

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 Judge Raul Cano
6 Pangalangan
7 Closing Statements - Courtroom 3
8 Thursday, 12 March 2020
9 (The hearing starts in open at 9.31 a.m.)
10 THE COURT USHER: [9:31:09] All rise.
11 The International Criminal Court is now in session.
12 Please be seated.
13 PRESIDING JUDGE SCHMITT: [9:31:31] Good morning, everyone.
14 Could the court officer please call the case.
15 THE COURT OFFICER: [9:31:38] Good morning, Mr President and your Honours.
16 The situation in Uganda, in the case of The Prosecutor versus Dominic Ongwen,
17 case reference ICC-02/04-01/15.
18 And for the record, we are in open session.
19 PRESIDING JUDGE SCHMITT: [9:31:52] Thank you.
20 I ask for the appearances of the parties.
21 Mr Gumpert is rising for the Prosecution.
22 MR GUMPERT: [9:31:58] Good morning, your Honours, Ben Gumpert for the
23 Prosecution. With me today, Adesola Adeboyejo, Shkelzen Zeneli, Colleen Gilg,
24 Beti Hohler, Pubudu Sachithanandan, Grace Goh, Yulia Nuzban, Jasmina Suljanovic,
25 Nikila Kaushik, Colin Black, Hai Do Duc and Sanyu Ndagire. It's a full house.

1 PRESIDING JUDGE SCHMITT: [9:32:17] Indeed. Thank you.

2 Ms Massidda, for the Common Legal Representatives of the victims.

3 MS MASSIDDA: [9:32:22] Good morning, your Honours. Attending the hearing

4 today, Orchlon Narantsetseg, Caroline Walter and I am Paolina Massidda.

5 PRESIDING JUDGE SCHMITT: [9:32:29] Thank you.

6 And for the Legal Representatives, Mr Manoba.

7 MR MANOBA: [9:32:31] Good morning, Mr President, your Honours.

8 James Mawira, Francisco Cox and Listowel Atto. Thank you.

9 PRESIDING JUDGE SCHMITT: [9:32:39] Thank you.

10 And for the Defence, Mr Ayena.

11 MR AYENA ODONGO: [9:32:42](Microphone not activated)

12 PRESIDING JUDGE SCHMITT: [9:32:47] Microphone, please.

13 MR AYENA ODONGO: [9:32:49] Mr President and your Honours, today I'm

14 accompanied by Chief Charles Achaleke Taku, Lyons, Beth, Gordon Kifudde,

15 Thomas Obhof, Tibor Bajnovic, Eniko, Michael Rowse and Morganne. And today

16 we have in court our client, Mr Dominic Ongwen.

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

18 And it's now the turn today for the closing statements of the Defence and I give you

19 the floor.

20 MR AYENA ODONGO: [9:33:30] I thank you, Mr President and your Honours.

21 The outline of our presentation will run like this: I'll be going through the main

22 areas of our concern in the case, laying the foundation for our case to allow my

23 colleagues -- Chief Taku, to handle areas to do with the plight of child soldiers, modes

24 of liability and the command structures, burden of proof and evaluation of evidence,

25 charges and Bar table motions.

1 He will be drawing inferences from some of the key situations in the case. He will
2 talk about intercepts and also touch on the matter of duress, and last but by no means
3 least the issue of the so-called wives.

4 My colleague Lyons, Beth, will be addressing fair trial issues. She will also be
5 dealing in some aspects of burden of proof, especially in areas of affirmative defences.
6 She will be dealing with mental disease and defects defence under Article 31 of the
7 Rome Statute.

8 Mr President and your Honours, I rise to ask you to find Mr Ongwen not guilty on all
9 the counts and charges he is accused of. And this is because your Honours, after the
10 last word of the Prosecution and gleaning through my notes and what transpired in
11 this courtroom, I find that they have not met the required standard of proving their
12 case beyond the element of reasonable doubt.

13 And Mr President, as I said in the opening statement, it would be an understatement
14 to say that the task before you in dealing with this case is the most unenviable one for
15 the following reasons:

16 Number one, never before has the world witnessed a conflict so profoundly complex
17 in nature, steeped in metaphysics and spiritualism as the one that forms the
18 contextual basis of the case before you.

19 Number two, considering the intensity and longevity of the conflict that bedevilled
20 our country for more than 20 years, you will find the navigation of this case rather
21 complex and perplexing.

22 Number three, you will have realised from what has gone through the witnesses
23 before you - that the technical approach on both sides of the protagonists and the
24 sheer protraction of the conflict that spanned more than two decades - are matters
25 that need very particular attention in order to appreciate what has been going on

1 before you in this courtroom.

2 It should not be left to our intellect, the intellect of counsels in this room to carry the
3 day. It should be appreciation of the factual situation of the Court as perceived by
4 your Honours that should determine this case one way or the other.

5 The next one is, there is this rare thing about the mysticism with which the LRA
6 prosecuted the war. This mysticism, your Honours would realise, gripped most of
7 the abductees with absolute awe and put them in total submission.

8 And last but by no means least, your Honours, we want again to raise our voice about
9 the role of government which finally facilitated the collection of evidence in this case
10 in the conflict. And we also want to raise our voice about the neglect or rather the
11 negligence with which the international community handled the situation in Uganda.

12 And some of these members of the international community actively assisted the
13 government of Uganda to perfect its war machinery in prosecuting war against an
14 ill-equipped, rag-tag soldiers of the LRA to the detriment of members of the
15 community.

16 Your Honours, Mr Ongwen who is before you was just a child when he was abducted,
17 brutalised and made into a fighter machine without a mind of his own. He is a
18 victim. Just like former -- other former soldiers who managed to escape and are now
19 participants in this courtroom as victims.

20 Your Honours, whichever way this case is decided, Mr Ongwen is entitled to all or
21 any of the reliefs given to the other victims. He is a victim. And this point, your
22 Honours, is not contested by the Prosecution. Neither has it been contested by the
23 victims' counsel.

24 This case is an indictment therefore of the government of Uganda and indeed the
25 international community. Especially those countries who instead of intervening to

1 discourage the government of Uganda from prosecuting the war against the LRA in a
2 manner akin to ethnic cleansing of genocidal proportions, instead funded and
3 perfected its war machinery of mass destruction -- considering the types of weapons
4 the government of Uganda acquired from them and used to fight an ill-armed rebels
5 within the civilian populations.

6 When deciding who was responsible for the death in the IDP camps, your Honours, I
7 call upon you to consider the type of weapons, guns which were used, and
8 particularly bearing in mind, your Honours, that it has been shown through witness
9 evidence before you that LRA just had light machine guns where you find bombs.
10 Find the fault with the government of Uganda's soldiers.

11 And My Lords, I want to raise these pertinent questions that should be borne in mind
12 when you consider this case.

13 Number one, apart from the preliminary issues relating to fair trial violations, your
14 Honours are asked to determine, firstly, whether the accused qualifies as a victim,
15 although I know I have already said this is not contested.

16 And then secondly, whether having been abducted as a nine-year-old child who
17 spends nearly 27 years under LRA, Mr Ongwen, at the stroke of midnight of his 15th
18 birthday, transcended into an adult in terms of mind transformation and thereby
19 became a perpetrator of the crimes he's charged with.

20 We submit that the Prosecution has been at a tangent with the factual situation of this
21 case. They turned their back to the core issues, which is the character of the LRA.
22 They ignored the effects of spiritualism on the mental state of Mr Ongwen. And
23 when you're talking about the mental state of Mr Ongwen, unfortunately they think
24 that what is relevant, the period that is relevant for assessing his mental state at the
25 time he's alleged to have committed the crime, was the charge period.

1 They have totally forgotten that it was the cumulative effect of what he went through
2 immediately after his abduction up to the time of his escape and surrender to this
3 Court.

4 And at this point, your Honours, I think I want to put this matter of whether Ongwen
5 was arrested, captured and brought to court, or he actually surrendered. I don't
6 have to emphasise this, your Honours. But I know that it has been paraded either in
7 the mass media or even in this courtroom that Ongwen was arrested and brought to
8 Court. No.

9 Evidence abounds that Ongwen, at the glimpse of an opportunity, escaped from the
10 grips of Joseph Kony like he had been trying for many years and surrendered to this
11 Court.

12 And I think when you're considering this case, this must be taken into account. A
13 responsible person who, of his own volition, with the mind-boggling threat by Joseph
14 Kony about the ICC, nevertheless decided to come out of the bush and surrender.
15 This has not been done by Joseph Kony and the others, including those who died, but
16 who before their death had an opportunity to surrender.

17 Mr President, we invite you to take special note that the Prosecution has not shown
18 that they took any effort to carry out any independent factual investigation into the
19 effect of spiritualism on the victims. They just -- it was business as usual. To them,
20 this is a normal case.

21 But Mr President, I want, as I have always done, to emphasise that before you is a
22 very special case which even those of us who live in Africa, where it is believed that
23 there is a line of brutality, there was nothing like that ever experienced. The
24 intensity of the emphasis on spiritualism, the way it was applied, you heard even
25 from the spiritual, the traditional spiritual practitioners themselves say it was beyond

1 them. Even the collective effort of all the witchcraft, of all the witch doctors in
2 Ahcoliland could not cope with it. They said they let him be because trying him
3 would lead to your own death. This must be taken into account.
4 Something very peculiar happened in this case. Kony is not an ordinary person.
5 Once in a while, when I have had opportunity to address rallies and people who are
6 blaming me for getting involved in this case, I would ask them: If you think that
7 Kony is an easy man, he has invited me to go and see him again, can I please offer an
8 invitation to any of you who would like to come, come and meet Joseph Kony.
9 I would pose that question to anybody in this courtroom. Most of them declined
10 because that is the thing about Kony that people in northern Uganda, you know,
11 believed. Ongwen, like the rest of northern Ugandans, believed the peculiarity and
12 effectiveness of Joseph Kony's spiritualism.
13 Mr President, and your Honours, somebody was trying to pour cold water on the
14 concept that we coined here that, once a victim, always a victim. Your Honours, this
15 is predicated on the fact that a person like Dominic Ongwen, once he was arrested
16 and he was never allowed to be free, he became -- the things that he did like slavery
17 of others is like, you know, on Tuesday Mr Gumpert used a very interesting phrase,
18 "dog-eat-dog" society. In our case, your Honours, I think we would prefer the
19 phrase "man-eat-man" society. That is the society we are talking about. That is the
20 contextual background to this case.
21 When Ongwen was abducted he had no option, he was made a slave. That slavery
22 continued until he left the bush. It is being suggested that he was a willing partner.
23 How can you be a willing partner with all those injuries and those attempts he made
24 to even extend, to make in contacts to the most the powerful general in Uganda, the
25 brother of the president of Uganda, Salim Saleh, to plan an escape.

1 You have heard, your Honours, that at certain points, especially during the charged
2 period, Ongwen became a madman and all the things that he was doing was aimed at
3 actually dying. That included sometimes daring Kony, sometimes defying some of
4 Kony's orders. And it has been argued, you know, in a very obtuse manner that
5 these were hallmarks of evidence that Ongwen was a free-minded person. No. I
6 have already talked about what people thought about Kony, even those who did not
7 see him. Those who saw Kony knew better. For a man like Dominic Ongwen to
8 dare him, that is not the behaviour of a normal man. That's the behaviour of a
9 madman who has adopted suicidal tendencies. And in his own words and the
10 words of some of people, by inference, some of the words of the people who testified
11 here, Ongwen actually did certain things beyond the human. And why did he do
12 this? He had lost his mind. All he wanted was to get rid of this human suffering
13 around him. Die. That's a madman, in my view.

14 Ongwen did not have a mind of his own.

15 We submit, your Honours, that you are faced with many vexing justice questions in
16 this case.

17 Number one, how should individual responsibility be addressed in the context of
18 duress and collective victimisation?

19 You've heard, your Honours, that one of the things that would befall anybody who
20 attempted to escape, for instance, was that they would follow you to your village and
21 mow down everybody in that village, your relatives, your neighbours, and so on and
22 so forth.

23 And the second one, is there any special consideration, this is another justice question,
24 is there any special consideration available to an accused, Dominic Ongwen, raised
25 within a coercive environment of extreme brutality never seen in modern history?

1 And thirdly, is it possible to achieve justice for both, both the accused who is himself
2 a victim, and for the victims of the crimes he is alleged to have committed?

3 War crimes have been tried before. Situations of rebels fighting governments have
4 been tried before. But I want to draw the attention of this Court that the factual
5 situation in the case before you is drastically different and you must be careful, you
6 should careful that it behoves you actually to set new standards and create
7 jurisprudence in this Court because of the special opportunity you have had to deal
8 with a very special case.

9 What is the background of this case, your Honours?

10 Of course, the historical context of this case has already been very comprehensively
11 given and I don't want to go into detail. And the only thing that I can say, your
12 Honours, is that we do submit that this case cannot be properly evaluated without
13 addressing the issue of Mr Ongwen's complex political victimhood, the complex
14 political victimhood that Ongwen went through.

15 According to the evidence before you, Joseph Kony in his delusion thought he was
16 fighting a political war to remove the government of Uganda. It is clear, your
17 Honours, from the testimonies of many witnesses that the political objectives of
18 Joseph Kony to overthrow the government of Uganda was not clear to anybody,
19 including Dominic Ongwen. He kept on changing his position and then at the end it
20 was clear that he was there for his own survival. But in order to survive, as the
21 saying goes, if you want to go quickly, go alone. But if you want to go far, go with
22 others.

23 On the basis of that, your Honours, Mr President and your Honours, we submit that
24 Ongwen should not be found liable and the reasons shall follow.

25 I respectfully refer your Honours to the remarks of the Presiding Judge at the opening

1 remark -- I mean, at the opening session. He said at page 1 -- I mean, this is to be
2 found at real-time transcript 24 to 25 on page 1 -- I mean, on page 7 and 8, he said:
3 "This referral was understood to extend to the entire situation in northern Uganda
4 regardless of who committed offences under this investigation."
5 Your Honours, you will have realised that, to date, your counsel has not been
6 hearkened.
7 Your Honours, after this further reminder today, will the Prosecutor emerge from her
8 slumber and deafening silence about this and have the guts to hearken the hues and
9 cries of the people of Acholi, Lango, Teso, West Nile, and indeed of the entire caring
10 Ugandans and other peoples of the world, to institute investigations to extend to the
11 entire situation in northern Uganda regardless of who committed the offences within
12 the charged period? Otherwise, your Honours, the question is will the Prosecution
13 allow this Court to administer justice to all instead of, you know, hiding behind the
14 smokescreen of high sounding clichés in this Court, and meaningless clichés, of
15 course, used in Court. The people of Uganda and the caring international
16 community are yelling for justice out of the situation that emerged in Uganda. It
17 takes two to tango. One is here. Where is the other?
18 Mr President, I'll talk about the noble theme of escape. It has been made appear like
19 it was a pick and go. Escape in the situation of the LRA, to begin with, varied from
20 one person to another, depending on the focus an individual attracted from Joseph
21 Kony. It was not an easy affair.
22 I'll refer you to what D-133, a child soldier expert and a former child soldier himself,
23 he testified that having interacted with former LRA child soldiers, there were no
24 known cases of escape by child -- I mean, child soldiers from the LRA. He
25 coherently maintained that most of the children who finally came back home were

1 actually recovered after battles with the UPDF, and others escaped under varying
2 non-voluntary circumstances. It is being suggested that it was very easy for Ongwen
3 to have voluntarily escaped.

4 Notwithstanding the peculiar position they themselves sometimes allude to, that
5 Ongwen appeared to be a special child because, of all the children abducted at his age,
6 there was no evidence that any of them rose in rank and command position the way
7 Ongwen did. And the Prosecution steerfully suggest that this was all because he
8 was a very brutal man. Your Honours heard from this courtroom the person that
9 Dominic Ongwen was. Your Honours heard that Ongwen sometimes went to pains
10 to protect the civilian population. Of particular reference is the case in Lukodi where
11 evidence has been led that, after he had sent his soldiers to go for food at Gwengdiya,
12 but ultimately he heard on the radio, FM, Mega FM radio that his soldiers had been
13 involved in the attack on Lukodi and that people died. He rebuked them seriously.
14 This is on record, your Honours. This is not the character of a brutal man who
15 would have earned his promotions and rise in rank to his brutality. The contrary is
16 true.

17 So we rubbish what was said in paragraph 507 to 515 of the Prosecution brief.
18 And it was also suggested that, you know, after the Cessation of Hostilities
19 Agreement which some of us drafted in Juba, and that window that was created
20 under that Cessation of Hostilities Agreement, Ongwen had an opportunity during
21 that RV where he met Colonel Balikudembe who alleged offered, actually they say
22 gave him, amnesty. Of course you know, your Honour, that Balikudembe was not
23 empowered to give amnesty. He may have offered, but remember, your Honours,
24 that this is an untenable proposition because at this time the important thing that the
25 whole world, including the civilised world and even America, which was at the

1 beginning reluctant to get involved in that peace talk, had already gone to that peace
2 talk. And there were no -- there were all signs that it might succeed. Ongwen had
3 already been in the bush for more than 20 years, why would be contributory to the
4 collapse of that opportunity? That is number one.

5 And remember that the scene that they are talking about was covered by people who
6 had been sent by Joseph Kony to oversee the evacuation of the forces from Uganda.
7 Can you imagine what would have happened if Dominic Ongwen had attempted or
8 even shown signs of escaping? There would be, first of all, blood shed, and I can
9 assure you that would be the end of the peace talk process. Which some of us are so
10 proud about because, although it was not finally fully implemented, people of
11 Uganda, some of whom are in the gallery here, will recognise that because of the
12 stroke of that pen, Joseph Kony was prevented from coming back to Uganda and the
13 situation of Uganda has changed. I know that I'm a concerned citizen of the world
14 and I would not want other people -- I mean, people in other parts of the world to
15 suffer, but at least I can say with a lot of pride that that peace talk helped the people
16 of northern Uganda who had been under grips of terror from both the LRA and the
17 government of Uganda forces for more than 20 years. They now rest.

