the rules of the LRA were by
11 no means absolute.

12 All those witnesses subsequently took the positive decision to escape --

13 THE INTERPRETER: Your Honour, could we please ask Mr Gumpert to slow down
14 a little bit?

15 PRESIDING JUDGE SCHMITT: [14:42:27] Yes, Mr Gumpert, you have heard it.

16 Please slow down a little bit.

17 MR GUMPERT: [14:42:35] I think I need not repeat perhaps.

18 Those witnesses that I identified a moment ago, they all took that positive decision to
19 escape and they carried that decision out.

20 The second matter, indeed, my last matter on which I will be addressing the Court.

21 Duress is not a blanket defence, it's crime specific.

22 The text of the Article of 31(1)(d) makes it clear that it is threat- and crime-specific.

23 The terms of the text of the article are consistently in the singular. It speaks of a
24 crime, a threat, this threat, and a greater harm in the singular form.

25 Case law from the International Criminal Tribunal for Yugoslavia, the case of Mrđa,

1 and that the ECCC supports that interpretation, the case of Duch.

2 Defence has made no attempt to analyse the circumstances of each charged crime or

3 to demonstrate how the alleged duress applies to that specific crime. Instead, the

4 Prosecution suggest, the Defence hopes to persuade the Chamber by making general,

5 broad assertions about the violent environment of the LRA, about Joseph Kony's

6 control of the group and about the role of spiritualism.

7 What was it, to take an example, that prevented Mr Ongwen, when he led his fighters

8 to the camp at Odek, knowing that the attack could result in civilian deaths,

9 abductions of children, destruction of people's homes and widespread terror, what

10 prevented him from hailing the government forces there and explaining that he and

11 the fighters under his command wanted not to attack the camp, but to put down their

12 weapons and surrender, like so many LRA fighters, many of them senior

13 commanders like Mr Ongwen, had done before them?

14 What was it, to echo something which Mrs Adeboyejo said a little while ago, what

15 was it when the little girl who became Witness 226 was finally brought to his quarters

16 which prevented him from quietly explaining to her that he didn't want to rape her

17 and that all they had to do was to lie down quietly together and wait until the

18 morning?

19 To borrow, if I may, the words of the Pre-Trial Chamber at paragraph 153 of the

20 decision confirming the charges in this case, and I quote:

21 "Duress is not regulated in the Statute in such a way that would provide a blanket

22 immunity to members of criminal organisations which have brutal systems of

23 ensuring discipline as soon as they can establish that their membership was not

24 voluntary."

25 Your Honour, those are my submissions and I hand over now to Mr Black.

1 MR BLACK: [14:46:49] Your Honours, I'll address a number of topics today all of
2 which have to do with the charged attacks. Now, we've written about each of those
3 attacks in our closing briefs and, of course, I won't repeat those submissions today.
4 Instead, I'll focus on responding to the Defence closing brief.

5 Now, I'll address the attacks in chronological order, starting with the attack on Pajule
6 IDP camp in October of 2003.

7 Before I come to what the Defence disputes about that attack, I think it's worth noting
8 some of the things they don't appear to dispute.

9 Nowhere in the Defence's closing brief, as far as I can see, do they appear to dispute
10 that the LRA attacked Pajule in October of 2003 or that the charged crimes were
11 committed there.

12 Now, they do dispute Mr Ongwen's liability for those crimes, but they don't
13 (Overlapping speakers)

14 THE INTERPRETER: Your Honour, could we please ask Mr Black to slow down a
15 little bit.

16 PRESIDING JUDGE SCHMITT: [14:48:01] Okay. We have the problem. And
17 what might also be that the structure of the language is English on the one side, which
18 is a very concise and short language, and the other languages we have to translate to,
19 which are perhaps a little bit, I would not say more complex of course, but a little bit
20 more prolonged when you speak it out. That might cause a little bit of problems.

21 Mr Black, same thing we had, please try to slow down a little bit.

22 MR BLACK: [14:48:26] Thank you, your Honour. And my apologies to the
23 interpreters. I'm actually having difficulty with the headphones, but I'll go slowly.
24 As I was saying, your Honours, they do not appear in their closing brief to contest the
25 fact that the crimes were committed, although they contest Mr Ongwen's liability.