18 And, Mr President, you see, it is not as if Ongwen did not try to escape. One very
19 poignant occasion is the occasion when he was while he had opportunity. And this
20 opportunity, I want this to be put in context. In the LRA it was always a question of
21 opportunity, opportunity, and in the case of Ongwen when was the best opportunity
22 that presented itself to him? The answer is, your Honours, the best opportunities
23 was, like in the case of many others, was when he was in the sickbay.

24 I think Salim Saleh found time to contact him or -- well, from records, Joseph -- I mean,
25 Dominic Ongwen sent some of his soldiers to go and make contacts with Salim Saleh.

1 Unfortunately, I think he was let down and, you know, this was discovered to his
2 detriment and that changed the course of his life completely. I'll address it later.
3 But the important thing that I want to engrain in the minds of this Court is the fact
4 that, you know, because of that one simple -- single incident, Dominic Ongwen was
5 never free again. And this is captured from the UPDF intelligence report
6 UGA-OTP-0255-0943, which reported thus:
7 "Major Odomi is under surveillance following his involvement in peace talk contact
8 with Lieutenant General Salim Saleh. Commander Odomi narrowly escaped firing
9 squad when he reportedly received some bags of money from Saleh."
10 So he was now under surveillance and it was known even to the UPDF.
11 Unfortunately, you know, our colleagues on the other side were not magnanimous
12 enough to disclose this as exculpatory evidence to the Defence.
13 Mr President and your Honours, I'll touch briefly on the Prosecution closing brief.
14 I regret, your Honours, to have to say that the Prosecution did a very shoddy
15 investigative job in the case before you. Instead of combing the villages of the
16 affected areas of northern Uganda for credible witnesses, the way we did, it is
17 obvious from the amount, the nature of witnesses you saw in this courtroom that they
18 basically went and sat in the comfort of their hotels in Gulu and collected only
19 evidence from government security agents. And the most trusted person to connect
20 them was Ocira, a colonel, a colonel in the UPDF. How can you try, how can you
21 rely on evidence collected by a colonel working for a government which would go to
22 any extent to ensure that somebody is found guilty?
23 Your Honours, can you consider what went in the minds of former abducted people
24 who were now under the superintendents of the UPDF and the government of
25 Uganda in which Colonel Ocira played an important role? Were they coming to say

1 anything other than what they thought would please Colonel Ocira or, rather, what
2 would not compromise their security? They would not tell you this. Even under
3 serious cross-examination, they would not disclose that.

4 But it is a matter of consideration, your Honours. I have my own value system. I
5 am sure you have your own value system. But it is worth reminding you, your
6 Honours, that wherever you find the hands of Ocira, Colonel Ocira in the collection of
7 evidence, rubbish that evidence. It is unreliable. Its integrity cannot be without
8 stain.

9 Of course I've already referred to the dog-eat-dog phrase. That was very interesting.
10 And consider that, you know, the community of northern Uganda had just emerged
11 from a traumatic period of war. Members of that community, any member of that
12 community in front of a colonel, and you expect him to say otherwise than the colonel
13 wants him to say? No. He frightened them just like that convict who escaped, for
14 those who liked literature in the government inspector, who, you know, cowered a
15 child into, you know, going to bring him rum, going to bring him food because he
16 said, you know, for me, I look still better. There is a man in the bush, if you saw him,
17 I look like a saint. If you don't bring me a file, if you don't give me food, if you don't
18 give me this, we shall get you wherever you are.

19 That is the picture I want to draw.

20 The people of northern Uganda, in front of a colonel, felt that way. They would still
21 be found. If they behaved silly, they would still be found.

22 For instance, your Honours, wasn't it important that the Prosecution should have
23 actually gone to any length to know the person they are bringing to court, to search
24 his background, to know his age, or do something about assessment of his age?

25 Nothing like that was ever done. And I can assure you the Prosecution relied on

1 literature from other sources rather than doing their own investigation. We did it.
2 And you see, the other thing is the issue of sexual and gender-based violence crimes
3 is so crucial in this case. Prosecution should have done something about a
4 background check, what happens in that community.
5 Now, I don't know where, although I am happy that they admitted, but I don't know
6 where they got information about Acholi traditional marriage ceremonies. These are
7 some of the things that they should have done. Because they were saying these
8 people got married in the bush, but yesterday they said, "No", you know, "There were
9 no marriage ceremonies", which now validates our case theory about sexual and
10 gender-based violence; that there was actually no marriage in the bush.
11 And since it was for them to prove that there was marriage in the bush - and they
12 now say there was no ceremony, there was no solemnization of any marriage in the
13 bush - therefore, how can they turn around and say, among other crimes, although it
14 is not provided for in the Rome Statute, there was forced marriage?
15 I persuade you, your Honours, to expunge that charge from the case.
16 There was no forced marriage because, first of all, it was not provided for -- it is not
17 provided for in the Statute. And the Statute restricts -- of course, they're relying on
18 Article 1 -- I mean 7(1)(k) to extrapolate that provision to include forced marriage.
19 Your Honours, if a careful reading of that section -- of that article and then the
20 elements of crime, which has expounded on it further, shows that if the intention of
21 the framers of the Rome Statute was that forced marriage should be, you know, one of
22 the crimes, they would have explained it in the element of crime. This was not done.
23 I ask you to expunge that.
24 And, your Honour, there is an interesting reasoning -- the way the Prosecution
25 reasons back and forth, back and forth about some of these is very laughable. They

1 admit that Mr Ongwen went through hell in the bush, of course these are my -- I'm
2 paraphrasing, went through hell in the bush and was turned into a devil. But later,
3 they turn around and say, "Nevertheless he emerged from hell a complete saint. He
4 is a saint and should be judged on the basis of a reasonable man."
5 Of course I'm not going to hazard any definition of a reasonable man. When I was
6 taught by some English law professor in my first year at the university, they said, "A
7 reasonable man is a man who walks on the streets of London." Of course that kind
8 of definition is untenable.
9 In this case, we are talking about a reasonable man in the circumstances in which
10 Dominic Ongwen as a child was subjected. Not for a few years. Not for 10 years.
11 But for 26 years.
12 And they continuously refer to abduction and use of child soldiers and sexual
13 crimes -- sexual and gender-based crimes as institutionalized policy matters of the
14 LRA issued to all units as standing orders.
15 Your Honours, you don't kill a messenger. You don't kill a messenger. You look
16 for the principal. And they applaud the manner in which, you know, Ongwen went
17 out extravagantly to -- you know, to implement those policies. And they use the
18 word "implement".
19 Your Honours, I want you to address your mind to this because we are talking about
20 principal agent relationship to some extent. In this case, we have already said in the
21 LRA there is no such thing like having an army council meeting to decide on any
22 major operational matter. That was the preserve of Kony.
23 As a matter of fact, the only institutionalised organ of the LRA was the council of
24 spirits. And the medium between the council of spirits and the humans, who were
25 the handmaidens of Kony in the war, was Joseph Kony.

1 Joseph Kony was the alpha and the omega of the LRA. His word was law. And
2 you defied it to your own detriment. Your Honours, it is being suggested that
3 Ongwen should have defied such a man. We are saying, your Honours, that you see,
4 Ongwen operated with very limited options.

5 In the closing brief, we put together what we think are extremely serious pitfalls in
6 the Prosecution case. We raised the all-important issue of fair trial violations
7 committed by both pretrial, and, with due respect, the Trial Chambers as well as the
8 Prosecution which, if proved, would send the case to a stay of proceedings.

9 And we say this without our tongue in the cheek. We are being, you know,
10 intimidated yesterday that that is not an area to go. No. We insist that some of
11 these are serious. If you don't give somebody sufficient notice to prepare himself,
12 how do you expect him to, you know, be here? I mean to defend himself effectively.

13 In paragraph 1, the Prosecution validated the Defence case theory, based on
14 Mr Ongwen's statement at the beginning of the trial, "I am not LRA or Joseph Kony".
15 And your Honours will remember that when you asked him whether he understands
16 the charges, Ongwen said, "No. As far as I'm concerned, I only understand it to the
17 extent that it relates to Joseph Kony and LRA."

18 That is not the understanding upon which somebody would be put to trial. That is
19 unequivocal. The man is saying, "This confuses me. How is it that I am before this
20 Court?" And, so in other words, I think he was not sufficiently notified about his
21 personal role.

22 And as you can see, Mr President and your Honours, the charges before this Court
23 were a product of a fishing expedition and this counts for the confusion. And
24 they -- they said, we're confused. They made some comments that the Defence is
25 confused. We're not. Actually, the reverse is true. It is the Prosecution who got it

1 all wrong and got it confused. Because if you look, your Honours, at the charges, the
2 pleadings in the warrant of arrest, they're drastically different from what is before
3 you.

4 If you look at the charges that were for the entirety of the LRA -- the five LRA
5 commanders who were there, most of them pointed to those who were over
6 Mr Ongwen. But then, finally, when it was Ongwen who found himself in this
7 courtroom, they behaved like the proverbial coward who feels hungry for a fight
8 when he sees a weakling. They're now hungry for a fight because Ongwen is a
9 weakling. They cannot have hold of Kony. They cannot have hold of Odhiambo,
10 Vincent Otti and the late ...

11 All this should be put in context, we are begging, we are praying, your Honours.

12 The charges were basically meant for senior commanders of the LRA.

13 And the talk about attacks of civilian targets - and, before I go to that, I want you to
14 listen to this. The Prosecution said between July 2002 and December 31, 2005, the
15 Lord's Resistance Army victimised thousands of innocent civilians in northern
16 Uganda. This is their statement.

17 Now if this is their statement, where does Ongwen fall in? Where does Ongwen fall
18 in? As I said before, Ongwen was just a mere handmaiden of LRA who, as we have
19 also said, was always acting under duress.

20 And the attacks, they say, it was widespread and systematic. Your Honours,
21 evidence on record show that the attacks were sporadic. As a matter of fact, they
22 were sporadic rather than widespread and systematic.

23 And this is a requirement of the law. They should have proved beyond reasonable
24 doubt that first of all, it was the civilians who were targeted.

25 Secondly, that the way it happened, it was systematic and widespread. But you

1 know, if it was systematic and widespread, they would not have only picked on four
2 crime scenes within this period.

3 Because we're not talking about the -- Lagile, we're not talking Koc-Ongako, we're not
4 talking about, you know, Adilang, and all those kind of things. We are talking about
5 the charged period between 2002 and 2005.

6 Your Honours will agree with me that if this thing was widespread, they would not
7 have just brought four crime scenes.

8 And at the background of that, your Honours will remember that the assignment, the
9 missions of the LRA was about food and other supplies of necessity. And at this
10 point, I want to say that even the charge of pillaging falls flat on its face because the
11 definition of "pillaging" under the Rome Statute requires them to prove that those
12 properties, I mean, the things which were taken, were not necessary in the
13 circumstances.

14 But we say that when they came back from Sudan, everybody in the population from
15 whom they would go and beg for food had been herded into IDP camps. These
16 people were left with the devil's choice, the choice between holding back and dying of
17 hunger or doing everything possible, even at the risk of contending with the UPDF
18 soldiers who were guarding the camps, to go and get that food. It was in this
19 context that they went. They went to look for food. But in order to get the food or
20 to get to where the food was, they had to contend with the UPDF and their auxiliary
21 forces, some of whom were right in the middle of the camps, because many people in
22 the camps were collaborators, as has already been elaborated by many witnesses.

23 So it was in the course of this confrontation between the LRA and the UPDF that
24 members of the civilian population became collateral casualties, and being collateral
25 casualties who died in the crossfire, there is -- I must say this at this point, you know,

1 the shoddiness with which the Prosecution made their investigation is crystallised in
2 their failure to even request for forensic evidence.

3 But the minor one which was done in Lukodi, for instance, gave very destructive
4 information about how actually death occurred in the IDP camps. Forensic evidence
5 from the Lukodi situation found, your Honours, it's on record, that there were big
6 bombshells near the IDP camps. While, on the other hand, you know, small shells,
7 shells for small guns, you know, AK-47, and so on, were found near the barracks,
8 which means near the barracks where there was engagement between LRA and the
9 UPDF, the LRA fought and evidence of their fighting was found at the barracks. But
10 where you find the big bombshells evidence, the only reasonable inference would be
11 that those bombs were thrown by the UPDF and who killed people therefore at
12 Lukodi. Your guess is as good as mine.

13 But remember, your Honours, that those who went from the Sinia brigade finally
14 went back to Dominic Ongwen and told Dominic Ongwen that there were no deaths
15 at Lukodi, meaning that, I mean, they had no reason not to tell him because death was
16 not a frightful thing to tell a commander. But the reason they didn't tell him was
17 because by the time they left, there was no death. Who killed them after the LRA
18 had gone? These are some of the things from which you can draw inferences, your
19 Honours.

20 Your Honours, the question of Ongwen's position of authority has been dwelt on by
21 the Prosecution very extensively. They say that Ongwen's position of authority and
22 control within the organised and hierarchical structure of the LRA. Mr President,
23 your Honours, the Prosecution relies on evidence of about 20 witnesses of various
24 background and roles in the LRA to prove Mr Ongwen's position of authority. Their
25 case theory is that during the charged period LRA was an organised and hierarchical

1 structure with all the features of a formal army. I have this to say: Yes, on paper,
2 that may be true, but in fact, that was not true. The LRA is basically about spirit
3 control, control of the forces through alleged spiritual -- spirit medium, and that
4 medium dwelt in only one person who was the alpha and the omega of LRA, that was
5 Joseph Kony.
6 LRA did not, I mean, operate according to conventional military orders or
7 instructions. While in the formal army, the commander-in-chief calls the army
8 council and discusses the strategies -- first of all, agree on whether or not to go on an
9 operation, and then they would discuss the strategies. But in the case of Kony,
10 Kony's LRA, your Honours, you heard that Kony would consult his council of spirits,
11 and the things that came to the commanders and did not -- and in any event, those
12 orders did not have to go to the next person to Kony, then to the next, to the next. It
13 is true, Mr President, that when he so chose, Kony would follow some form of chain
14 of command. But when it was inconvenient to him, he did not.
15 And I dare say, Mr President and your Honours, that in the case of the charged crime
16 locations, Kony was the wiser, much the wiser for following the orders of the spirits.
17 He went directly to commanders that he preferred and circumvented Dominic
18 Ongwen.
19 Your Honours will find that in all these situations there is some grey area somewhere,
20 there is some grey area somewhere, and especially with the presence of people like
21 Lapaicho and then Ocan Labongo hovering in the wings around Dominic Ongwen.
22 These were confidantes of Joseph Kony. We have been bringing evidence to show
23 that rather than going to Dominic Ongwen, who was the *de facto* brigade commander,
24 you would find that Lapaicho was somehow there. In the case of Odek where Kony
25 actually wanted somebody to -- I mean, his people to be taught a lesson for behaving

1 lously, he chose somebody else.

2 And the reporting on the so-called intercept, which we have rigorously contended are
3 unreliable, you know, when you -- in criminal matters we are dealing with the life of
4 somebody just like any other person. Yes, if he is found guilty, so be it, but before
5 being found guilty, the standards have been -- the bar has been set very high for the
6 Prosecution: You must prove the charges beyond any element of doubt.

7 Your Honours, Ongwen always acted on superior orders. Ongwen, your Honours,
8 you know, in the LRA, like I said, it was on paper, yes, but in fact it did not work
9 because Kony to a great extent was a copycat.

10 Evidence was brought before you, your Honours, that, you know, whenever
11 President Museveni promoted people in his ranks, including himself, Kony did
12 exactly the same. When President Museveni was a lieutenant general, Kony made
13 himself a lieutenant general. When President Museveni finally made himself a
14 general, Kony also promoted himself to a general. There was a time when UPDF did
15 not have divisions, LRA did also not have divisions. But as soon as, you know,
16 President Museveni made arrangements to cascade his system up to the point of
17 division, Joseph Kony did exactly the same, he also created divisions.

18 And you see, your Honours, I want to convince you that all this was done merely for
19 public relations purposes, but not to tie Joseph Kony to, you know, submitting
20 himself to the chains of chain of command. And it should only be interpreted
21 as such.

22 And the other thing I want to say about this is that, you know, they are saying by the
23 21st -- was it 21 July -- 17 July, Dominic Ongwen had already been appointed deputy
24 brigade commander. But, you know, on the 21st of the same month, there is a
25 document that was authored by the government of Uganda, by the UPDF, listing 68

1 most senior commanders of LRA. Dominic Ongwen is significantly absent from
2 that list.

3 But more importantly, your Honours, on 22 July, it is alleged that Vincent Otti had a
4 radio communication with Joseph Kony where Joseph Kony asked him about those
5 who had not been deployed, senior commanders -- I mean commanders who had not
6 been deployed. Dominic Ongwen was one of those who was mentioned.

7 Now, if by the 22nd Dominic Ongwen had not been employed, can they tell us how
8 far back Dominic Ongwen had not been employed? This strongly suggests, your
9 Honours, that you should believe our story. Of course, considering the totality of
10 the situation around Ongwen at that time, that for the whole of 2003 Dominic
11 Ongwen was inoperative.

12 There is this ridiculous proposition that by 6 December Dominic Ongwen was already
13 up and operating, but, your Honours, Dominic Ongwen got very serious injury on
14 6 November 2002. You saw Dominic Ongwen here. He has a shorter leg on that,
15 you know, limb. They shot him and they seriously damaged his bones, fractured his
16 bones, some of which got lost, and that is why his leg is shorter. I think to suggest
17 that less than one month later he was up and operating is rather insensitive. Even
18 with the highest technology in orthopedics, nobody can convince me that a man who
19 got that kind of injury would have been up and operating within six months.

20 Mr President, I will ask Chief Taku to, you know, address you briefly before we go to
21 lunch. Thank you.

22 PRESIDING JUDGE SCHMITT: [10:48:24] Thank you.

23 Mr Taku, please.

24 MR TAKU: [10:48:27] Your Honours, permit me very briefly first to extend my
25 appreciation to my learned colleague Manoba and Francisco Cox for acknowledging

1 the status of victims of Defence witnesses. That's how -- what true professionals are
2 supposed to do before the Court, International Court.

3 Your Honours, senior counsel, lead counsel has already submitted on the scope of the
4 case that you defined when we started this case. This case is not about Sudan or
5 actions that took place in Sudan or took place in Congo. Obviously it's not about
6 isolated acts.