1 They don't deny that Mr Ongwen was together with Vincent Otti, the mastermind of
2 this attack, in the days just before it.

3 They don't dispute that Mr Ongwen was present at the RV, the meeting, before the
4 attack or that he was seen leaving that RV just before the attack.

5 On all of those points, at least, it seems that the parties agree.

6 I also note that, for Pajule at least, the Defence have wholeheartedly embraced the
7 Prosecution's intercept evidence. They cite the logbooks over and over again, as they
8 relate to Mr Ongwen's injury, his arrest, his position in the LRA, and even his
9 participation, or not, in the attack.

10 The Defence even suggest that, if we had an audio recorded intercept from this date,
11 which we don't, but they suggest that if we did it would be a reliable indicator of
12 what Mr Ongwen was doing on that day.

13 And so you see my point here, your Honours, is that when the intercept evidence,
14 when the Defence feel that's favourable to them, they consider it reliable and they ask
15 you to rely on it. It's only when the intercept evidence incriminates Mr Ongwen that
16 they question it or ask you to reject it.

17 Let me come squarely now to the two main arguments the Defence raise as to why
18 they say Mr Ongwen should not be responsible for the crimes committed during the
19 Pajule attack.

20 As I say, they appear to accept that Mr Ongwen was with Otti at that time, and that
21 he was at the RV from which the attack was launched. But, they say that
22 Mr Ongwen was, one, severely injured, and two, under arrest at the time. And
23 consequently, that he had no position or power in the LRA and could not plan or
24 participate in the attack.

25 The evidence shows the opposite.

1 At this time Mr Ongwen had a significant rank, he was a major. He had recently
2 been appointed to a senior position, 2IC of the Sinia brigade.

3 And critically, your Honours, he had been operational and active for at least nine
4 months following his injury in November of 2002, and five months since he was
5 arrested, briefly, in April 2003.

6 Let me address the injury first. It's undisputed that Mr Ongwen was injured in
7 November 2002, he suffered a leg injury, and he stayed for some time in an LRA
8 sickbay. But let me make this point as clear as I can, because it's important, an LRA
9 sickbay was not a hospital like we might think about it. In fact, it wasn't so much a
10 place as it was a group of LRA fighters. Recall that at this time the UPDF was
11 hunting the LRA in northern Uganda so, by necessity, the sickbay moved around, it
12 included armed fighters, injured fighters, as well as healthy fighters to help take care
13 of them. They carried out operations, among other things, to get the food that they
14 needed to survive.

15 Indeed, a number of Oka battalion fighters remained with Mr Ongwen in the sickbay,
16 some of whom came and testified in this courtroom. They said that, despite his
17 injury, Mr Ongwen was the highest ranking person in that sickbay, everyone else
18 there took orders from him, and he continued to issue orders and to launch missions
19 from December 2002 right up until he left the sickbay sometime in the summer of
20 2003.

21 What exactly does the evidence show about how long Mr Ongwen may have been
22 incapacitated by his leg injury in November 2002?

23 Log books show that already on 6 December 2002 he reported to Kony that he'd
24 ambushed and burned a vehicle on the Kitgum-Gulu road.

25 P-205, a long-time Sinia brigade member, confirmed Mr Ongwen's ability to launch

1 missions at this time. He said that while in sickbay Mr Ongwen would, quote, "send
2 people to work", end quote, and that in December of the same year he was injured, he
3 sent people to collect cattle from Pajule.

4 Witnesses who escaped in March of 2003, more than six months before the Pajule
5 attack, and who had served with Mr Ongwen in the sickbay, confirmed that when
6 they left the LRA he could walk.

7 By April 2003, Mr Ongwen was reporting that he and his men had ambushed vehicles
8 and killed civilians. Specifically, on 5 April he reported operations in Lagile during
9 which his group killed civilians and burnt civilian houses. According to Witness
10 P-379, Mr Ongwen was sufficiently healthy to deploy for that attack in person.