7 You heard, you heard submissions, quickly, about the wives. We take note that at
8 paragraph 160 and 174 of the Prosecutor's brief, the Prosecutor has already at least
9 accepted that a lot of the evidence of these women were outside the time frames of the
10 Court and that they were only used for context. And of course the examples that my
11 learned colleague cited about the wives, Article 56, most of it you will see occurred in
12 Sudan.

13 But what is important about this is that the Prosecutor also submitted that even when
14 abduction of women was allowed, according to them, they say Ongwen abducted
15 women.

16 In paragraph 104 of the amended arrest warrant pleadings, Mr Kony outlawed,
17 banned the abduction of women in Sinia brigade because Abudema had committed
18 some violation regarding the women, he punished the whole, and we submit, your
19 Honours, that Dominic Ongwen did not -- there's no evidence to suggest within the
20 charged period he abducted. The evidence of the wives, which we contest
21 vigorously, they themselves from their own statements and from the pleadings and
22 from the submissions the Prosecutor has already said were outside the time frames.
23 Nevertheless, for one instance, even if it were to be true, which we contest, that
24 Ongwen dared or disobeyed Joseph Kony and took upon himself outside the policy
25 and the structure of LRA and committed these crimes, including the one of hiding a

1 woman under the bed, there is no gain saying that the policy element is lacking, the
2 context of the war crimes and the context of the crimes against humanity are lacking
3 become isolated incidents outside this policy structure within which the charges
4 alleged. We are confined to the confirmation of charges as aware. And we must
5 also look at one other incident, your Honour, that with regard to the charges alleged
6 and with regard to the contextual elements, where they are not pleaded the
7 Prosecutor cannot invent some along the line of their submissions by saying even
8 though the abduction of women took place outside of the time frame, this would be as
9 context. They are not pleaded.

10 The second point I will make, your Honour, very quickly is that the Prosecutor
11 yesterday at paragraph 100 and 101 of the real-time transcript said that the precise
12 location of the RV did not matter and that it was not pleaded and it was not even
13 required to be pleaded. In that case, your Honour, if you believe the Prosecutor,
14 then we urge that the crimes related to the planning and other crimes that were
15 alleged to have occurred at the RVs should be dismissed as a matter of law because
16 the location is not known. The Prosecutor say it doesn't matter, therefore, they
17 could not have occurred in the abstract so majority of these crimes are alleged to be in
18 the RVs.

19 The next point, your Honours, before I go to the main thrust of our argument, goes to
20 the fact that Mr Ongwen, as the charges are alleged, was not alleged to have
21 committed the crimes alone. They said several brigades, a number of brigades
22 occurred and there were task forces and these task forces (Overlapping speakers)
23 THE INTERPRETER: Message from the Acholi booth: Would you kindly ask him
24 to slow down, please.

25 PRESIDING JUDGE SCHMITT: [10:53:21] Mr Taku, we had this the past two days

1 too. Please slow down a little bit so that the interpreters can follow.

2 MR TAKU: [10:53:25] Yeah. The task forces, your Honours, there is no evidence
3 that Dominic Ongwen exercised control over Trinkle brigades and the other brigades.
4 Never. Even as a battalion commander -- or either as a battalion commander in Sinia
5 or a brigade commander. They were controlled directly by Joseph Kony. And the
6 spotlight here is Dominic Ongwen. What happens, his participation alone, mention
7 of Dominic Ongwen alone without bringing the spotlight on these other brigades who
8 were in the task force makes the case to collapse. In particular, as a matter of
9 pleading, they said Dominic Ongwen and other leaders, and the identity of leaders,
10 your Honours, has not been brought to your attention.

11 Indirect co-perpetration - sorry - indirect co-perpetration and other forms of liability
12 you need an agreement, you need to show the identity of the other people, the
13 participants, but this is not the case. They haven't, either as a matter of pleading or
14 as a matter of evidence. And in this case the Prosecutor, in order to obviate their
15 pleading requirements and the notice violations, they now in their brief have
16 characterised the fact that Dominic Ongwen's fighters, no longer LRA fighters but
17 Dominic Ongwen's fighter, you see systematically in their brief they have created a
18 new category which is not in the pleadings, it is not in the evidence.

19 That said, your Honours, within the time that is left, let me get to my purpose quickly
20 and try to make my point as fast as possible since my time is very limited.

21 Your Honours, listening to the Prosecutor and the victims in this case, my worry and
22 that of Mr Ongwen is that if your Honours accept the narrative that we heard these
23 few days and the changing theories of the case floated by the Prosecutor, there will be
24 only one winner and that winner would be Joseph Kony, whose invincibility this
25 process must have eternalised in the spirit of the victims, in the spirit of people of

1 northern Uganda, and it will send a wrong message to the world that child soldiers,
2 whom the Rome Statute architecture was intended to protect, are on their own.
3 They can be sacrificed for political expediency all to excuse its inability to bring
4 Joseph Kony to justice. And that would be very, very sad indeed.

5 Victims and true victims and all the victims, and I can say everybody in northern
6 Uganda is a victim, it is not just some form of victim that constitutes an opportunity
7 for some form of activism. It is real victim, real human beings, all the participants in
8 this case. And I can say, your Honours, with due respect, that Dominic Ongwen is a
9 victim.

10 It's unfortunate that, in the pre-confirmation pleadings that the Defence filed there is
11 the victim status of Dominic Ongwen among other violations or other objections, the
12 Pre-Trial Chamber dismissed it without any reasoning. And the Prosecutor did not
13 accept the victim status of Dominic Ongwen until the opening statement, which is
14 accepted but said that he was a victim perpetrator.

15 So the notion of victim perpetrator was introduced in this proceeding for the first time
16 in the opening statement by the chief Prosecutor, yet the victim who -- the victim
17 status of Dominic Ongwen was an issue that was brought to the pre-trial Judge who
18 completely dismissed it without reasoning. That was not just a fair trial violation, it
19 was a denial of fair -- of due process in a case in which the status of Dominic Ongwen
20 is important.

21 And referring in the arrest warrant, that the Prosecutor merely said Dominic
22 Ongwen's origins are unknown and the charges against Dominic Ongwen were
23 confirmed as a competent adult without considering his own objections and the
24 objections he raised as to the competency to be tried at that point in time. He has
25 litigated some part of it before your Honours, but it was an issue which the pre-trial

1 Judges completely ignored.

2 Your Honours, I will not dare to go into the question of mental health, my colleague
3 will deal with that. But one key issue your Honours must look at is, quickly, the
4 question of the evidence submitted through Bar table motions, these ISO intercept
5 reports that the Prosecutor has relied heavily on.

6 Now, one critical thing, your Honours, is that it is not -- the Prosecutor has not
7 explained why they were required to rely on evidence that was submitted through
8 Bar table motions to secure a conviction, that was not to prove acts and conduct
9 charged. The purpose of submitting evidence through Bar table motion is
10 completely different. And even when the Prosecutor had called witnesses, fact
11 witnesses, you must assess the evidence with these witnesses with caution because of
12 their only criminal involvement admitted.

13 Now let me take one witness, 205. 205 admitted that he told Ongwen, when
14 Ongwen inquired from him whether there were casualties in Lukodi, he said no.
15 Even though Ongwen had heard over the radio, he consistently said no. Every
16 person -- witness that was involved, they told Ongwen no casualties. Either the
17 casualties were unknown to them or they lied to Ongwen.

18 Now, this evidence of these Prosecution witnesses goes to show that the *mens rea* of
19 Ongwen, or even the *actus reus* of asking them to go to Lukodi cannot be proved
20 because P-18, who came from another unit, testified that Ongwen said he should go to
21 Gwengdiya, as lead counsel has said.

22 A certain Rwot Oywak, Rwot Oywak the Prosecutor admitted in their view that was a
23 collaborator of Joseph Kony and you heard evidence that he took back someone who
24 was fleeing and helped him to take him for him to escape, he took him back to Joseph
25 Kony. You heard evidence from Rule 68 P-15, one of Lwala schoolgirl victims who

1 was distributed to Vincent Otti, that Vincent Otti placed a call to Rwot Oywak and
2 also to a military commander in Pajule and also to a certain Lacambel informing them
3 that he was coming and therefore -- and therefore he had an opportunity to
4 incriminate Dominic Ongwen to excuse his own criminal involvement in the crimes
5 that occurred. He cannot be believed.

6 But apart from that, your Honour, the only time that Rwot Oywak said something
7 which you could take seriously was outside the context of the crimes -- alleged crimes,
8 describing an event that occurred before the Acholi cultural leaders where he saw
9 Ongwen. He said Ongwen was demonstrating and crying, "my education has been
10 ruined" moving up and down like a madman, devastated, and the inference, hoping
11 to impress the cultural leaders, cultural leaders who put pressure on Joseph Kony to
12 make sure peace returned so that him and fellow victims could return to their home
13 to rebuild their lives. And you see this systematic conduct by Ongwen supporting
14 the peace process all along.

15 When we come back from break, from the time on, I will expand on this and some
16 other points.

17 PRESIDING JUDGE SCHMITT: [11:02:50] Rightfully, you rightfully addressed the
18 break, Mr Taku.

19 We will have now the break until 11.30.

20 (Recess taken at 11.03 a.m.)

21 (Upon resuming in open session at 11.30 a.m.)

22 THE COURT USHER: [11:30:48] All rise.

23 Please be seated.

24 PRESIDING JUDGE SCHMITT: [11:31:07] Mr Taku, you still have the floor.

25 MR TAKU: [11:31:10] Thank you, your Honours.

1 Your Honour, before I move to another point, I would like to deal with one, one
2 matter which is of critical importance to Mr Ongwen. And it relates to the inferences
3 that the Prosecutor invited the Chamber to draw on several good acts that
4 Mr Ongwen did towards men, women and civilians during the charged period and
5 also outside the charged period.
6 And to draw, make negative inferences of that, draw negative inferences - permit me
7 to even to call criminalise a conduct - to show that Mr Ongwen had the capacity to
8 defy Kony, if he could carry out those orders.
9 One, it is trite law, a matter of inferences, that the inference that they invite you to
10 draw must be the only reasonable inference. And, in this context within the charged
11 period, they found that Mr Ongwen conducted this on his own. When he saw
12 civilians, he protected civilians, women, children, who were under the threat, who
13 were systematically being bombarded by the UPDF, he protected them.
14 And also the fact that he refused, when Kony gave him orders -- many years after
15 during the peace process, he gave an order to kill the Acholi cultural leaders, kill
16 members of the international community, and other significant personalities,
17 including David Matsanga and Honourable Ayena, Kony gave instruction to kill and
18 Ongwen defied, cannot be criminalised or you cannot draw negative inferences from
19 that for the following reasons:
20 First, those acts were consistent with international human values that the
21 Rome Statute's architecture protects.
22 Secondly, they can be inferred to ensure that Mr Ongwen did not have the requested
23 *mens rea* to resist the orders of Joseph Kony, alongside other brigades when Kony
24 himself was monitoring by radio, by intelligence officer - which the Prosecution
25 admits, concedes in their brief - were watching. He could not.

1 But, when he had the requisite *mens rea*, he protected people. He protected victims,
2 women, children. He took care of them.
3 And therefore, your Honours should decline to draw the negative inferences.
4 With regard to the Acholi culture - the royal fathers, as it be - you remember the
5 impassioned appeal Ongwen made, devastating appeal before the cultural leaders
6 when Rwot Oywak reported. They talked about education had been ruined and
7 devastated.
8 Now, that is not the image of Ongwen, the callous Ongwen that the Prosecution
9 wants to project. When he came in touch with the cultural leaders, he was making
10 an impassioned plea - based on his own personal circumstances in the bush - that the
11 cultural leaders should ensure that the peace process prevails so that he and others
12 can go back and rebuild their lives.
13 This is the only reasonable inference you can draw from this. And to say that Kony
14 had promised and told Ongwen that he wanted to ignite a Third World War by
15 killing members of the international community, killing Honourable Ayena, killing
16 David Matsanga and the royal cultural leaders of Acholiland, to exterminate, Ongwen
17 said no.
18 As Honourable Ayena rightly said, Ongwen was prepared to die than to destroy the
19 most valuable architect of unity, of peace, and the cultural identity of the Acholi
20 cultural leaders and religious leaders. He was prepared to die.
21 But did Kony excuse him for that? The evidence shows that Kony did not. Because
22 he took his time. P-16 told the Court how Kony demoted Ongwen to private, gave
23 him 200 strokes of the cane, and condemned him to death. Ongwen was waiting
24 execution, but was rescued by some of the executioners who knew Ongwen to be
25 a good man. Ongwen fled. We cannot reveal their name because these individuals

1 are still in the bush today.

2 But Kony executed so many people for being responsible for Ongwen escaping and
3 coming to surrender to face justice.

4 But wait for a while about inferences. The evidence shows by the Defence victims
5 that P-678, the Prosecutor's intermediary, who doubled as liaison, who also doubled,
6 was a senior counterintelligence commander in the UPDF. During the peace talks,
7 he took back the victims back to Kony, alongside with children. Some came back
8 pregnant. They were lucky. Some of those children have never come back and,
9 indeed, one of the women who came back and were raped by UPDF soldiers and died
10 as a result. You heard the evidence, it is on record.

11 So, your Honours, if the Prosecution's own intermediary could not resist the demands
12 of Kony to take back victims who had been rescued to Kony - and some are still there
13 today - and the Prosecutor could not even investigate, could not even dare to
14 investigate their own intermediary, how do you expect Dominic Ongwen in captivity
15 to dare Joseph Kony without consequences, I beg to ask?

16 The next point I move to, your Honours, is about the question of discriminatory
17 intent.

18 Your Honours heard evidence from the Rule 68 -- P-28. P-28's evidence is important
19 for three reasons. He says, one, after Iron Fist, the main motivation of Kony was
20 survival. He abandoned the political objective of taking over power for survival.
21 There was systematic bombardment over Sudan and the territory, and he ordered
22 Vincent Otti to take back some of the commanders -- some of the fighters in order to
23 distract the attention of the UPDF on him.

24 Now, two, he ordered that food should be looted. Pillaging from Uganda and
25 brought to him in Sudan. You heard evidence of Prosecution witnesses, led by

1 the Prosecution themselves, how this food's looted. They were not carried to Mr
2 Ongwen and there is no evidence, scant evidence that food looted in any of these
3 camps were was ever carried to Ongwen. At least one of the witnesses said he
4 carried food he looted from Lukodi to Tulu, but there is no clear evidence. But you
5 saw evidence from P-12, Rule 68 and other Prosecution witness that they carried food
6 to Kony for his own subsistence and also subsistence of the women and children who
7 were LRA soldiers.

8 So the question of discriminatory intent, P-28, was present when Kony set the rules,
9 he was one of the founders, was very clear that the objective changed completely, it
10 was survival. So you must note that Iron Fist put a stop to the political objective of
11 take over the government.

12 About the women, P-28 says, and this -- this is the Prosecutor who says they consider
13 Kony was central to the abduction of these young women at least until after Iron Fist.
14 Rule 68, P-15 talks about the abduction of those girls, the execution of those girls,
15 Sinia brigade was not involved because they had been banned. Remember
16 paragraph 104 of the amended arrest warrant they called Otti, Kapere and Tabuley
17 were involved. And P-115, P-115, your Honours, gives a very moving account of
18 what happened. He said: I don't know Dominic Ongwen. I have never seen
19 Dominic Ongwen. I have never heard of Dominic Ongwen.

20 Because the evidence of abduction and execution of women in this case comes from
21 Teso, comes from the event, the abduction which P-15 talks about. It cannot be
22 abduction in the abstract, they must bring evidence. It is not just speculation he took
23 part in abduction. Where is the evidence?

24 Within this time frame Dominic Ongwen was in sickbay. And was he in the sickbay?
25 Yes, P-205 confirmed he carried him. He was nearly dead. Did he have a radio?

1 Again, P-205 says no. P-440, whom you know, your Honours, and I will not describe
2 his attribute but everyone will know, but he was one of the closest commanders to
3 Joseph Kony. He was the heartbeat of the system. He was the highest LRA
4 commander who came here to testify. He said there were no radios at the level of
5 the battalion, no radios at the level of battalion.

6 And you have the Prosecutor witness evidence saying that Kony was telling Otti that
7 they should give a radio to Dominic when he was promoted. If he had a radio, why
8 would Kony be saying that he should be given a radio?

9 In any case, when I get to the intercept evidence, I will indicate, I will prove that even
10 Lapaicho, some of the evidence will show that Lapaicho were reporting, allegedly
11 reporting acts of attacks committed on Dominic. If he had a radio, why would
12 Lapaicho, why would the Prosecutor say Lapaicho was reporting these acts? So the
13 fact that he had a radio and was able to command, your Honours, is not proven by
14 the evidence. It is mere speculation.

15 Now, your Honours, let me venture to -- of course the question of child soldiers,
16 before I go to the intercept, which is longer part, your Honours, P-28 again says the
17 abduction of children became problematic, during, after Iron Fist, because of the
18 movements, they were not in one location, and that there was systematic
19 bombardment and therefore it was difficult for him to abduct and train.

20 Abduction had taken place in Teso, where there was no bombardment and where
21 Kony concentrated his effort, as you will see. But Dominic Ongwen did not go to
22 Teso because P-16 said he visited in the sickbay. And there is overwhelming
23 evidence that he was in the sickbay. He didn't go to Teso. And it is in Teso that
24 witness after witness, Prosecutor even came to say, they were (indiscernible) and gave
25 the location and some of the victims saw them.