11 There are more examples, your Honours, with citations, in our closing brief. My
12 point is simply that Mr Ongwen's presence in a sickbay did not mean that he was
13 inactive, that he had lost authority or that he had lost control of his fighters. To the
14 contrary, he continued to plan and order attacks and, when healthy, to go on those
15 attacks himself all the way through 2003.

16 I'll turn now to the question of Mr Ongwen's arrest.

17 Once again, there is no dispute about the fact that Mr Ongwen was arrested in
18 April 2003. The Prosecution itself led evidence about this, evidence that Mr Ongwen
19 and at least one other person were arrested, albeit briefly, around 20 April 2003, after
20 they had apparently had contact with a senior UPDF commander named Salim Saleh.

21 The Defence argue that Mr Ongwen remained under arrest from this time in April at
22 least up until the Pajule attack, but the evidence paints a completely different picture.

23 On 22 April 2003, just two days after his arrest, Mr Ongwen reported on the radio to
24 Kony that he's forgotten the location of some hidden arms and asked for directions.

25 Shortly after that, he reported that he had sent one of his commanders to go and

1 retrieve them.

2 On April 28 Kony instructed Mr Ongwen to continue checking the Lagile area for
3 remaining civilians, and said that if he found some he should, quote, "just destroy",
4 end quote.

5 On 26 May Mr Ongwen reported attacking Opit.

6 On 7 June another commander, Lapaico, told Otti that the commander who attacked
7 Opit was Dominic and that he had, quote, "burnt all the camp mission and trading
8 centre".

9 By the end of September 2003, Joseph Kony himself singled Mr Ongwen out for the,
10 quote, "hard work" that he was doing. Kony even suggested that if Abudema, who
11 was then Sinia brigade commander, that if he wasn't careful someone else might
12 appointed command of that brigade. The implication seems to be, your Honours,
13 that that other person was Dominic Ongwen, and indeed, within months he had
14 assumed that position.

15 Again, there are more examples in the logbooks and in our closing brief, but suffice it
16 to say that from April to September 2003, Mr Ongwen was active, operational,
17 sending men on missions, personally participating in operations, and earning the
18 praise of his superiors, including the very man who'd ordered his arrested in
19 April 2003, Joseph Kony. This does not sound like someone who was still under
20 arrest and who'd been stripped of command.

21 It is consistent, though, with the evidence in this case. (Redacted)

22 (Redacted)

23 (Redacted)

24 (Redacted)

25 (Redacted)

1 (Redacted)

2 (Redacted)

3 Second, your Honours, the logbooks make clear why Mr Ongwen was with Otti in
4 October 2003, and again it has nothing to do with arrest.

5 On September 17, 2003, Mr Ongwen was named second in command of the Sinia
6 brigade.

7 The very next day Joseph Kony asked Otti about Ongwen's injury and whether he
8 was fit enough to take up the post of 2IC. And Otti responded, and I quote,

9 "Dominic can now walk and can manage that post very well without any problem".

10 End quote.

11 On 22 September 2003, Otti listed for Kony his senior commanders in Uganda. He
12 referred to Mr Ongwen as in Sinia brigade, but like four or five others, he said he was,
13 quote "without office", end quote. Kony ordered Otti to take all those commanders
14 without office and to keep them with Otti at headquarters. The Defence has never
15 suggested that those other commanders were under arrest and yet they all were taken
16 to Otti.

17 About one week later, 10 days before the Pajule attack, on 30 September, Kony
18 singled out Mr Ongwen as someone who should stay with Otti's group, and I quote,
19 "because he has good plans which can help Otti", end quote.

20 And indeed, within a week Ongwen had joined Otti's group, and within a week after
21 that Pajule was attacked.

22 I would submit that the logbook evidence tells us exactly why Mr Ongwen was with
23 Otti in October 2003. Far from being under arrest, Mr Ongwen had been promoted
24 to 2IC of Sinia brigade. Otti was gathering people for an attack and Joseph Kony
25 himself had recognised Mr Ongwen's ability to help him with the planning.

1 I'll turn now to the 29 April 2004 attack on Odek, although some of the points I'll
2 make I think apply also to Lukodi and Abok attacks.