1 It is not enough to say that he saw people whom you characterise as being young
2 people as escorts, because you have first to establish when were they abducted and by
3 whom? Was it within the time frames. That evidence was not given.
4 And I can only concur with Judge Tarfusser when at the beginning of the Article 56
5 that he rebuked the Prosecutor about the tendency of leading evidence out of the time
6 frames. And one of the inadequacies, deficiencies that this trial suffered,
7 the Prosecution case suffered is the inability to establish time frames, to establish at
8 least the ages, which they concede in paragraph, in paragraph 75 that many of the
9 witnesses could not even establish their ages and are now bound by speculative
10 indicators.
11 But they had the ability to call expert evidence. They had the ability to talk to the
12 parents of these children because the Convention on the Rights of the Child says
13 evidence of age given by parents, even though not accurate, can be accepted. Yes,
14 witnesses can give evidence of age, but there must be -- they give a foundation,
15 a proper foundation and the basis on which the evidence can be accepted as being
16 credible.
17 It is not just witnesses speculating on the ages of other victims under traumatic
18 circumstances. That is not enough. It is not what Lubanga -- I mean the
19 jurisprudence cited that my friend was saying. Yes, you can accept independent
20 evidence of witnesses, but it must be credible. You must be able to see the witness
21 and assess the integrity of that witness and the competence to give evidence of age.
22 This has not been done. The Prosecutor is on a fishing expedition here.
23 The cobweb pleading of this case and the cobweb of strategy of pleading everything,
24 adopting everything, your Honours, has helped to muddy notice in this case,
25 complicating the case.

1 But it is a straightforward case, like lead counsel said. The case is that they want you
2 to hold Ongwen responsible for the conduct of Joseph Kony, allegedly for
3 executing -- executing the order of Joseph Kony. But what is lacking is with each
4 charged attack, having admitted that Joseph Kony ordered, the inquiries would have
5 started from Joseph Kony to say when you order this attack, what safeguard did he
6 put in place to ensure that they are executed.

7 The evidence in the arrest warrant pleadings and in paragraph 56 of the confirmation
8 of charges decision shows that Kony had an elaborate communication network. It
9 belonged to him. He had intelligence officers whom the Prosecutor has considered
10 were there. He mobilised all the units and, as the communication regime shows, he
11 activated the entire system. They were on the radio during the orders. And
12 your Honours should not forget, with regard to, with regard to the case of Odek,
13 remember with P-38, chain of custody witness came. There was that entry in one of
14 the reports where one of the investigators said - and I can produce the reference when
15 I get there - it is low but we can get the message from Joseph Kony and Joseph Kony
16 was giving orders and receiving orders from five, from many about the attack on
17 Odek.

18 And I ask Prosecutor, where is this audio? You led evidence Joseph Kony gave the
19 order, yes. Your witnesses have given the evidence, yes. But the Court would like
20 to know what did Joseph Kony say and from whom was he receiving? Because it is
21 contentious, highly contentious who was reporting and who was executing the
22 orders.

23 That entry is very important for you to make determination with Odek and others.
24 But apart from that, with regard to the intercept, as I said, your Honours,
25 the Prosecutor has escaped, completely abandons its own evidence. P-403 was

1 a Prosecutor own internal expert who evaluated all the intercept audio reports for
2 the Court and testified and submitted into the record. Why would the Prosecutor
3 come and make demonstrations here, cherry-pick notes here and there, and ask you
4 to rely on them, notes that were tendered through the bar table, to convict on them,
5 whereas the same notes have been discounted at two levels. 403 says that there were
6 at least five or more interception sites in Sudan, in Lira, in Soroti, in Kampala, and
7 different, different units including the CID they intercepted, and all these were sent to
8 the chieftaincy of military intelligence in Kampala for purposes of intelligence for war
9 operations.

10 And, of course, the UPDF independently also relied -- depended on the directional
11 findings. What is material, what you should want to see is the end product. Where
12 are the intelligence reports? We (indiscernible) 403 with intelligence reports with
13 regard to Odek, that is the only intelligence report you have. There is no
14 corresponding intelligence report for Lukodi, from Abok, from Pajule, and the
15 inference is that the Prosecutor is withholding them or did not care to look for them.

16 But with regard to Odek, the intelligence report at the highest level of the UPDF,
17 where the UPDF military command used for war operations clearly says it was
18 Ocan Labongo who reported that he attacked Odek. Underlined in that
19 communication; Dominic Ongwen was underlined, Joseph Kony was underlined, all
20 their commanders when Ocan Labongo took note, took credit for this. Yes.

21 Furthermore, Your Honours, as if that is not all, your Honours should ask yourself
22 whether this report, bits and pieces of the report were all personal impressions of
23 the witnesses or were contemporaneous report. The witnesses themselves report
24 difficulties. P-59 says most of my staff did not understand Acholi, or he said don't
25 understand Acholi. He told you about the conditions of work in his office with one

1 of his colleagues, and he said that he personally made notes, he made his own notes
2 in order to help the commanders in the form of analysis.

3 P-03, your Honours, you saw him here, his sitrep with regard to Odek clearly
4 contained the name Ocan Labongo. And now you saw those notes later on by
5 Labongo who put Ongwen by a different ink would not know at what time he made
6 those impressions.

7 Now, irrespective of what he said and what (indiscernible) he did here, what is
8 important to this Court is that the intelligence report that came out by his superiors
9 and which are collaborated by the directional finding is that Ongwen was not there,
10 Ocan Labongo indeed is the one who took credit for the attack of Odek.

11 And furthermore, 403 has analysed that entry where the question of the diamond,
12 because the Prosecutor alleges that Ongwen allegedly was overzealous and
13 committed a crime because he wanted a promotion, wanted from Kony, but again
14 they said the intercept shows that it was Labongo who reported to Kony that I found
15 a diamond and Kony said the person will be promoted, not Ongwen. And even the
16 idea of allegedly committing crimes because he wanted promotion and that indeed he
17 was promoted is fallacious, because 440, whom they brought here and actually
18 listened to one of the intercepts established the difficulties they had in listening to the
19 intercepts. He said throughout the period he never saw Ongwen, he never met
20 Ongwen. But when he listened to the intercept he heard, he heard Kony telling Otti
21 that the spirits have asked him to promote certain officers and that the spirit, he stated
22 the spirit promoted Joseph Kony first, promoted Ocan Labongo, promoted Otti,
23 promoted Dominic Ongwen, and P-014, Lapaicho, among others.

24 So in the LRA it is the spirit that promote. They conflict promotion with
25 appointments to posts of responsibility, the command position. Yes, Kony

1 appointed Ongwen to a command position the way he has said.
2 He never said, he never said -- I'm sorry, please.
3 Now, about the appointment, your Honours, there is evidence here that LRA lost so
4 many commanders, Livingston, Tabuley, you can name it, many, many commanders.
5 And that is what saved Ongwen from execution, because they were short of
6 commanders, and Kony appointed him a commander, definitely a command position.
7 But appointed a member his close protection unit, Ocan Labongo, to be the second
8 commander. 440, P-440 says he knew him, they were in the same location, he was
9 close protection unit commander, and that's why you saw systematically he had
10 a radio, he reported. And in any case, your Honours, the evidence shows, and 403
11 has analysed, that when P-16 said that Ongwen was often on the radio, he analysed to
12 find it was not true, he found Ongwen was the least of the commanders on the line,
13 he was never actually on the line. At one moment Kony asked and he said, "Yes, I'm
14 here," suggesting that he heard Kony's orders, was on the line. And because he was
15 not often on the line, it was impossible to say that he was often on the line for people
16 who were trained, only in 2002 they started training, a crash course for interception.
17 By 2001 Iron Fist happened. By 2002, in November, Ongwen was wounded and it
18 was found, a radio, for them to purport that it identified the voice of Ongwen.
19 And P-03 says it, that it is difficult for him. And 403, in his analysis, also says it was
20 possible that commanders, the intercept signallers could be sent to go on assignment
21 with other commanders. And when they are on assignment with other commanders,
22 because the UPDF attributed the voices of the signallers to their commanders, when
23 this signaller was sent on operation with other commanders and they were
24 communicating, it was possible for UPDF to continue to attribute these attacks to the
25 commander to whom the signallers had been assigned. This is 403 saying this. You

1 need to read the report of 403. You need to read 440, who had intimate knowledge
2 about the distribution of radios, who had a radio.

3 About the question of TONFAS, there was no other expert about TONFAS than him.
4 Yet, he says in 2004 when he was interviewed, the Prosecutor did not play, contrary
5 to what they said, any of the radio intercepts to him, neither was he asked to break
6 the TONFAS.

7 Now, your Honours, without breaking the TONFAS which he said carried the orders
8 of Joseph Kony, the evidence of the intercept is sufficient -- insufficient, totally
9 insufficient for your Honours to recall to rely on, in any respect, to admit the finding
10 of guilt in the case irrespective of what the Prosecutor has said that we rely on it. Of
11 course, we are entitled to rely on it to establish reasonable doubt, to show there is
12 reasonable doubt, because we don't have the burden of proof, the same standard
13 the Prosecutor.

14 So as a matter of law, as a matter of fact, judging from 403, who analysed all the
15 evidence, these other attempts in the courtroom to make theories and
16 computer-generated evidence, which was never on the record, should be dismissed
17 because 403, their own witness, their own internal expert has submitted information
18 before your Honours. And each of that information, looking at the same material as
19 Dominic Ongwen, it was in Lukodi.

20 There are three sources: Ongwen said my splinter force went out and I am waiting
21 for them to come to find out what happened. And another intelligence officer said
22 Cel Ibong is not on the line, I think that is the CID. But all of them equivocate
23 Ongwen was expressing doubt, it is not equivocal. Ongwen was expressing doubt:
24 My splinter force went out, they are not back, so I don't know what went on.

25 There are two ways of looking at it, your Honours, one of it is that they went to

1 Gwengdiya, according to Ongwen, as P-18 said. Another one is that they were
2 a splinter group and of course the contact, you lose touch and they move about.
3 And probably he wanted to know, as every reasonable commander, whether they
4 were involved or not.
5 And when they came, I remember one of the wives, (indiscernible) wives saying one
6 was very angry with Ocaka. One of the wives was very, very angry. I think it was
7 the second wife, I don't know, with him. He asked each of them and hear it over FM.
8 People died. The people died. What happened? Each of them lied to Ongwen.
9 Your Honours, by their own lies, by their representation, your Honours, you should
10 assess their evidence with caution.
11 Secondly, there is no *mens rea* element, there is not even any *actus reus* with regard to
12 Ongwen's participation.
13 Now, your Honours, one thing, your Honours, I had almost forgotten. The
14 confirmation decision talks about the question of the LRA being a conventional force,
15 they have attribute of a conventional force.
16 Your Honours, two important witnesses, UPDF senior commanders who came to
17 testify contradict; Colonel Balikudembe and Colonel - one minute, your Honours, let
18 me -- Kanyogonya. Kanyogonya. They said that no, they did not consider them as
19 being a conventional force. Kony had no right to start calling himself general,
20 Ongwen to call himself brigadier, they don't -- under the method of warfare were not
21 those, and the way they led wasn't.
22 Now, neither the Prosecutor nor any of us was there in the field. Probably the only
23 person who has intimate knowledge in this courtroom is Honourable Ayena. But,
24 your Honours, while you have two critical, significant UPDF officers who were
25 involved in the war operations, one was with intelligence, at the chieftaincy of

1 military intelligence, who doubled as a lawyer; and one was the brigade operational
2 commander who was (indiscernible) Ongwen in Gulu. And they said these people
3 did not have this attribute.

4 On what basis is the Prosecutor contradicting this own evidence of these individuals,
5 who are not just fact witnesses but could be military experts in their own right on
6 command structure and military operations?

7 On what authority would the Prosecutor contradict the evidence of their own witness
8 who would say that what matters, the most credible document the UPDF relied on,
9 were the intelligence reports, not bits and some pieces which have been rejected in the
10 analysis which their own expert rejected. On what credibility, your Honours, I beg
11 to ask?

12 And the last one I have to beg, your Honours, before I hand over to my colleague is
13 on the question of pillaging. The Prosecution argues in paragraph 249 of
14 the Prosecution brief that the Defence did not provide formal notification of its
15 intention to rely on necessity as a ground for excluding criminal responsibility for
16 pillaging under Article 31.

17 Your Honours --

18 PRESIDING JUDGE SCHMITT: [12:04:16] Mr Taku.

19 MR TAKU: [12:04:18](Overlapping speakers)

20 PRESIDING JUDGE SCHMITT: [12:04:22] Mr Taku, may I? I don't like to interrupt
21 you, but I am reminded to ask you to speak -- I am reminded to ask you to speak
22 a little bit slower so that the interpreters --

23 MR TAKU: [12:04:29] (Overlapping speakers)

24 Your Honours, the Prosecution misunderstands the law; element 2 for the war crime
25 of pillaging under Article 8(2)(e)(v) of the Statute requires the Prosecution to

1 demonstrate that the perpetrator intended to deprive the owner of the property and
2 to appropriate it for private or personal use. The corresponding footnote, footnote
3 62, of this element clearly stipulates that appropriations justified by military necessity
4 cannot constitute the crime of pillaging.

5 The Defence argues that the Prosecutor failed to prove beyond a reasonable doubt
6 that the alleged appropriations were not justified by military necessity and did not
7 prove the necessary elements for pillaging.

8 We earlier, your Honours, pointed to Prosecution evidence on how Kony ordered.

9 He made the order, the looted food was taken back to Joseph Kony, in the context of
10 the attacks which they themselves said were war crimes.

11 There is another issue, your Honours, that I want to address, which is paragraph 54 of
12 the -- paragraph 54 of the charges, the document confirming the charges, which says
13 that the finding of the Pre-Trial Chamber with regard to the status and the command
14 structure of the LRA could be, could be used as contextual elements.

15 We beg to differ, your Honours.

16 First, that finding does not constitute notice. We have said that there is a paucity
17 of -- a plethora of pleading violations, complete lack of notice, including of contextual
18 elements with regard to each of the charged crimes. You cannot use the cobweb
19 pleading tactics, and also in the course of the trial where the Prosecutor asks, applied
20 to the Court to lead evidence out of charged attacks to prove contextual elements.

21 That could only -- we objected, it could only have been valid if they were indeed
22 pleaded. But this is not the case.

23 And paragraph 54 and 56, do not meet the requirement of a state policy, the
24 command structure, a statute, Ongwen, how do they meet that requirement? Either
25 on notice of a state policy, or a state-like -- of a policy, state-like policy, handling the

1 legal requirement of widespread and systematic attacks. They fail to meet the
2 preliminary requirements, your Honours, for contextual elements in this particular
3 case.

4 One minute, your Honours, let me ask lead ...

5 (Microphone not activated)

6 PRESIDING JUDGE SCHMITT: [12:08:17] Microphone, please.

7 MR TAKU: [12:08:20] I did not intend to take the Court through the analysis of the
8 intercepts, it would take a very, very long time, but I hope that the Court will read.
9 And I just want to dismiss the unsubstantiated, unfounded allegations made by the
10 Common Legal Representative that, in paragraph 90 and 94 of their submissions, that:
11 "... there is no dispute among the parties as to the relevance and probative value of the
12 written transcripts and related items used during the testimonies of the witnesses six
13 of whom are dual status witnesses represented by the [common legal representative]."
14 This was a misrepresentation that I expected my colleague to withdraw, with
15 apologies. But, your Honours, at the time of making this statement she was aware
16 from that it was highly contested, either in the pleadings, either in defects series,
17 either at every turn, and also in the cross-examination. The question of ages were an
18 issue, the question of the venue or geographic parameters. And of course
19 the Prosecutor has not even dared, and to represent that among the parties, I don't
20 know which parties, at least between the Prosecution or the Defence will know that
21 there is sufficient dispute about that.
22 And your Honours had the opportunity in the conduct of this trial to observe matters
23 related to Article 56 wives. We pleaded consistently, and we will say it again about
24 their status. Now, what do you say if you put restrictions on the ground that there is
25 interference?

1 Then, the Single Judge now himself called a status conference to say there is
2 a problem with the witnesses, they don't want to come, some want to testify for
3 Ongwen. And you say, "Oh, a witness is a witness." (Indiscernible) statement
4 under a different context by your Honour, and the context you made it was correct.
5 It was not the context in which the witnesses themselves has expressed reservations.
6 They expressed reservations, proper fair trial and guarantee of fairness would
7 warrant you to hear him: Why do you want to come? You see, it is not about what
8 the parties say that matters. Why? Was there interference with you, was there a lot
9 of interference?
10 At that point in time, the reasons and rationale for the Article 56 was clearly
11 challenged, and that's why you heard assistant to counsel Mr Tom Obhof, based on
12 the representation made by the judge, to say I want to lead two of the witnesses, that
13 is the context in which he understood it. And he now said, no, I defer back. And
14 you make a general blanket assessment of vulnerability.
15 International criminal tribunal for the past 20 years, more than 20 years, and before
16 your Honours in another trial, there is second trial before your Honours, you have
17 assessed vulnerability on a case-by-case basis. And if there is interference it is
18 a serious allegation because it is Article 70. Your Honours will either ask an
19 investigation, or at least you ask the witnesses about. It is about the witnesses, about
20 what they required, their state of mind. And you have seen their state of mind
21 rolled out in these proceedings about wanting to meet and visit Mr Ongwen.
22 Now, we put in these emails between the Prosecutor and the Defence into evidence
23 because you needed to know their state of minds. And two witnesses who were
24 alleged to be at the base, at the origin of the alleged interference, came to testify, the
25 one who had the NGO. And one of the main person who did it, who received

1 a phone call, the Prosecutor did not even as much as put or challenge or lay that case.
2 The Article 6 witnesses came. The Prosecutor did not even ask them was there
3 interference. He didn't take the opportunity, they missed so many opportunity,
4 your Honours.
5 Your Honours, the sanctity and integrity of these proceedings and that of this Court
6 warrants that the process be fair. Witnesses should be treated with the dignity and
7 the conduct that they deserve. They were witnesses, either for Ongwen or for
8 the Prosecutor, but their opinion mattered. Did it matter then? Yes. Does it
9 matter now? Yes. Does each team matter? Yes. There are emails with the
10 Prosecutor saying that if they allow one of them to come, the other will be jealous. If
11 these witnesses were very vulnerable, these witnesses were such victimised they
12 hated Mr Ongwen, why would they want to visit him at every turn? (Redacted)
13 (Redacted)
14 (Redacted)
15 (Redacted)
16 (Redacted)
17 (Redacted)
18 To that extension, your Honours, what matters, your Honours, is what was the mind
19 of Mr Ongwen and what was the mind of these women at the time Joseph Kony
20 imposed the rules on women. What did they think they were? What did people in
21 the LRA think?
22 P-28 again explains the rationale for Joseph Kony abducting women and children.
23 And this rationale, this reason given by P-28, who was again present when the rules
24 were made, shows that the specific intent is wrong, the *mens rea* is wrong. Kony said
25 that he was apprehensive that by the end of the war many of his people would die of

1 HIV and that, because these people are going to school, education has put in their
2 mind that they can become, they can -- young girls can go out with men, men can go
3 out, or out freely, so let them come and grow here. And according to Joseph Kony
4 and the way he interpreted the rules, you will see clearly. And I wish, if I have the
5 time, to reach out and I think I will find it and I will read out the impression, for you
6 to know, what he, what he clearly said, your Honour.