3 In the next few minutes I'll address four topics: direction finding, Mr Ongwen's
4 location on the day of the attack, the intercept evidence (Overlapping speakers)

5 THE INTERPRETER: Mr President, could the speaker kindly slow down.

6 MR BLACK: [15:02:08] (Overlapping speakers)

7 PRESIDING JUDGE SCHMITT: [15:02:10] Mr Black, please repeat the last sentence
8 and slow down a little bit.

9 MR BLACK: [15:02:14] Sorry.

10 I'll address the direction finding, Mr Ongwen's location on the day of the attack, the
11 intercepts evidence relating specifically to Odek, and the location of the pre-attack
12 RV.

13 So first, direction finding. And you might be asking yourselves what again is
14 direction finding and why am I discussing it during the Prosecution's closing brief?
15 After all, neither the Prosecution nor the Defence called a single live witness to tell
16 you what direction finding is, how it works, how reliable it is.

17 The only evidence on this topic appears in Rule 68(2)(b) statements which were
18 submitted by the Prosecution for a different purpose, because they addressed the
19 intercepts programme. We made clear when we submitted those statements that we
20 didn't rely on direction finding.

21 The Defence likewise announced, in filing 555, and I quote:
22 "The Defence intends to challenge the processes in which the UPDF 'located' persons
23 on the radio, and explain the deficiencies in the UPDF technique."

24 THE INTERPRETER: Mr President, the speaker, kindly slow down for the Acholi
25 booth to catch up.

1 PRESIDING JUDGE SCHMITT: [15:03:45] Again, I think I repeat it, that it's difficult.
2 You, of course you know what you have in mind what you want to say and you get
3 carried away. And the Presiding Judge is one of those who also normally speaks
4 very slow, so -- very quick, on the contrary, and has problems to speak slow, so I fully
5 understand you, but please try to speak a little bit slower.

6 MR BLACK: [15:04:12] I apologise, your Honour. I'm a serial offender here, so.

7 PRESIDING JUDGE SCHMITT: [15:04:15] I would not go so far but please observe
8 this.

9 MR BLACK: [15:04:19] These positions of the parties, your Honours, led you in
10 decision 596 to conclude that the unreliability of the UPDF direction finding evidence
11 was not disputed between the parties, and there was no reason to call live witnesses
12 to talk about it.

13 It's surprising, therefore, that the Defence now at the end of the case rely quite heavily
14 on direction finding.

15 At paragraph 353 of their closing brief, the Defence rely exclusively on direction
16 finding data to plot Mr Ongwen's alleged location two days before, and two days
17 after, the Odek attack.

18 In the context of Lukodi, at paragraphs 405 and 406, the Defence argue that it would
19 be impossible for a witness's recollection to be correct because they say, quote, "it
20 conflicts with contemporaneous data collected by the Government of Uganda
21 directional finding programme." End quote.

22 Now, in fact, that evidence isn't incompatible, but my point, your Honours, is that the
23 Defence, who before considered this information unreliable and full of deficiencies
24 has now hung it's proverbial hat on this evidence.

25 Back to my two questions: What is direction finding? And why am I talking about

1 it if the Prosecution doesn't rely on it?

2 Very briefly, the term direction finding data refers to coordinates that were generated
3 by the UPDF in an effort to locate LRA commanders during hostilities. Basically,
4 and I hope I say this right, the UPDF would use electronic equipment to identify an
5 LRA radio signal and try to determine from where that signal came. If they could do
6 that from two receivers, they could triangulate the directions and estimate where the
7 LRA signals originated from. If that was successful - of course they just have radio
8 signals - to know who was speaking they asked the intercept operators "Who was
9 that?" And the intercept operators gave the names, the identities of the commanders.
10 And then the coordinates would be written down in UPDF intelligence reports,
11 several of which are in evidence of this case. So that's what it is.

12 But again, why am I talking about it?

13 Well, let me be crystal clear. The Prosecution is not changing its position; we're not
14 now asking you to rely on this information to convict Mr Ongwen.

15 For one thing, as I've said, you don't have very much evidence about it and how
16 precise or how reliable it is.

17 But more importantly, even if it is reliable, it's limited in at least two important ways:

18 First, the intelligence reports list coordinates for some LRA commanders on some
19 days, not for every commander on every day, and we simply don't have coordinates
20 for Mr Ongwen for most of the days in the relevant period. We don't have
21 coordinates for any of the days of the charged attacks.