7 One minute, your Honours.

8 Your Honours, P-28, your Honours, and he says:

9 "While speaking in tongue Kony said that the Spirit ordered him that children be
10 taken to grow in the bush. Because many of the older people were going to die of
11 HIV and the spirits did not want the children to be infected. Because education
12 which had been brought had spoiled children before they are even mature, they want
13 to go out with men now or men, also the same thing, want to go out with women
14 before they were mature ..."

15 Dominic Ongwen, we submit, was a victim of this policy and he had opportunity
16 when they implemented the policy, and not a perpetrator of this policy. And you
17 have to look at the allegation against him within this context: What did he know?
18 At the time of his abduction he did not have any idea about sexuality, especially
19 within the cultural aspect of Acholi. And this is we in Africa, the Acholi included,
20 who have concerns about the question of morality among our children. This is
21 a perfect aggression. Kony had the same concern, but his remedy was wrong, was to
22 take them to the bush just to grow. And that is why he imposed stiff laws, very stiff
23 laws and a very rigorous regime for children growing in the bush for what he called
24 rape, execution and all whatnot. This is the person who was with him, present at
25 inception, this is what he says.

1 P-28 goes further to say both men and women would go quietly - when they are
2 distributed to them - even if they didn't want it because at least this way -- they will
3 go quiet, they will not complain, they will accept both men and women, they had no
4 choice because they want to be alive.

5 This was the regime, this is the rules, and when interpreting the rules, your Honours,
6 you should interpret the rules completely, not in the abstract.

7 Kony made the rules, but what is the full point of the rule? P-28 gives you a full
8 account, full account, and the motivation and how they were implemented.

9 Now, about the implementation of Kony's orders, your Honours. The amended arrest
10 warrant pleads the use of the radio. He also pleads the complete command structure
11 of the LRA, at least until when the severance of the case when, as lead counsel said,
12 did now dump everything on Ongwen as a scapegoat, a scapegoat so that the victims
13 of Ugandan can go. You have no remedy, you have no hope. Too bad for people
14 who have raised expectations to victims, that Ongwen, we have got Ongwen, there is
15 no need to look for Kony.

16 But, again, P-38, whom Kony gave a wife and he refused and Kony summoned
17 everybody and he knew that he was going to die, he accepted. Whom after
18 abduction of the girls, the girls were brought to Kony's location, he held some,
19 released some. Of course, Ongwen was not given any, but P-38 was given one and
20 he says that the moment you refuse a wife, Kony will call you and say that you want
21 to escape.

22 And about the disciplinary regime of Kony, make no mistake, he killed Otti Labongo,
23 he killed Vincent Otti. He would have killed P-205 himself. He told you Ongwen
24 saved his life. Imagine if every commander, because Ongwen, they were the one
25 saying go. And when Ongwen, at least Ongwen said, when he had become more

1 senior outside the time frame, how many witnesses came here and said but for
2 Ongwen we would be dead.

3 You heard the witness that said that Kony said they should go and attack Awach. Is
4 it Awich? Awach. Ongwen at that time told the people don't. Because Ongwen
5 was not involved, was -- the execution, the entire command structure had not been
6 activated. These orders were given to a different commander of a different unit.
7 Ongwen said no, if you have a way. Then the commander, they came back, but
8 when Kony has given his orders and he is watching with the IOs, internal officer,
9 whom the Prosecutor concedes were there watching, and Kony is there. And 440,
10 P-0440 said, when Kony has given an order, an operational order, okay, nobody is
11 going to be at peace until that order executed, if not, there will be dire consequences.
12 And you heard P-205 saying that when Ongwen had this contact with Salim Saleh,
13 Kony gave an order to Okwonga Alero to constitute a task force and go and kill
14 Ongwen.

15 P-05 was member of the task force to go and kill Ongwen. He was Prosecution
16 witness. That Okwonga Alero was to go and kill Ongwen. But later on, well, he
17 changed his mind to say because the phone was still there, let him come with
18 the phone. And brought him and put him in Control Altar.

19 You heard a lady commander in Control Altar who participated in the attack in Pajule
20 giving complete exculpatory evidence about Ongwen. She testified about women's
21 issue and the procedure in place to resolve complaints.

22 You heard evidence, Prosecution evidence, how Kony executed his chief intelligence
23 officer Agweng for raping his own wife. You heard evidence how Kony meted
24 punishment at every turn. You heard evidence of one of the commanders who fled,
25 and you asked him, your Honours asked him, the President asked him: You told

1 Ongwen you wanted to escape? He said yes. Were you not afraid Ongwen will go
2 and betray you to Kony? He said absolutely not, not the Ongwen that I know. But
3 that by the time I was escaping everyone knew that Ongwen was a deadman.
4 Ongwen would be killed at any time. Ongwen himself was aware that he was going
5 to die.

6 Remember that witness. When Mr Obhof wanted to ask him a question about what
7 happened in Central Africa, he said, no, I didn't come here for that. But he was very
8 categoric that Ongwen knew and everybody knew, every commander, that Ongwen
9 was a candidate to die. How do you know? That when Kony start talking to you,
10 and the way he was talking about Ongwen, everybody knew that Ongwen was in the
11 radar to die.

12 This is Prosecution evidence, your Honours. Men, women. Women came here, you
13 asked them: You have met Ongwen? How was he? They say Ongwen was
14 a good man. Ongwen was a commander but he would talk with everybody, he
15 would empathise with the condition of everyone. Showing that, where is the
16 *mens rea*? Someone who had the *mens rea* -- someone who has the *mens rea* to commit
17 these crimes would not have witness saying this. You saw witness after witnesses,
18 they wanted to greet Ongwen. They said, when we heard Ongwen had surrendered
19 20 of us rushed to Gulu to go and welcome him. But he was here.

20 You heard witness -- even majority, and Ongwen himself told me that Kony predicted
21 that one of us here will go to one institution in the world to talk about the, about the
22 LRA to the world. Now his prediction is right, Ongwen is here. But the difference
23 is that the image of Kony looms large in these proceedings, looms large even in this
24 courtroom.

25 If you look at the case the Prosecutor has submitted to your Honours, 75 per cent is

1 about Joseph Kony. Less than 10 per cent, 10 per cent about other, other people on
2 these close commanders, considering the defects, the defective notice and defect
3 pleadings, but only about 15 per cent is about Ongwen. They only bring in Ongwen
4 to say he is a (indiscernible) of Kony.

5 Now, did you have complete evidence in order to, by the Prosecution, for you to
6 ascertain that this Kony you are talking about? The focus was just Ongwen.

7 You have P-3 saying when the Prosecutor came to my office for the intercepts, I had
8 a lot of other information involving other commanders and other -- and the attacks.

9 The investigator said only one material about Ongwen. How do you do that in
10 a case where you are alleging multiple form of criminal liability, indirect
11 co-perpetration, common plan, common purpose, liabilities? How does the focus on
12 Ongwen prove the elements, even contextual elements and elements of this crime?
13 Ongwen along in this Court is meaningless, making this case a complete waste of
14 time. This is not how to lay a case.

15 And Honourable Ayena said one thing about the investigation. Take note, P-78,
16 who procured more than 40 witnesses, many of them who were former LRA
17 returnees, whom again he conscripted back into UPDF to continue their
18 victimisations. And I want the victims to know that the victimisation of your
19 witnesses was not just because they were LRA, but because some of them who were
20 victims were brought as victims back into UPDF.

21 And who did this? P-78. The Prosecutor's note showed that he was involved in the
22 scandal involving money from witnesses. The Prosecutor note showed he sat in
23 during investigations. But take note, his own report, which we have, showed that
24 Raska Lukwiya which, contrary to the Prosecutor, Ongwen remained the only senior
25 commander in Uganda, which is false, Raska Lukwiya was number three only to

1 Kony. He was the most senior commander. And the notes showed that he was
2 progressing to the safe passage, Ongwen. And their own investigators' notes. P-78
3 is saying that he got some of the returnees and some UPDF and they set an ambush at
4 Musheni (phon) hoping to kill Ongwen and Raska Lukwiya.
5 Of course, Ongwen, a child of God was not killed, he missed it. Raska Lukwiya died.
6 Here is a man, intermediary, who was supposed to help the Prosecutor to arrest
7 Raska Lukwiya and bring him to justice. Raska Lukwiya had a warrant on his head.
8 He was supposed to arrest and bring him. He chose to kill him.
9 Your Honours, I can go on and on. My time is up. I can only make one
10 impassioned plea, your Honours. You should not accept this victim to be used as a
11 scapegoat, as a sacrificial lamb for the inability of the government of Uganda,
12 the Prosecutor, or the ICC to bring Joseph Kony to book, to account for his crimes, in
13 which Ongwen would be a participating victim.
14 Your Honours, we urge you to acquit Ongwen for all the charges. Thanks, your
15 Honours, and I hand back to lead counsel.

16 MS LYONS: [12:30:25](Microphone not activated)

17 PRESIDING JUDGE SCHMITT: [12:30:26] Microphone, please.

18 MS LYONS: [12:30:31] Your Honours, give me a few moments.

19 I will do a half hour now, then lunch break at one, and then I still have 45 minutes, if
20 my arithmetic is correct. Let's see how I do.

21 As I stand before the Court today I remember standing here almost two years ago
22 when we opened the Defence case, September 2018. And as I was preparing, many
23 of my arguments were the same, so I will endeavour to make new arguments here to
24 discuss issues in the brief and, of course, to comment on issues which were triggered
25 or sparked by the briefs of the participants and the Prosecution and their remarks.

1 As my colleagues have eloquently stated this morning, we're in this courtroom
2 because Mr Ongwen surrendered himself. That's the reason we're here. And, in
3 fact, each of us have said it differently, but this is a proxy prosecution. This is
4 a prosecution, in my view, of the LRA and the proxy part is that Mr Ongwen is sitting
5 there and not Mr Kony.

6 I will not belabour this point, but I think it's an important point conceptually, but also
7 legally, in terms of how this process operates and what are its objectives.

8 Now, Mr Ongwen from the beginning, when he was asked to enter a plea in
9 December 2016, told the Court, "I am not the LRA." Each of us, as well as
10 the Prosecution, have referred to these remarks from December 6, 2016.

11 My concern is that the process of going through a prosecution of a child soldier is
12 objectively yet another victimisation of Mr Ongwen, our client, and I would extend it
13 by analogy to all child soldiers who should have been protected by Uganda under
14 international law.

15 Uganda signed the Convention on the Rights of Children on 17 August, 1990. They
16 acceded to the Optional Protocol to the Convention in 2002, which prohibited the
17 recruitment of child soldiers under 18.

18 At the end of the day, the person who will bear the consequences of this prosecution,
19 of this proxy prosecution, and bear any personalities if they are determined by this
20 court, will be Mr Ongwen.

21 I represent Mr Ongwen. I don't represent all the child soldiers in the world,
22 obviously. But I think that his prosecution, this prosecution does send a message,
23 child soldiers, and the issue is whether child soldiers should be held accountable for
24 the crimes of their captors, and in this case the captor being Joseph Kony.

25 Now, two years ago I remarked on Chief Prosecutor Bensouda's comments in their

1 statement on the International Day against the use of Child Soldiers. Here we are
2 more or less a year and a half or so later, my arithmetic is not good, but a month ago
3 again she made a statement on behalf of the Prosecution. She said that crimes
4 against children are abhorrent violations of fundamental rights, they shock our
5 collective conscience. We must act to protect them.

6 We concur with that sentiment.

7 And again, I would offer the tactical suggestion that we made in September 2018,
8 which is, given the tools at the disposal of the Prosecution, there is certainly, if there
9 were the will, there is certainly a way to have ended this prosecution, dismissed this
10 prosecution, withdrawn the prosecution. I don't know the exact terminology, but
11 one thing about the law in the Rome Statute is provides, if you read it broadly, tactical
12 options based on the law for all of us, for Judges, the Prosecution, and certainly for
13 the Defence. We use them. And I'm saying the Prosecution could have found
14 a way to take a different stance in terms of child soldiers and not prosecute
15 Mr Ongwen.

16 Now, the key issue on this point has to do with the age of culpability in the
17 Rome Statute, 18. And the argument which has been discussed by my colleagues is
18 that, when someone turns 18, whether at the stroke of midnight, or whenever, things
19 don't change. You don't become -- you don't -- I guess the word is metamorphasise,
20 you don't change from one thing to another.

21 And here we had testimony, I'm not giving evidence, but we had an expert who gave
22 evidence before the Court. He has been referred to as D-133. D-133 is a retired
23 UPDF major who himself had been abducted in the 1980s by the UPDF predecessor
24 organisation, the Lord's Resistance Army, and who now has worked for years with
25 ex-LRA. And his evidence is available, obviously, to your Honours, and it's also

1 public evidence. But the points that he made that are important to remember, are
2 that being a child soldier never ends. Its effects, especially the mental effects, the
3 psychological effects continue throughout one's life.
4 The second point, child soldiers do not act on their own volition. And this was
5 a point that was echoed in T, T-03's testimony as well.
6 And lastly, in the LRA, a child soldier is in captivity. He or she has no control over
7 his or her mind. There is no mental control. It is under the control of Kony. And
8 we want to emphasise the importance of this.
9 And in addition I would point out to your Honours, I know that we submitted, and
10 I believe that the participants or the Prosecution may have also submitted the report
11 on the psychological effects of child soldiering by Dr Elizabeth Schauer, which had
12 been used in the Lubanga trial as well to substantiate these points.
13 Now, this is a case of legal firsts for prosecutions in this international court. This is
14 a first prosecution here of a child soldier. It's a first prosecution of a mentally
15 disabled person in this court who is asserting mental disease or defect as a complete
16 defence.
17 To my knowledge, it is the first prosecution of a defendant where duress also is being
18 asserted as a complete defence against all charges.
19 And lastly, this is the first prosecution of a single defendant or accused person for 70
20 charges and seven modes of liability.
21 These first present legal challenges to all of us, obviously, but they also present
22 opportunities to the Chamber. And I only ask on behalf of the Defence that
23 the Chamber consider that today, as there is still in 20 countries approximately
24 a quarter of a million child soldiers, this Chamber can only rule on the allegations
25 against Mr Ongwen and the evidence. I understand that. But parallel to that,

1 especially today in an age of media and computers, et cetera, there is an impact of this
2 case and there is a message of what it sends. And that that's what I think we have to
3 talk about.

4 Now, we've argued from the beginning that violations of fair trial under Article 67
5 and international instruments have permeated this trial. The Prosecution said
6 we - it's probably true - we devoted 20 per cent of our closing brief to this issue. And
7 probably could have devoted, if we had -- more, if the situation were different. But
8 much of the record has been made and litigated. I don't want to relitigate here. But
9 I do want to just identify some of the areas, I am sure the Court is aware of them, but
10 so that others can have some sense of where the issues have arisen.

11 One has been in notice, defects in notice. There has been a series of pleadings on this,
12 including also on sexual gender-based crimes and the notice. Another area has been
13 on translation. Another area has been on burdens of proof. Another area has been
14 on the evidentiary regime. And another area has been on illegal pleas and another
15 area has been on the accommodations of the Court proceedings for a disabled,
16 mentally disabled client, as well as the fair trial rights which are associated to that but
17 are also separate.

18 One of the points which we want to emphasise is that the violations of the right to
19 counsel and right to remain silent started at the time of Mr Ongwen's surrender, and I
20 will talk about this in a moment.

21 I have also mentioned the smorgasbord of charges and modes of liability. We made
22 efforts through a no case to answer which was rejected to try to get the Trial Chamber
23 to pare down this list. I mean, it's probably not legal to say, it's not legal language to
24 say it's just too many for one person, but that's really what I'm trying to say. I mean,
25 you have to, you know, in order to defend yourself there has to be some clarity about

1 what the essential allegations are and essential modes of liability. But here it's just,
2 it's overwhelming in terms of exercising your right to fair trial and to defend yourself
3 against 70 times 7, 490 charges, if you want to do the arithmetic. That's what we are
4 faced with.

5 And I will also talk a little bit about the issues of the mental disabilities in a moment.
6 But what I want to say is that all of these fair trial violations, they are violations of
7 human rights and in the Rome Statute under 21(3), as we all know, the Statute must
8 be applied and the law must be interpreted to be consistent with internationally
9 recognised human rights.

10 Now, the Defence has consistently taken a position that the violations of human rights
11 are egregious, whether you look at them one by one individually or whether you look
12 at them in the aggregate collectively. However you want to mix and match, there
13 are violations of fair trial rights.

14 Now, when we suggested that the Court declare or order an immediate permanent
15 stay of the proceedings, this was not suggested without thought or seriousness. This
16 was not suggested lightly. It was suggested on our, based on our analysis looking at
17 the last few years, looking at the violations which started from the surrender, through
18 now. That it was impossible, in the words of I think it was Judge Fulford that
19 the Prosecution quoted from the Lubanga Appeals Chamber decision, it was
20 impossible to piece together the elements, the constituent elements of a fair trial. It
21 was just too much. It isn't possible. And this is a reason why we still maintain the
22 position, because stays, which are exceptional remedies, legally can be granted for fair
23 trial violations. And it's our position consistently, as we have argued and as we
24 have pleaded and as your Honours have no doubt read in our brief, that we have an
25 exceptional situation here.

1 Now, I want to discuss two of these violations right now. But I want to emphasise
2 that, contrary to the representations of the Prosecution, we are not basing the remedy
3 of stay for fair trial violations only on one or two violations, we are basing it on the
4 whole string of fair trial violations. And this is just important to emphasise in case it
5 doesn't come out as clearly as we want it to in our brief.

6 I would ask that the court officers place, there is a public annex to our brief on
7 violation of Mr Ongwen's right to counsel and his right to remain silent, I would ask
8 that you place it on the monitor. I am not going to go through it in great detail.