22 Second, even if we had coordinates for where Mr Ongwen allegedly was, the
23 direction finding tells us nothing about what he was doing. For that, we need other
24 evidence. We need witnesses, or maybe logbooks, or intercept evidence. We do
25 have that evidence, a lot of it, in this case and we think your Honours can rely on that

1 direct evidence rather than making suppositions based on the direction finding.
2 But having said all of that, I feel that I must address the content of the direction
3 finding data because the Defence have suggested that it creates a reasonable doubt
4 about Mr Ongwen's ability to participate in the Odek attack. And for that reason I'm
5 going to show you what, if accepted at face value, the direction finding information
6 would show about Dominic Ongwen's location between March and August 2004.
7 Your Honours, on the screen is a map. This is a map of part of northern Uganda. It
8 shows the sites of the four charged attacks. And as I'll show you in a moment, the
9 Prosecution has plotted the direction finding coordinates on this map.
10 As I go through the coordinates, your Honours, I'd ask you to keep two things in
11 mind:
12 First, I draw your attention to the light blue line, the river, that goes from the top left
13 centre of the map to the bottom right centre. That's the Achwa River. The Defence
14 would have you believe that in April 2004 that river was uncrossable.
15 And second, they suggest to you that Mr Ongwen couldn't walk very far at this time.
16 Now, there's a distance scale on this map, it's a bit small for me, but if you judge by
17 the blocks with the dates of the attacks, each of those blocks is about equivalent to 10
18 kilometres. Oh, the grid is a 10 kilometre square, Mr Gumpert educates me.
19 The first coordinates we have from this period are from 10 March and they place
20 Mr Ongwen someways north of Pajule.
21 We have nothing for the next two weeks. But on 25 March he is on the banks of the
22 Achwa River, some 10 or 15 kilometres north of Odek.
23 On 3 April he has gone back to the east.
24 And then between 3 April and 6 April, according to the direction finding evidence, he
25 has covered some 40 or 50 kilometres to the west and crossed the Achwa River. This

1 is less than a month before the Odek attack.

2 About less than two weeks later, on 19 April 2004, he has walked 40 or 50 or so
3 kilometres back to the east and again crossed the Achwa River. Between 19 April
4 and 21 April, just two days, he walks at least 40 kilometres, crosses the Achwa River
5 and is southwest of Odek.

6 The next coordinates we have for him are on 27 April 2004. He has again crossed the
7 Achwa River and he is now, well, let's say, 20 kilometres north of Odek. This is two
8 days before the attack. We don't have any coordinates for 28 April, or the 29th, or 30
9 April. The direction finding data tells us absolutely nothing about where he went
10 during that time.

11 The next coordinates we have are from May 1. He is again a little more than 20
12 kilometres north of Odek. And I would emphasise, your Honours, that he's on the
13 opposite side of the Achwa River.

14 So if you take the direction finding coordinates at face value, at some point - we don't
15 know when - but at some point, from the direction finding, at some point in these
16 crucial four days when the Defence have told us that it was impossible to cross the
17 Achwa River, Mr Ongwen has crossed it.

18 Now I won't go through each specific location after this, but I would note, your
19 Honours, that the coordinates for 18 May 2004 place Mr Ongwen less than
20 20 kilometres from Lukodi, the attack there happened on 19 May, and as the date of
21 the Abok attack on 8 June draws near, Mr Ongwen is in that area.

22 I'll just click through the remaining dates into August as he crisscrosses this terrain.
23 So, to conclude on this direction finding question, again we're not asking you to rely
24 on this to convict Mr Ongwen, but when you consider the Defence argument we ask
25 you to take it in context, because this information suggests that Mr Ongwen spent this

1 entire period trekking back and forth and back and forth across this area of northern
2 Uganda, repeatedly crossing the Achwa River, and covering hundreds of kilometres.
3 Far from creating reasonable doubt, your Honours, we believe this evidence is
4 entirely consistent with the Prosecution case.