9 And I also want to say, I did not make this, it was made by Tibor Bajnovic. I wish I
10 could have, but if you could place it either on the evidence channel or the monitor.

11 My monitor doesn't work, so I don't know if anybody has it. Is it up? You have it,
12 all right.

13 So I am looking at the paper. But, basically, our position is that when Mr Ongwen
14 surrendered, the -- surrendered. Now I can't read it, I can't see it. That's all right.

15 But when he surrendered in January 2015 to a rebel group called Aboro, he spent
16 a number of days with the US special forces and then he was transferred to the UPDF
17 headquarters at Obo.

18 The proceedings at Obo, in the Central African Republic, were conducted at the,
19 quote, "behest" of the ICC, which is the legal language, the legal standard that triggers
20 the rights under Article 55 and, as we argue in our brief, there are rights under
21 Article 59(2) as well. So that what happened in Obo took place at the behest of
22 the ICC.

23 Now, what happened was -- and these, the events at Obo were clearly related to,
24 that's the second criterion, were clearly related to the ICC. So, at Obo, what
25 happened? Mr Ongwen gets there, he appears. He has no counsel, yet he is told

1 that he is an ICC indictee being held on the charges of war crimes. And
2 subsequently, there is information elicited from him about his surrender.
3 Now, at this point, as I said, there is no legal counsel, he is not informed of his right to
4 counsel, nor is he asked to waive this right. Now this was 14 January 2015.
5 So, essentially, what happened at Obo was Mr Ongwen was clearly a suspect who
6 was about to become a defendant. He was told there was a warrant for arrest there.
7 Now, about 30 minutes after this questioning of Mr Ongwen, he was asked for the
8 first time if he wanted the assistance of a lawyer, and then he was introduced to ICC
9 duty counsel.
10 Now, our position is that the right to counsel should have been implemented the
11 moment he set foot into the UPDF headquarters. I would also add that both Uganda
12 and Central African Republic, who were acting on behest of the ICC, are signatories
13 to the International Covenant on Civil and Political Rights which guarantees the right
14 to counsel. And while it does not, the ICCPR does not explicitly say this in their text,
15 the jurisprudence is that the monitoring mechanisms for the ICCPR have clarified that
16 right to counsel applies to suspects.
17 And, in addition, I point out that the same provisions hold for the African Charter.
18 So this is the very first example that we have of the failure, fair trial violation. The
19 failure of, the failure of the ICC to provide counsel and to alert -- notify Mr Ongwen
20 of his right.
21 The second point, which I will try to finish before lunch, related to this is the right to
22 remain silent.
23 Now, the bottom line here is that the Prosecution - it was ending in 1449 - submitted
24 a video of the transfer at Obo and what happened without counsel where Mr Ongwen
25 was questioned.

1 Now, the problem is that one of its experts, Dr Mezey, relied on this video, as well as
2 other material, to reach her conclusions that Mr Ongwen was not suffering from any
3 mental disease or illness. And this is testimony found at T-162, page 17.

4 Now, our position is that the video that was shown to Dr Mezey was obtained in
5 violation of Mr Ongwen's fair trial right to counsel and right to remain silent, and
6 therefore it's our position that it was not legally obtained, it was illegally obtained.

7 And pursuant to Article 69(7) of the Statute, evidence should be excluded which
8 would be, quote, "antithetical to and ... seriously damage the integrity of the
9 proceedings."

10 And it's on this basis that we've argued that Dr Mezey's subsequent evidence should
11 be excluded, because the video was not legally obtained and she admitted that it was
12 part of the basis on which she reached conclusions.

13 Again, here we have violations of our statute, the Rome Statute, but violations also of
14 international law consistent with the Rome Statute.

15 Now, the second issue I want to talk about has - let me just -- I am moving faster than
16 I thought - has to do with the illegal plea.

17 Now, I have talked about this a lot in our opening statement. It's available to
18 everyone. But I just want to emphasise two short points about it.

19 First of all, we start from the position that a plea must be voluntary, knowing and
20 unequivocal. And this applies to guilty pleas, but also to pleas of not guilty.

21 And at the December 6, 2016 hearing, it's our position that Mr Ongwen did not
22 knowingly -- did not in a knowing or informed way and did not unequivocally enter
23 a plea.

24 We rely on two things: One the transcript where he says very clearly, as a number of
25 people have discussed here, said he did not understand the charges as being brought

1 against him, they were being brought against the LRA. "I'm not the LRA."
2 And I would point out that approximately a month or so later, in document 1147,
3 even the Trial Chamber acknowledged that Mr Ongwen did not, quote, "give an
4 unqualified affirmation that he understood the charges." This is in paragraph 9.
5 Secondly, at the time the plea was entered Mr Ongwen had read, many months before,
6 the Document Containing the Charges, but the full copy of the confirmation decision,
7 which is the document on which the proceeding is based, had not been translated.
8 And we've also submitted records and evidence that shows that he did not receive
9 a full translation until seven days - either six or seven - days after, after the plea was
10 taken. So it doesn't make it possible for him to have, even if it had been translated,
11 to have understood everything there. He didn't have the material.
12 And lastly, I would reiterate that the charges were read out in court in that
13 proceeding but not the modes of liability.
14 Why do I make a big deal about modes of liability?
15 Because that's, the modes of liability are the allegations of how you allegedly
16 participated in the crime. Right. It's part of the charging document. So that this
17 information is critical to an accused to his understanding. So these are very
18 important points and why we would conclude entering the plea was illegal.
19 However, there's a second point which applies to Mr Ongwen, which is that, given
20 the notice by the Defence of his mental health issues, his inability to understand, in
21 our view, was compounded by this and they were not considered.
22 So that for these reasons we argue that the plea was not legally entered.
23 At this point I have two minutes, but if it's okay, your Honour, I would ask that I
24 could stop now and go on to the next subject after --
25 PRESIDING JUDGE SCHMITT: [12:59:06] It's okay. We have lunch break

1 until 2.30.

2 MS LYONS: [12:59:13] Thank you.

3 THE COURT USHER: [12:59:14] All rise.

4 (Recess taken at 12.59 p.m.)

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

6 THE COURT USHER: [14:30:11] All rise.

7 Please be seated.

8 PRESIDING JUDGE SCHMITT: [14:30:29] Good afternoon, Ms Lyons, you still have
9 the floor.

10 MS LYONS: [14:30:36] Thank you, your Honour. Sorry.

11 Thank you, your Honour, I will now continue for about 45 minutes and my
12 colleagues can watch the time for me.

13 I wanted now to talk a little bit about the issue of Mr Ongwen being a disabled client
14 and what that means both in terms of accommodation to his disability and also to fair
15 trial rights. There is an intersection of these rights.

16 First I want to mention that the convention on the rights of persons with disabilities
17 states that persons who are disabled must be accommodated, reasonably
18 accommodated. Under Article 2 of definitions it states that discrimination includes
19 all forms of discrimination, including denial of reasonable accommodation.

20 The Defence position, as we outlined in our brief, is not that there was no reasonable
21 accommodation, for example, in the sitting schedule to Mr Ongwen's disabilities, but
22 that it took eight months to get this accommodation despite the recommendations of
23 the detention centre, despite the pleas of the Defence, despite any evidence we may
24 have submitted in terms of the Defence experts. But as a whole, the question for us
25 was, it was slow. And this had a direct effect on Mr Ongwen, who was the person

1 who was mentally disabled, and his ability to meaningfully exercise his rights, his fair
2 trial rights of participation, assistance to counsel and other fair trial rights.
3 But what I want to focus on here is, and this shows where the reasonable
4 accommodation and fair trial basically intersect, is the most recent decision by the
5 Trial Chamber to deny what was called a Rule 135 examination. This was explained
6 by the Prosecution yesterday, that parties have the right to request examinations,
7 medical, psychological, psychiatric examinations of persons and the Trial Chamber
8 will rule on this.

9 Now this issue is particularly important because it involves fair trial. The right for
10 a defendant in any court to decide whether he or she wants to give evidence on his or
11 her behalf is a fundamental right. I mean, there's no -- there are no -- in my view
12 there are no ands, ifs or buts about it. It's black letter law, whatever it's called in law
13 schools, but it's there, it's as simple as that.

14 And here the Defence was asking that an independent expert, not Prosecution experts,
15 not our experts, but an independent expert be appointed to determine if Mr Ongwen,
16 who has been diagnosed with various mental illnesses, was able to even consider the
17 decision, make the decision, understand the consequences of that decision, whether
18 he wanted to testify or not. This is very different than I or my colleagues in the first
19 row as attorneys explaining to a client, you have the right to testify, this could happen,
20 this could not happen, explaining the consequences. But as a lawyer, given the
21 information that I had available and the team had available and that you heard in
22 terms of Mr Ongwen's mental state, not only from the Defence experts, but also
23 from -- confirmed fundamentally by your expert, Professor de Joop in 2016, it raised
24 flags about whether he was even able. And before I could even feel professionally
25 able to ask him the question, I needed to have, speaking individually as an attorney, I

1 needed to have an expert to tell me: Yes, he can make a decision; he can understand
2 the question; he can understand the consequences. That's all we were asking for and
3 this was denied.

4 Now, the result of this was that Mr Ongwen was placed in a position where he has
5 never been able to decide the question. He could not decide, Could I give evidence
6 or not give evidence in this case? So this immediate step was both a reasonable
7 accommodation, in our view, to a disability; and secondly, it ended up being
8 a violation of fair trial.

9 Now I want to distinguish this at this point, distinguish two things. The mental
10 disability is operating in this accommodation sphere in terms of how the proceedings
11 are going on and what Mr Ongwen's input or not is to those proceedings. It's
12 a separate question which you decide as to whether the evidence you have heard
13 meets the requirements of 31(a). I'm not talking about that. The Prosecution mixed
14 that up a little bit, and I think that was maybe what was referred to a day or two ago
15 as concept creep. I'm not exactly sure what concept creep is, but they're two separate
16 issues and I want to clarify that.

17 And this is the problem, that he has been denied this right and it's a fundamental
18 right.

19 At the same time, this decision was litigated and at one point on our request for leave,
20 the Trial Chamber stated that the accused may be mentally disabled, the fact -- the
21 question of whether the accused may be mentally disabled was never considered in
22 the impugned decision.

23 Now this implicates his rights under the Rome Statute Article 67 as well as his
24 (Overlapping speakers)

25 THE INTERPRETER: [14:37:45] Your Honour, could you please ask Ms Lyons to

1 slow down a little bit.

2 PRESIDING JUDGE SCHMITT: [14:37:51] Ms Lyons, I am asked to tell you to slow
3 down a little bit.

4 MS LYONS: [14:37:55] Thank you, your Honour. Okay. And I'm not wearing my
5 headphones so I didn't hear it. Thanks, your Honour.

6 His rights as a defendant were, his rights as a defendant were violated because he
7 wasn't placed in a position where he could make the decision whether he wanted to
8 testify or not and present evidence on his own behalf, and that's part of the rights
9 under Article 67(1)(e).

10 Now whether or not an additional examination, an additional medical examination is
11 required, has to meet certain standards. And you yourselves in decision -- okay,
12 decision 1412 talked about the sufficient indicia that were required to meet the test for
13 135. You talked about indications suggesting the existence of medical conditions
14 which may impact on the accused's ability to meaningfully exercise his fair trial rights
15 which the Chamber is unable to resolve without the assistance of one or more medical
16 experts. And that's at paragraph -- it's also in paragraph 12 at decision 637.

17 Now, this is a different standard than we heard two days ago from the Prosecution,
18 who said the only basis on which -- I'm paraphrasing -- the only basis on which to
19 request an independent medical examination is new facts or new evidence. That is
20 not the standard. Your Honours will look at this and will look at the issue carefully,
21 I know, but we are saying that the standard in fact was met. And the standard was
22 met not only by our experts, Dr Akena and Professor Ovuga, but by the
23 Court-appointed expert, Professor de Joop, and also by various reports from the ICC
24 DC. And I would like to point out I will not read from Professor de Joop's report, it's
25 a confidential document. There was some reading of it during the Prosecution

1 presentation. But I will say that we have talked publicly about the conclusions and
2 the three conclusions of depressive -- major depressive disorder, post-traumatic stress
3 syndrome, and dissociative disorders are all there and the first two for post-traumatic
4 stress disorder and for major depressive disorder are characterised, according to the
5 DSM categorisations, as severe.

6 Now, in the discussion of accommodation and disability and the rights of fair trial in
7 our brief, we used the term "disability blind spot" and the Prosecution position on this
8 a few days ago was there is no merit. Let me explain what I mean. I am raising this
9 as somebody who is physically disabled and has to watch herself because I miss
10 examples of access or physical disability to other people and I'm not paying enough
11 attention sometimes to mental disability. Why? Mental disability is invisible. It's
12 as simple as that. It's hard to see.

13 We have had testimony from our experts that diseases and their symptoms do not
14 show themselves 24/7 every day. The experts from the Prosecution, certainly
15 Professor Weierstall-Pust and I believe Dr Mezey, talked about fluctuation of
16 symptoms. They come and go. So that a person who has a mental disability is not
17 wearing it on his or her, you know, a sign on his or her body, it's not on the T-shirt, "I
18 have a mental disability". It's not there. It's hard to see.

19 And so that's why we concluded that sometimes when the Trial Chamber appears to
20 us to not be looking at the disabilities of the client and not accommodating them fast
21 enough or not believing there is merit to them, they were saying there may be, they
22 may not be seeing the whole picture. It's as simple as that.

23 And as I said, we know -- I know what -- I know what the disability blind spot looks
24 like and feels like and we all of us have it for different things, but I'm saying that it
25 was just a question of the awareness in terms of what has to be done in this situation

1 and that's why we raise that issue.

2 Now I would like to move on to the issue of the burden of proof of the affirmative
3 defences.

4 We concur with the Trial Chamber's position in decision 1494 that an accused must
5 never be required to affirmatively disprove the elements of a charged crime or a mode
6 of liability as it is the Prosecution's burden to establish the guilt of the accused
7 pursuant to Article 66, pursuant to reasonable doubt.

8 Now, at the same time, the Trial Chamber decided that the interpretations of the
9 applicable law on the defence, the burden of proof for the affirmative defences would
10 be made in the judgment. Now we have litigated this. We have lost. But I want
11 to say the reason that we have been pursuing this is it's impossible, I mean, it's
12 impossible to effectively act in the dark, we are -- essentially we have been operating
13 in the dark as to what the burden of proof, whatever it is that you decide you will
14 apply to the affirmative defences which are a huge part of our case.

15 Now, we understand that this is not a free-for-all, the evidence, right? We
16 understand that both sides and also the participants present evidence to you, that's
17 one step, and at the end of the step you make a decision on the evidence. That is
18 a given. But what filters that evidence in between, that middle step, is the burden of
19 proof. And that is the reason why we have been so adamant about finding out
20 before we presented the end, or later if we had to, what is the burden of proof that
21 you are going to apply? Because then we may choose other evidence, we may
22 decide it's not worth wasting the Court's time or anyone's time here to present X
23 when Y is what's needed to support the burden of proof. But we have no way to
24 decide that without knowing what that burden of proof is.

25 So we don't have the legal guidance on this from the Trial Chamber and essentially

1 we are operating in what seems to us as a legal quagmire, which prejudices
2 Mr Ongwen's right to a fair trial.

3 Now, in their briefs, both the Prosecution and the Common Legal Representatives for
4 the victims have taken up this issue. In the Prosecution brief paragraphs 380 and 476
5 deal with the issue of the burden of proof. The position they take is basically that
6 nobody bears the burden of proof. They don't bear it, we don't bear it, no one bears
7 it. All right?

8 Now, I think that this confuses in their reasoning in that paragraph the applicability
9 of Article 31 and the burden. We understand the Chamber has the power to apply
10 the law, that's the Bench's, that's the Bench's role. But that's different than making
11 a decision and giving legal guidance on the burden of proof.

12 So we are now still here today in our closing arguments not knowing what is the
13 burden of proof that you will apply for the -- for the defences of mental health
14 defence and duress for the affirmative defences we presented.

15 Now, admittedly, the Rome Statute is not so clear on all of this. It's a little bit
16 ambiguous. But generally, where there is ambiguity, due process requires that the
17 resolution be in favour of the accused and the Rome Statute has adopted this
18 principle in Article 22(2) which basically says where there is an ambiguity in terms of
19 crimes and we would apply it to modes of liability and also to affirmative defences
20 that it should be resolved in favour of the accused.

21 Now the reason we are applying it also to affirmative defences, although it's not listed
22 there, is that like crimes and allegations of crimes, affirmative defences that go to guilt
23 or innocence, or you can change the wording, exclusion of criminal liability, but it
24 ends up being the same thing.

25 As also Article 67(1)(i) says there is no reversal of burden on the accused. This

1 would be a violation of fair trial rights. There is no onus on the Defence.
2 Now, the Prosecution says in its brief that the Trial Chamber decision has
3 acknowledged that the provisions have not been fully fleshed out by the Court.
4 That's true. But this does not say that no party has a burden, and that's what we are
5 talking about. So that the question of what is the burden is different than what is
6 applicable. And lastly, the issue of the Trial Chamber to decide, that isn't even
7 a question. That's what we want but we want a decision. Now at paragraph -- we
8 wanted a decision during the trial.

9 Now the Prosecution on the same subject at paragraph 397, they appear to reverse
10 themselves. First, they have been saying, nobody has a burden, you don't have
11 a burden, we don't have a burden, okay? But in paragraph 397, the last sentence
12 says -- and they are talking about mental disorder, mental disorders during the,
13 during the time of the alleged crimes. Their last sentence reads, "No such
14 explanation has been advanced." Those - one, two, three, four - those five or six
15 words are placing a burden on the Defence to explain. In an affirmative defence, yes,
16 we have to present evidence to say -- to show why we think it exists. That's all we
17 have to do. That triggers the subsequent steps. But that is not a burden of proof.

18 Now, the CLRV similarly at paragraph 157 of their brief, they take the position that
19 the burden rests with the Defence because what they say is that -- and this was
20 repeated in the real-time transcript yesterday at page 53, none of the grounds for
21 excluding criminal liability have been proven by the Defence.