5 This brings me to my next point, which is Mr Ongwen's location on the day of the
6 attack. The Defence have suggested that Mr Ongwen was not near Odek on the day
7 of the attack, he was 20 to 25 kilometres north near Lapak. They rely on two pieces
8 of evidence, the first is the direction finding, which we've just looked at.

9 The second is Witness D-75. Your Honours, we addressed D-75 in detail in our
10 written submissions, I won't go over that again, but our position is that you should
11 completely disregard his Odek evidence, as either fabricated or hopelessly unreliable.
12 Whatever you thought of his evidence when he testified though, I would emphasise
13 that D-75 is the only witness placing Mr Ongwen near Lapak on that side of the
14 Achwa River at the relevant time.

15 Fully 10 witnesses place him on the Odek side of the river. Fully 10 witnesses saw
16 him there shortly before or after the attack, or in some cases both. Five witnesses
17 saw him in or near the camp itself. Three additional witnesses saw him at an RV
18 before the attack or right after the attack. And two victims of the attack saw him
19 after they were abducted.

20 The Defence, of course, quibble with pieces and parts of the testimony of most, or
21 maybe all, of those witnesses. They fail to acknowledge though that all of them
22 place Mr Ongwen on the Odek side of the river, far away from Lapak where D-75
23 said he was.

24 Another body of evidence which the Defence would ask you to ignore are
25 Mr Ongwen's own reports of the Odek attack over LRA radio on 30 April and

1 1 May 2004. And this is my next point.

2 Mr Gumpert has addressed the intercept evidence generally, so I'll limit myself to a
3 couple of comments about Odek.

4 As a general matter, the Defence challenge the reliability of the intercept evidence,
5 and they echo some of those challenges in the Odek section of their brief.

6 But a few things are noteworthy:

7 First of all, as I said before, the Defence rely quite heavily on the direction finding.
8 And as I hope I made clear, the attributions of radio signals to commanders for
9 direction finding purposes is the same attribution as in the logbooks. It's done by
10 the very same intercept operators, some of whom testified in this case.

11 Second, the Defence themselves rely directly on the logbooks to suggest that
12 Ocan Labongo was the first person to take responsibility for the Odek attack.

13 Now, we have addressed this claim in detail at paragraph 279 of our closing brief.
14 I won't repeat that here, but the bottom line is, we submit, if you look closing at the
15 underlying documents, it's clear that it was Mr Ongwen, not Ocan Labongo, who
16 reported the attack. But again I make the point, your Honours, that where the
17 Defence will have you believe the logbooks are reliable if they think that it's good for
18 them. Only when the logbooks incriminate Mr Ongwen do they suggest that they're
19 not reliable.

20 I'd also note, the Defence speculate that Ben Acellam, another LRA commander,
21 received a direct order from Kony to attack Odek. But what do they base this on?
22 They base this on an attribution of a call sign in a logbook and a brief snippet of an
23 audio recorded intercept. And let me emphasise, there's not a shred of actual
24 evidence of any such direct order from Kony to Ben Acellam, but is another example
25 of the Defence relying on the intercept evidence when they think it suits them.

1 As Mr Gumpert said earlier, we believe they cannot reasonably have it both ways.
2 In any event, there is overwhelming evidence that the intercept evidence as to Odek is
3 reliable.
4 The first point I would make relates to voice identification evidence. Fully five
5 witnesses sat in this chair and recognised Mr Ongwen's voice on those recorded
6 intercepts. Unless I've missed it, the Defence haven't addressed any of those voice
7 IDs in their closing brief.
8 Now to be fair, they do suggest in other parts of the brief that the government
9 intercept operators had a bias. Mr Gumpert addressed this. But they don't grapple
10 with the fact that former LRA witnesses recognise that Odek tape. Certainly
11 Mr Ongwen's own comrades-in-arms didn't have a bias against him that he suggests
12 that the government witnesses had.
13 And again -- well, actually, I note that one of those former LRA witnesses
14 remembered hearing this report back in 2004. So he didn't only hear a voice that he
15 recognised, he heard a conversation that he recognised. He could remember it
16 happening at the time.
17 And Defence Witness D-100 also recognised Mr Ongwen's voice. Certainly the
18 Defence don't suggest that he harboured some kind of bias against the accused.
19 The fact is all of these witnesses were well placed to recognise Mr Ongwen's voice
20 and they all did so.
21 When the Defence complain about pauses in the tapes or improper handling, those,
22 I would submit, are basically distractions from the fact that all of these witnesses
23 heard Mr Ongwen in his own words, with his own voice, accept responsibility for this
24 attack.
25 I'll try to go slow, your Honour.

1 I'll come now to a point, a new point, which applies to the Odek attack, but I think
2 also more broadly.

3 The Defence, quite rightly, insist and emphasise that we have the burden of proving
4 our case beyond reasonable doubt, and that's right. We have that burden. We
5 embrace that burden, and we have met it in this case.

6 But, the burden of proving our case beyond a reasonable doubt does not apply to
7 every little fact or every piece of evidence in the case. As the Lubanga Appeals
8 Chamber said in the Lubanga Appeals Judgment, and the Chamber has repeated this
9 many times, the beyond reasonable doubt standard applies to the elements of the
10 crimes charged and the elements of the modes of liability, the so-called material facts.
11 All the other facts, subsidiary facts, are not subject to the beyond the reasonable doubt
12 standard.

13 Consequently, when the Defence argue that the Prosecution has failed to establish
14 beyond reasonable doubt where the pre-attack RV occurred for Odek, well, in a sense,
15 they're right. If you had to find that location beyond reasonable doubt, well the
16 evidence probably wouldn't get you there. But the precise location of that RV is not
17 a material fact. It was not alleged in the confirmation decision and it is not subject to
18 the beyond reasonable doubt standard of proof.

19 What has been proven beyond reasonable doubt, in relation to this RV, is that
20 Mr Ongwen was in a perfect position to order that attack and to personally
21 participate. As I stated earlier, 10 witnesses place Mr Ongwen at or near Odek at the
22 time in question, several of those witnesses place him at this RV giving orders to his
23 men, including orders to kill civilians. Several witnesses saw him after the attack,
24 including two victims. And we even have the audio recordings of him reporting the
25 attack. This is all the evidence you need, your Honours, and all the certainty you

1 need to convict Mr Ongwen of the Odek charges.

2 The Defence do make one more point which I'd like to address. They don't only say
3 that the precise location of the RVs is unclear, they say that some of those locations
4 were just too far away from Odek, that it would have been impossible to reach Odek.
5 But that's not correct.

6 Mr Ongwen, when speaking to his medical doctors, his Defence experts, he said that
7 after his abduction into the LRA sometimes he would walk up to 35 miles a day in the
8 rain without boots. That's 56 kilometres, your Honour.

9 P-54, who lived with Sinia brigade in this very same area in 2003, testified that from
10 Loyo Ajonga, one of the locations, it was a six-hour walk to Ode; from Orapwoyo,
11 four hours.

12 Now in light of that evidence, your Honours, which is entirely consistent with
13 average human walking speeds, all of the Prosecution witnesses place Mr Ongwen
14 within a day's walk of Odek on the day in question.

15 Your Honours, I don't have anything more specifically about Lukodi to say. I've
16 touched on it a little bit. We have written quite a bit on it in our written submissions.

17 And Mr Gumpert addressed the intercept evidence earlier.

18 So let me turn finally to the attack on Abok in June 2004.

19 I'd like to make just three points, and the first concerns Witness 252.

20 At trial your Honours heard many witnesses testify about this attack and the crimes
21 committed there. Much of that evidence is addressed in our closing brief. But one
22 of those many witnesses was P-252 and the Defence have now suggested that he's not
23 credible, not because he intentionally lied, they don't say that, but they say he has a
24 health condition which affects his ability to reconstruct memories. They also raise a
25 specific concern about the amount of time he stayed in the LRA or the date of his

1 escape.

2 On the first point, when P-252 testified, his recollection was clear and consistent with
3 other evidence. He showed no sign of any inability to remember what had
4 happened to him or to talk about it.

5 And I'd emphasise that various aspects of his evidence were corroborated by 13
6 Prosecution witnesses and two Defence witnesses. I'll give just a couple of examples:
7 Like P-252, three other witnesses described a parade that took place before this attack,
8 during which Mr Ongwen issued orders and instructed his subordinate, Okello
9 Kalalang, to select fighters and personally lead the attack.