22 In sum, it's repetitive, but we have no burden, we have presented evidence to show
23 that the mental disease or defect existed and existed and existed during the time of
24 the charged crimes, and now it is up to the, in our view, up to the Prosecution to
25 disprove that defence, each and every element of it, beyond a reasonable doubt.

1 Now, the Prosecution's interpretation of this issue of burden seems to carry over to
2 their interpretation of some of the elements of the affirmative defences. At
3 paragraph 380 the same one, they say, the Prosecution adds only that the use of the
4 word "destroyed" in Article 31(a) implies that absent such destruction, an accused
5 person is presumed to possess the capacity to appreciate the unlawfulness or nature
6 of his or her conduct and the capacity to control his or her conduct to conform to
7 requirements of the law.

8 Now there is no footnote there. And it's our position that this conclusion was just
9 made up by the Prosecution. We don't have a source. We don't have a footnote.
10 We would argue that there is no presumption, as they say, that an accused person is
11 presumed to assume the capacity here.

12 We would argue pursuant to Article 22(2), again, that the elements have to be
13 interpreted *in dubio reo* in the light most favourable to the Defence, in favour of the
14 Defence. When in doubt, this is the strict construction that is required by the Rome
15 Statute.

16 Along the same lines the CLRV also adds another criterion, in our view, to the
17 requirements of 31(a). I don't have the paragraph here at the moment, but yesterday
18 the representative talked about the severity of mental illnesses basically as a criterion
19 for the defences. Now the Statute at 31(a) talks about capacities. Capacities are
20 very different than severity. And I simply call this point to the attention of the
21 Judges, again, using the authority of Article 22(2). These are two different things.
22 Now the issues of the defence, 31(a) and (d), 31(a) and (d) are separate. There is
23 no -- yesterday -- withdrawn. Yesterday -- or two days ago the Prosecution
24 presented a scenario where if the Judges -- they were suggesting, if you don't find
25 31(a), then you go to 31(d). There is nothing in the Statute that says under 31(1)(a),

1 (b), (c) or (d), that any of the situations -- any of defences, rather, here are in the
2 alternative or that you move from one to the next to the next to the next. They are
3 separate, they stand independently, and I think as a matter of law and an analysis,
4 that has to be a starting point for evaluating the evidence that we have presented.
5 Now is there a relationship? Yes. I discussed this in the question of the plea, ability
6 to understand. It's raised in the proportionality criterion which raises the issue of
7 intent and ability to form intent under duress. So, yes, there is a relationship. But
8 that does not mean that you start with 31(a), as was suggested, and if you don't reach
9 that, then you move to 31(d). And to complicate perhaps the scenario of the
10 Prosecution, we would assert that each defence, the mental health defence, as well as
11 the duress defence, in and of its own right is a complete defence. So that is, that's
12 our position there.

13 Now, one moment.

14 Now I would like to move on a little bit to the mental health section in my last 15
15 minutes. Now you have heard extensive testimony from our experts, their experts,
16 there were experts on some issues from the victims, there was -- you have heard a lot
17 of testimony, there have been extensive reports as well as from your own
18 Court-appointed expert, and this has been reviewed in the brief quite extensively.
19 I want to just focus on a few points here. First of all, I would like to reiterate that
20 both our doctors, our experts and Professor de Joop -- I'm sorry, de Jong - Joop is his
21 first name - de Jong unite, concur on the fundamental three diagnoses which are
22 major depressive disorder, PTSD, other specified dissociative disorders. And in
23 respect to the dissociative disorders, our experts identified both identity disorders
24 and later amnesia disorders and in addition they identified symptoms of obsessive
25 compulsive disorder. Both talked about depersonalisation and derealisation in their

1 reports and as well as cautioned against a high risk of suicide in Mr Ongwen.
2 Now our experts concluded that Mr Ongwen's mental illnesses stemmed from his
3 abduction in 1987, continued through the years in the LRA and still plague him today.
4 The continued through the years of the LRA includes the charged period. They were
5 asked to make conclusions about his mental health during the charged period as well
6 as before and after. They were not asked to say what was his mental health for this
7 criminal allegation (a), (b), (c) or (d). That was not the mandate. Nor, as I think
8 Dr Akena expressed, this was not their expertise. Their expertise was to assess
9 mental illness.
10 Now I'm sure that everyone who heard the testimony remembers Dr Akena's vivid
11 description of the trauma to which Mr Ongwen was subjected probably in the first
12 months in the LRA where he was asked -- or where he was forced to skin a person
13 alive. The person was an abductee who had tried to escape. And this is detailed in
14 Dr Akena's testimony in T-248.
15 Now, the Defence experts further concluded that these mental diseases and illnesses
16 made it impossible for Mr Ongwen to formulate intent in a sense that he could not tell,
17 he didn't have the judgment to tell right from wrong and he didn't have the capacity
18 to understand what he was doing in relationship to the law, conformity of the law.
19 Now there were some specific examples in their reports. They talked about when he
20 depersonalised and when he disassociated, he could not control himself. They
21 concluded that while in the bush, which was during the charged period, he did not
22 appreciate that what he was doing, his conduct was wrong. And they chronicled his
23 involvement in the crimes of the LRA under the influence of dissociative episodes.
24 They talked about, in both reports, two distinct personalities.
25 So essentially Mr Ongwen, one person, one physical body, was operating, in their

1 professional expertise, two people. These two personalities were identified
2 differently, gradually based on information, but this was from the inception, the
3 information that was presented.

4 And I would quote what they said, especially with dissociation, it is difficult for an
5 individual "to choose right from wrong under a pressing and life-threatening stressful
6 experience. During an episode of dissociation, an individual automatically (without
7 deliberate conscious awareness) assumes another personality for whom mental
8 capacity to know right [and] wrong does not exist."

9 You have the information before you and you will make a judgment on this. We
10 acknowledge, as Judge Schmitt eloquently pointed out, that there is always a problem
11 of going back in time with forensic psychiatry. This was a problem which our
12 experts were well aware. One has been involved in forensic psychiatry since the
13 eighties, so you can calculate the amount of time.

14 But based on the expertise, their expertise and their interviews with the client, their
15 interviews with other sources, their review of the materials they were able to access at
16 the detention centre, they put together two reports, which you have read and which
17 clearly, in our view, make out the case under 31(1)(a).

18 Now the last two issues on this point I'm going to deal with and close up is the issue
19 of malingering. Malingering has reared its, as I say, my view, ugly head, but it's
20 reared itself again in paragraph 403 of the Prosecution brief. And basically we again
21 have the charge, the Defence experts, according to the Prosecution here, failed to use
22 psychometric testing to rule out malingering according to best practice, and the
23 footnote of best practice is Professor Weierstall-Pust.

24 Now I'm not going to go through the examination and cross-examination again. I
25 don't have time. But the point is our experts explained that they had ruled out

1 malingering and the basis on which they did it. Yet, the Prosecution keeps up with
2 its mantra: No psychometric testing means bad methodology. And we have to
3 conclude that part of this exposes on their part a cultural blind spot because in fact
4 there have been articles, for example, in 2006 by Ardila, A-R-D-I-L-A, which talked
5 about cultural values underlying psychometric testing.

6 I'm not an expert in psychometric testing, all right? It's used in mental health, it's
7 used in employment, it's used all over the place. But take a look at what has been
8 produced in terms of the literature. Routledge has a book on this, cross-cultural
9 neuropsychology. All I'm saying is these are important considerations as to whether
10 you use and when you use psychometric testing and what is the context. What is the
11 culture in which you use it? What does it mean that instructions are given certain
12 ways in cultures in western countries, in African countries, in Asian countries? And
13 I could go on and I don't have the time. But this is the issue.

14 The DSM recognises the need to talk about culture related diagnostic issues. We
15 don't have any disagreement about that, but it's important that this be dealt with, I
16 think, head on and that's why we are raising it now.

17 I also have to say again at paragraph 406 the Prosecution makes a sweeping point that
18 the Defence says that cultural differences undermine expert opinion. This was never
19 said. There was testimony from our experts refuting this, but it's important to repeat,
20 it's important to repeat they talked about the fact that they may share a cultural
21 affinity or the same culture as Mr Ongwen that helps them to understand or to talk to
22 Mr Ongwen, but in terms of making a diagnosis, this was not the determinant factor.
23 They have looked at other criteria that are recognised within the profession.

24 Now we concur with the CLR brief on this point: At paragraphs 33 to 35 they say,
25 importance is placed on culture -- they say, excuse me, that "cultural dimension

1 presented ... ought to be taken into account in the [Trial] Chamber's assessment of ...
2 testimonies [which it has] heard ...". So I think that, you know, culture obviously
3 plays a role, but it is wrong, it's wrong for the Prosecution to keep saying that the
4 Defence experts say that culture is the key factor, the only factor in terms of diagnosis.
5 It's simply wrong. But I rely on the record from our witnesses.
6 But the bottom line is, look, whom do you believe? You have heard the witnesses.
7 You have three experts from the OTP, two from us, and then you have Professor -- the
8 Court-appointed expert. So this is really -- that's really a question at the end of the
9 day.
10 And I ask you especially, you heard Dr Akena and Dr Ovuga in this courtroom the
11 last few weeks in November and then during the rebuttal case, and the bottom line is
12 do they appear to be psychiatrists whom a patient, if he or she were malingering or
13 exaggerating or trying to get some kind of benefit, do you think that that person, that
14 patient would succeed in getting over on Dr Ovuga and Dr Akena, in tricking them,
15 in making them believe something that cannot be justified scientifically and based on
16 their observations? And that is really the decision, I think, with all due respect, that
17 has to be made in terms of the, in terms of the experts. Our position is, no. The
18 answer is no. But it's not for us to decide. This is up to the Judges.
19 And lastly, on this topic, as I come to the end, I cannot -- I have to respond to the
20 real-time page 74 attack from the Prosecution on the Defence experts. Because it
21 isn't professional and it's disrespectful. The Defence experts, according to the
22 Prosecution, quote, "seem to have gone to pains not to make themselves aware of ...
23 voluminous testimony of Mr Ongwen's behaviour given in the courtroom", continues
24 and says a few words, then "They wilfully or negligently cut themselves off from
25 a vital source of [information]". The attacks of wilfulness and negligence, in my

1 view, have no place in this debate. Principled disagreement about conclusions,
2 methodology, observations, that's part of what this is about, but attacks on wilfulness
3 and attacks on negligence become personal and they should not be considered, this
4 point should not be part of these proceedings.

5 I have one minute to finish. And I think at the end of the day, it's going to be
6 necessary for those who are judging the case to put themselves in the shoes of
7 Mr Ongwen, in his mindset, in the environment of the bush. And for many of us
8 this is simply not possible even to fathom, but it is the task that those who are judging
9 this case I think may have to undertake.

10 Mr Ongwen is not just a person sitting in the back flanked by security officers who
11 has been here for a couple of years, whose mental health has been analysed and
12 dissected, talked about in front of him, collectively by five experts at least, he's
13 a victim. In his own words, he says he survived the LRA prison. Those are his
14 words, which he agreed I could use. This controlled his life for 27 years and he
15 survived and he will survive the process however it ends.

16 And it's now actually in your hands.

17 We have of course asked for acquittal on all counts based on our affirmative defences,
18 but if the Trial Chamber reaches any verdict of conviction, we are also asking, which
19 lead counsel will elaborate on, we will be asking the Chamber to suspend punishment
20 and return Mr Ongwen to Acholiland in the care of the elders so that traditional
21 mechanisms of *mato oput* can be implemented. It's the Defence's view that this
22 would best serve the interests of justice for Mr Ongwen and for the community of
23 which he is a part. And for the ICC, it's also our view that this would demonstrate
24 its spirit of complementarity and cooperation with the existing cultural processes.

25 Thank you.

1 PRESIDING JUDGE SCHMITT: [15:17:16] Ms Lyons, please close your microphone.

2 MS LYONS: Sorry. Thank you.

3 MR AYENA ODONGO: [15:17:22] Mr President and your Honours, I'm up again,
4 but I want to thank my colleagues for their very competent presentation for part of
5 this morning and part of this afternoon.

6 Mr President and your Honours, we have had a long walk and we are at the end of
7 that walk. Before I lose track of what my colleague Lyons Beth has just said, I just
8 want to add this. She said you have heard from nearly five mental health witnesses.

9 I want to add that, Mr President and your Honours, you also heard from cultural
10 leaders from Acholi and Lango. You also heard from *ajwakas*, so to speak,
11 spiritual -- cultural spiritual practitioners, and because of that angle of
12 interrelationship between culture and, you know, mental health practices, that should
13 be taken into account when, I mean, when the experts are dealing with, you know,
14 mental health, I think it is relevant for you to seriously address your minds to what
15 they said.

16 I will immediately turn again to my client, Mr Ongwen. That boy. I want to
17 constantly call him a boy because from my earlier submission he has had a such
18 disjointed life that the wheels of his life stopped on the day he was abducted.
19 He's just attempting to rejoin the trail of life again, but alas, when he finally found his
20 way out of the bush by risky escape and handed himself over to the authorities,
21 instead of now rejoining him with his society, Ongwen has found himself here.
22 This boy has served 27 years in Kony's incarceration. He has been here,
23 your Honours, for five years already, and I don't know for how much longer after this
24 trial and possibly an appeal he will remain here. By the end of this process, and God
25 forbid if he should serve some sentence, the best part of his life will have gone.

1 He didn't choose it, like I opined before. The choice was between Kony and the
2 government of Uganda. Complemented by the contributions of the international
3 community, we call upon you to look at him with pity.

4 Mr President, of course I will add a bit to that when I make my submission about our
5 prayers, so to speak.

6 Mr President, I will address a subject which has not been canvassed in this room very
7 much, the question of superior orders -- I mean -- yes, superior orders. But when
8 you talk about superior orders, there is a -- I want to submit there is a relationship
9 between superior orders, there is a linkage, I mean, superior orders, duress, mental
10 disease and defect as well as mistake of fact and law. And this is well captured
11 under Article 33 of the Rome Statute.

12 And, your Honours, the argument is that when you are considering the question of
13 superior orders, duress, and so on and so forth, like I said, you must consider
14 provisions which deal with the list I have given in a comprehensive manner.

15 Your Honours will remember that the concept of superior order, the world has
16 grappled with the concept of superior order for a long time and especially after
17 the -- I hope I'm not -- I have now fallen back to my problem again, speaking fast, but
18 the way I looked at the Presiding Judge, critically looking at me, maybe I have
19 understood, sir.

20 At the Nuremberg trial, as everybody who has been following legal arguments will
21 remember, they came up with a position that superior orders is no defence, and
22 people have been arguing back and forth, back and forth, until when this idea finally
23 came at the establishment of this Court. And a colonel in the UK army, said, well,
24 this is now -- he commented that the poisoned chalice was transferred to this court. I
25 mean, to the diplomatic conference that was dealing with the question of drafting

1 Article 33.

2 I now say, Mr President and your Honours, that that poisoned chalice has now been
3 passed on to this Court. Because the biggest question about that concept was, is
4 superior order a complete defence on its own, or is it just a relevant factor to duress,
5 to mental disease and defect, to the question of law, I mean, law and fact?

6 And, your Honours, under Article 33(1) superior order is a factual -- the question was,
7 is superior orders a factual element relevant to other defences, particularly duress?
8 This is what we want you to attend to.

9 It is a fact, your Honours, that because of his spiritual attributes, omnipotent and
10 omnipresence, and more importantly because Mr Ongwen believed them,
11 Joseph Kony's superior orders constituted duress. We submit that, therefore,
12 Mr Ongwen did not have to see a cocked gun aimed at him to apprehend imminent
13 danger. It is enough that he believed in Kony's through -- I mean, the spirits, he
14 believed in Kony's ability to be present with him at any one time through the spirits.
15 Hence, the correlation between superior orders and duress.

16 It is also a fact, your Honours, that Mr Ongwen suffered mental disease and defect, as
17 has been enunciated here, because of the pressure upon his mind exerted by the
18 superior orders of Joseph Kony, woven around spiritualism. This was also the same
19 for his mistake that it was, and this is a mistake of fact, he believed that, you know, it
20 was the ten commandments, and the orders that came from the ten commandments,
21 that was the law. And we -- I emphasise this because, you know, the concept of
22 superior orders, which has now been planted under Article 31(1), is only allowable on
23 two conditions. Condition number one is that the person was under a legal
24 obligation to obey the superior orders, and then number two, that he actually
25 believed.

1 Now, when you talk about legal obligation, in the LRA, your Honours, you wanted to
2 find out when -- if you are asking was Ongwen under legal obligation, you want to
3 find out what legal obligation. Because legal obligation would seem to connote that
4 he is bound to comply as a matter of obedience under a certain body of laws.
5 I am under legal obligation because of my professional standing to my client because
6 there is a law that binds me to that. How about Ongwen? Your Honours, we want
7 to hazard to say that the law that Dominic Ongwen knew was the ten commandments.
8 The ten commandments and what in ordinary legal parlance would be called the
9 legislation, subsidiary legislations of Kony that emanated from the spirits or the
10 spirits said it will be done like this, the rules and regulations that were set according
11 to the ten commandments. And don't be misled. When we talk about ten
12 commandments it appears it's a holy thing and if you were to follow the Ten
13 Commandments, thou shalt not kill, thou shalt not covet another man's wife, and so
14 on and so forth. That sounds so fine, but that was not the case in the LRA. The ten
15 commandments that Kony put in place was to be understood according to his own
16 interpretation. And this boy was captured at the age of about nine, he had not
17 known about any other law, because at that point he's not presumed to know law at
18 the age of less than nine. And so he was to be made to know -- he was made to
19 know that the only law available in the world are the ten commandments of
20 Joseph Kony.
21 So I indulge you, your Honours, to take cognition of these facts when you're dealing
22 with the question of whether Ongwen was under a legal obligation.
23 I submit that he was, yes, under Kony, under a legal obligation - according to Kony's
24 law applicable in the bush - to obey those orders. Because Kony had set his own set
25 of dos and don'ts and if you didn't do according to what Kony told you, you died.

1 And many died because of that.

2 Mr President, I would like to say that the Prosecution totally failed - let alone
3 attempted - to prove that Mr Ongwen was not under a legal obligation to obey the
4 superior orders of Joseph Kony.