10 P-252 also testified that the LRA fighters returned from Abok with maize, cooking oil,
11 beans, and other food items. Four Prosecution witnesses and two Defence witnesses
12 gave similar accounts.

13 P-252 described LRA fighters coming back from the attack with abducted civilians
14 who were bound at the waist. This account was corroborated by nine Prosecution
15 witnesses and two Defence witnesses.

16 Now insofar as P-252's date of escape is concerned, there the Prosecution agrees that
17 he probably got that wrong when he testified. We explain at paragraph 72 of our
18 closing brief that we think he left the LRA in mid-June 2004. But like several
19 witnesses in this case, P-252 had trouble remembering the month or even the year that
20 certain events happened. And we submit that 15 years after the fact, and given the
21 circumstances of his abduction, his stay with the LRA and his eventual escape, that's
22 not all that surprising. And it doesn't fundamentally undermine his credibility.

23 To be clear, you don't need to rely on P-252 to convict Mr Ongwen of the Abok crimes.
24 but on the evidence, you're more than entitled to do so.

25 Turning to my second Abok point, a number of witnesses testified that Okello

1 Kalalang was the LRA commander who Mr Ongwen placed in charge on the ground
2 of the Abok attack.

3 The Defence in their closing brief sort of twist that evidence to suggest that it was
4 Kalalang himself who was in charge, who gave the instructions, not Mr Ongwen.
5 But this narrative is simply not supported by the evidence, even the evidence cited in
6 the Defence closing brief.

7 For example, P-330 told your Honours that Odomi - remember, that's Mr Ongwen's
8 nickname - was the overall commander, the person who ordered the Abok attack, and
9 the one who issued instructions to Kalalang to select a standby. He also told you
10 that, after the attack, his superior reported to Kalalang, who reported to Ongwen
11 about what happened during the attack and what they had taken.

12 Witnesses P-406 and P-54 also testified that Mr Ongwen appointed Kalalang to select
13 and lead the fighters to the attack site.

14 Six different witnesses confirmed that Kalalang was subordinate to Mr Ongwen.
15 And of course the intercepted report and logbooks confirm that Mr Ongwen reported
16 the attack to his superiors.

17 All of this evidence shows, your Honours, that it was Mr Ongwen who gave the
18 orders for the Abok attack, not Okello Kalalang.

19 And finally, the Defence claimed in their closing brief that the only instruction proven,
20 according to them, for the Abok fighters was to collect food at the camp. And they
21 suggest that therefore Mr Ongwen should not be held liable for counts 37 to 49.

22 But let us recall, your Honours, what it means to collect food. When the LRA
23 collects food, what is that about?

24 Defence Witness D-105 told your Honours, quite frankly, that collecting food meant
25 taking it by force from civilians.

1 Many witnesses told you that collecting food was done by LRA fighters armed with
2 guns, bayonets, and machetes.
3 Collecting food often meant attacking civilians in camps and, as Witness P-330 put it,
4 committing atrocities.
5 At Abok in particular, it included shooting, stabbing, beating, hacking civilians to
6 death when they hid or attempted to flee. It involved locking civilians inside their
7 homes and setting those homes on fire.
8 Even at its least violent, your Honours, collecting food for the LRA meant breaking
9 into civilian homes and shops, stealing their food, their clothes, drinks, money, even
10 livestock. At Abok and elsewhere, it meant leaving those camp residents who
11 weren't killed or abducted to face potential starvation and certain deprivation.
12 That, your Honours, is what it meant when the LRA went to collect food and we think
13 that you should understand it in those terms.
14 That is the end of the Prosecution's closing arguments. I thank you for your
15 attention. We would ask you to convict Mr Ongwen on all counts.
16 PRESIDING JUDGE SCHMITT: [15:33:53] Thank you very much.
17 That concludes today's hearing.
18 We resume tomorrow at 9.30 with the closing statements by the representatives of the
19 victims.
20 THE COURT USHER: [15:34:03] All rise.
21 (The hearing ends in open session at 3.34 p.m.)