5 Secondly, Mr President, the Prosecution failed totally, let alone did not even attempt
6 to prove beyond reasonable doubt, that not only did Ongwen know the order was
7 unlawful, but that he also knew that the order was manifestly unlawful.

8 Mr President, and your Honours, it behoves this Court, first of all, to come out with
9 a clear definition as a matter of international criminal law -- international criminal law
10 jurisprudence as to what, in these circumstances, is meant by manifestly unlawful.

11 Manifestly unlawful.

12 Is it the point -- is it the case that it should be manifestly lawful (sic) according to
13 international law in the context of LRA or -- what is it? And when you talk about
14 unlawful, unlawful according to which law? These are some of the questions you
15 will have to ask yourself.

16 To me, I studied law, but I was never faced with this kind of situation. If some
17 people went -- I mean, for instance, the slaves who were taken to the US, I know that
18 finally they were -- they belonged -- I mean, they had to comply with the US laws, but
19 I'm sure deep in the jungles where they were taken to, you know, plantations and so
20 on and so forth, those people had exclusive, you know, treatment of the slaves.

21 Did they have to stand, you know, up and say, "But you know, according to the law
22 of the United States, I am not supposed to do this. I -- you're not supposed to beat
23 me." That, I mean, these are some of the comparisons we shall have to make.

24 Mr President, in the circumstances, I would say that Dominic Ongwen was
25 under -- was all the time obeying a superior order. And you know, in the case of the

1 Nuremberg trial, they rejected the question of superior order just because -- it was
2 mainly based on the fact that if they were to allow that, then it would boil down to
3 only one person being held responsible, that was Hitler.

4 But you know the factual situation in Germany then and the international community
5 was completely drastically different. First of all, that was a regular army and they
6 knew the laws of war, but in a situation like the LRA, and especially a child soldier
7 who was arrested -- who was captured when he had not exposed himself to the
8 goings on in the legal world, how was he expected to know?

9 If you were talking about Vincent Otti, you're talking about Banya who had originally
10 been in a regular army, at least, we'd say, "Yes, but these people knew." But a child
11 like this, nine years, never exposed to any other thing and he was indoctrinated and
12 brought up by the hand, so to speak.

13 You will have to, your Honours, find out that he did not -- I mean, he was bound by,
14 you know, superior orders, I submit.

15 Mr President, your Honours, on the question of sexual and gender-based violence, I
16 invite you to studiously look at each element of those crimes and determine as to
17 whether any of those charges, the way they were framed, stand.

18 For instance, when you talk about sexual slavery, sexual slavery - according to the
19 elements of crime - connotes exclusivity. Connotes ownership. Exclusivity in the
20 context of marriage, for instance, it means that you should -- it is -- you determine the
21 fate of that person. Nothing happens to you whatever you do to -- because it's your
22 possession. She is your possession.

23 But evidence was led here, your Honours, by which it was said, if it was reported that
24 you are irresponsible, you are disturbing a woman, Kony had the power to remove
25 the woman from you and allocate -- and reallocate, so to speak.

1 It is up to you to decide whether that connoted exclusivity. In the -- you know,
2 Kony dehumanised the womenfolk so seriously that they were just like chattels. He
3 would allocate and reallocate. So they are, I mean like chattels. You didn't own
4 them -- actually, they were the property of LRA. You kept them at the pleasure of
5 Kony.

6 To me, your Honours, I would strongly suggest that you find that there was no sexual
7 slavery. There was no sexual slavery.

8 And intercepts -- I now go to intercepts.

9 Sorry, we -- I wish that you had allocated us more time, Mr President, but that is now
10 neither here nor there. But Mr President, when we talk about -- first of all, the
11 Prosecution at their opening said more than -- their case remain -- I mean, will
12 depend on more than -- I mean, 50 per cent of their case will depend on intercept
13 evidence.

14 We have seriously attacked the intercept evidence and I think fatally injured them.
15 Supposing -- I mean, I'm just posing this question, supposing according to law,
16 because I'm not according it to me, according to the law of evidence, this intercept
17 evidence collapsed. And yet by definition, if you have to prove something beyond
18 any element of reasonable doubt, it means that you should prove them beyond 50 per
19 cent. Are they suggesting that their ... I would suggest that their case should
20 collapse with the collapse of the intercept evidence.

21 And this is my last word on the intercept evidence. Mr President, you heard from
22 the witnesses, some of who actually recorded the intercepts. They described to you
23 where they were recording from, the type of machines they were using, they said it
24 was -- and the confusion which was at the Gulu office, people were fighting for
25 position and we established -- because we kept on interviewing them here so that

1 they may actually tell us that they were at war with one another. And because they
2 were at war with one another, you cannot ignore the possibility that there was the
3 destruction of documents in order to undermine the other. This is both for the
4 recorded tapes and also the logbooks. Volumes - of some of these in there, 600 and
5 so on and so forth - were transferred to Kampala.

6 I want you to critically examine the principle of chain of custody. The colonel who
7 came here - and he's in the CMI - told you how he kept them. Spread them all over.
8 And when it became necessary for them -- for him to pick some to bring to -- I mean,
9 for this case, he sampled some of them. And the way -- when we asked them, "Were
10 they safely stored?" He was not sure about it. Actually said, "It was not very
11 safely -- they were not safely", you know, "stored". And then their transmission
12 from wherever. All these are important to consider.

13 We put the question to an expert who was brought here:
14 Is it possible to transpose a section of, you know, a speech between two peoples in
15 a different situation and then cut and put it on another disc, so that it appears like it
16 was on the same day?

17 He said: Yes, it is possible.

18 Mr President, I'm saying you should be careful about this.

19 And last but by no mean least, that boy lost his mother. Lost his father. Lost some
20 of his relatives to the very war that enslaved him. When you're passing your
21 sentence, think about him in that context. He's an orphan. His society needs him.
22 His siblings need him. The community needs his leadership.

23 And My Lord, I say that you should find him not guilty. And if you find him not
24 guilty or whatever the case, should you be inclined to find him guilty on some
25 charges, our prayer is that you give him very substantially a reduced sentence.

1 He has already served more than 30 years of prison. You can't add a lot more than
2 that. And I hope, in the circumstances -- and the good thing is, my colleagues on the
3 other side do agree that for the limited purpose of mitigation, they would say yes.

4 The traumatic experiences count. So you can take a cue from that and use it
5 to give a ...

6 And then my last word. We have written to you a proposal in our brief to say in the
7 event that you are inclined to convict Ongwen, please release him and send him to
8 serve part of his sentence or the whole of his sentence at home under the supervision
9 of Acholi traditional leaders.

10 And this does not in any way contradict the Rome Statute. In fact, my sister, Lyons,
11 has put it very well. The Statute -- this Court is a complementary Court. Is a
12 complementary Court. One of the ways you could express to the international
13 community that this is a complementary court is to have a linkage with the system
14 back at home. You will have done so many Christmas ceremonies for the people of
15 Acholi and the affected people of Uganda.

16 The question of the directional finding, I will not go into it because I -- is it my ...

17 PRESIDING JUDGE SCHMITT: [15:47:09] You still have 13 minutes, I --

18 MR AYENA ODONGO: [15:47:10] Can you imagine (Overlapping speakers)

19 PRESIDING JUDGE SCHMITT: [15:47:10] -- I do not say --

20 MR AYENA ODONGO: [15:47:11] Can you imagine --

21 PRESIDING JUDGE SCHMITT: [15:47:12] -- I do not say that you have to use them.

22 I simply state that you have (Overlapping speakers)

23 MR AYENA ODONGO: [15:47:14] (Overlapping speakers) You know --

24 PRESIDING JUDGE SCHMITT: [15:47:15] -- 13 minutes.

25 MR AYENA ODONGO: [15:47:19] Mr President, you know that I would

1 want actually two more hours, so I can sacrifice 10 minutes.

2 PRESIDING JUDGE SCHMITT: [15:47:30] As I have said, you have still 13 minutes.

3 Not two hours, but 13 minutes.

4 MR AYENA ODONGO: [15:47:36] Very well. Thank you.

5 So Mr President, the question of what punishment you come with to give to Ongwen

6 is not exclusively provided for under the Rome Statute. The principle of

7 complementarity empowers you to think outside the box.

8 Yesterday, Mr President, was it on Tuesday? The Prosecution, through

9 Mr Colin Black, my friend Colin Black - who the other day I said he's not black after

10 all, he's a friend here - he said that: You know, you made a decision on the

11 directional finding to say that, you know, they were unreliable and therefore they

12 cannot be used.

13 And your Honours, I make these submissions to correct those -- the factual errors

14 presented by the Prosecution on Tuesday in relation to -- or this -- to our intended

15 reliance upon the directional finding materials.

16 Firstly, while the Prosecution discussed filings - filing 555, and decision 596 - the

17 Prosecution failed to represent the Defence correctly, as it did not discuss filing 659

18 and decision 711.

19 Your Honours, in decision 659, at paragraph 17, the Defence stated:

20 "[...] the Defence hereby indicates that it provisionally considers the directional

21 finding material reliable [...]"

22 Then in decision 711, at paragraph 11, the Chamber noted that the Defence was not

23 barred from using this evidence.

24 Secondly, your Honours, the Prosecution analysed P-403. Noted that the direction

25 operation was an essentially separate operation from the interception of radio

1 communications. That is Prosecution Witness 403 at UGA-OTP-0272-0466 at
2 page 046, paragraph 60.

3 On the other hand, P-3 and P-59 were not generally part of the directional finding
4 operation. For these operations, your Honours, several vehicles would be sent
5 across northern Uganda in order to triangulate the signal. So it's not as if they would
6 want us to believe.

7 Thirdly, your Honours, the Defence notified the Prosecution via emails in mid-2017,
8 that it continued its pursuit about the Defence -- the directional finding material.

9 The Defence wrote two emails requesting meetings with P-27 and P-337. And that
10 letter, I mean, the email states:

11 Finally the Defence asks that the witness bring with him placements of the
12 mobile -- of the mobile field stations for the directional finding material from
13 October and -- no -- October- November 2002, through July 2004, if it is available.

14 The Defence sought to authenticate the material.

15 Finally, your Honours, the Defence conducted an interview with P-27. This is found
16 at UGA-D26-0011-0508, page 0522 to 0523. P-27 stated that each directional finding
17 units in the early '90s were able to get great locations, so long as the LRA was using
18 a high enough frequency to get a perfect location.

19 The witness stated that band 10 or higher was ideal. During the charge period, your
20 Honours, the LRA was using between 7,000 megahertz to -- 7,000 to 8,000 megahertz.

21 And this can be found at UGA-OTP-0272-0466, page 0452, paragraph 20.

22 Your Honours, band 10 is 3,000 megahertz to 30,000 megahertz and the LRA was
23 using a much higher band than three. Much higher. About 10 usually, as stated.

24 And the LRA used -- I mean, your Honours, the only reasonable conclusion is that
25 these directional findings are accurate and as we said, we intend and -- and you did

1 not stop us from using it. So the position that was given by our learned friends was
2 completely false.

3 Your Honours, I want to deal with crime sites. Your Honours, I want to deal with
4 crime sites. Your Honours, I'm going to briefly discuss the alleged crime locations,
5 but let me first talk about the evidential burden of the Prosecution under Article
6 46 -- I mean, 66.

7 Although my learned sister and brother, Taku, have already talked about it, you
8 know, for every crime site, what happened at the crime site, it is a duty -- it is
9 a burden of the Prosecution to assemble their evidence around those -- around each of
10 those and prove beyond any element of reasonable doubt that it was
11 Dominic Ongwen, either directly or as a co-perpetrator, that caused the crime at those
12 scenes -- at those locations.

13 We deny each and every allegation that was made by the Prosecution on Tuesday.
14 But related to this, before we launch to each of the crime sites logbooks, as a matter of
15 principle, your Honours, the Defence does not revert to the logbooks - as claimed by
16 the Prosecution - when we deem them convenient or helpful. Not at all.

17 The Defence uses the logbooks to show inconsistency between the Prosecution's
18 evidence -- I mean, the inconsistency in the Prosecution's evidence. I respectfully
19 submit, your Honours, that it is up to the Chamber to decide what to believe and
20 what not to believe. Will the Court believe the in-court testimony or the logbooks
21 laden with human infallibility?

22 While we may agree that the in-court testimonies were not always inconsistent with
23 the logbook recordings; nevertheless, the occurrences in differences between them
24 and the logbooks are far too many to ignore. A quick note in the inconsistencies can
25 be seen in Prosecution Witness 209's testimony. He stated that Buk Abudema was at

1 Pajule during the Pajule attack. Yet, a logbook used in his testimony places Buk over
2 60 kilometres away in a place called Adilang.

3 On the other hand, Prosecution -- 209, who was one of the main consumers of the
4 information, stated at real-time transcript 161, at page 39, that the UPDF information
5 about LRA operations was not always reliable. It's not you or me making these
6 allegations, but a person who was using that information. It couldn't be any further
7 from the truth.

8 I now look at the Pajule crime situation.

9 Mr President, and your Honours, in relation to Pajule, the Defence first and foremost
10 reminds the Chamber about Mr Ongwen's injury and arrest within less than a year
11 before. This morning, I talked about Ongwen's unavailability almost for the entire
12 2003. And at this point, maybe let me make a slight correction in what I said this
13 morning. I think I quoted the wrong date. Instead of July, instead of ... I said
14 Ongwen, I think, was arrested in July, 20th and then he was released on July 22nd. I
15 think all this happened in September, and it is to be found on page 28.

16 PRESIDING JUDGE SCHMITT: [16:02:22] Mr Ayena, I won't, as we have always
17 done so, when we have timelines - and I know you want to elaborate all your
18 points - I will give you the time, but please keep the time also in mind.

19 MR AYENA ODONGO: [16:02:35] Okay, please.

20 PRESIDING JUDGE SCHMITT: [16:02:36] Yes. I won't stop you here, as you know
21 from the whole trial that we did not do that --

22 MR AYENA ODONGO: [16:02:38] Yes.

23 PRESIDING JUDGE SCHMITT: [16:02:39] -- but please keep it in mind what we
24 have said before (Overlapping speakers)

25 MR AYENA ODONGO: [16:02:45] Please.

1 PRESIDING JUDGE SCHMITT: [16:02:46] What we had agreed upon.

2 MR AYENA ODONGO: Did you assure me that then I had 30 minutes? Now I
3 have about (Overlapping speakers)

4 PRESIDING JUDGE SCHMITT: [16:02:51] No, this is the problem, is that obviously
5 that my spelling was not -- it was "13" minutes and it might have been reflected in the
6 transcript as "30" minutes; so I would not want to be bound by my misspelling. Yet
7 this might have created some sort of trust in you; so please continue.

8 MR AYENA ODONGO: [16:03:23] Yes, thank you, your Honour. So anyway, let
9 me go straight to the Pajule attack.

10 The logbook, I mean, you can see the confusion about the logbook. Now in the
11 Pajule attack, the Defence first and foremost reminds the Chamber about
12 Mr Ongwen's injury. The injury made it impossible - we are saying - for Ongwen to
13 have participated. And you remember, and we repeat, Ongwen was actually not
14 a free person at all from the time he was arrested until he left the bush. How could
15 Kony trust him anymore when he was now in touch with actually almost the
16 alternative president? Because that general we are talking about is so powerful and
17 Kony had all reasons to really protect him.

18 You remember ...

19 So there is a grey area I want to touch on Pajule. And the fact that, you know, at that
20 time, Dominic Ongwen was a mere major. You remember the array of generals and
21 colonels, including Otti. How could a mere major, whose character had been so
22 seriously ravaged by allegation of treachery, be allowed to sit in that
23 planning committee -- I mean, meeting?

24 Then Odek. Your Honours, the Prosecution appears to have given up on its attempt
25 to prove that the career criminal - that is, Prosecution ... 245 - was involved in the

1 attack. As shown in the Defence brief, Prosecution Witness 245 places the RV at Bolo,
2 where everyone who lives in that area knows he's on the opposite side on the
3 Achwa River from Odek. So the placement of Ongwen, and the other reasons that
4 we gave in our brief, puts Ongwen away from that place.

5 And then, there is this fallacy about the walking distance, the average walking
6 distance. Your Honours, you went there and you saw the terrain of the place; the
7 thickets in the wild bushes of Acholiland in that area.

8 Considering that he had to cross the river, how could Ongwen - in the state he was at
9 that time - walk all that distance to go to attack Odek? That is preponderant -- I
10 mean, that is a totally unacceptable thing to say. There are so many witnesses who
11 would validate this.

12 For lack of time, I shall move on to Odek -- I mean, to Lukodi. Mr President and
13 your Honours, this is perhaps the most well-laid case of the Defence about Ongwen's
14 not being there.

15 But let me add something about Odek. You remember that Odek is the home place
16 of Joseph Kony and Joseph Kony had a personal vengeance against his own people.
17 So he chose the most suitable person to go and teach them a lesson, and the person he
18 chose - you heard from the witnesses - was one of those people aligned to the
19 Control Altar to go and take personal charge of Odek. And this is the man who
20 finally is recorded to have reported the Odek incident. Ongwen was not there.

21 And then we come to Abok. Your Honours will remember - and luckily enough,
22 you went on a site visit to some of these places - the directions that were pointed for
23 Ongwen to have come from, it doesn't fit.

24 And then no single person, not a single witness said conclusively that Ongwen
25 participated. And yet some of the witnesses said Ongwen personally participated.

1 Now if you should find that, first of all, he did not participate, then you may draw
2 inferences that there was some motive to lie about the situation. Somebody talks
3 about Abongomek having been sent, but nobody concretely says it was
4 Dominic Ongwen. They are just inferences.

5 But all that said and done, your Honours, we are saying even if it were to be found
6 that Ongwen was a co-perpetrator at least -- or even participated directly, he did so at
7 the behest of Joseph Kony. Ongwen was acting on superior orders under duress and
8 he had no choice in the matter. And therefore we pray that you dismiss all the
9 charges against Mr Ongwen.

10 And I conclude in these terms. Your Honours, be it stated that the world is looking
11 upon those of us in the courtroom to set a new standard for the International Criminal
12 Court. The world is waiting to see a new direction for how to handle child soldiers.
13 For however long they live in the bush, so long as he was -- unless he acted so
14 manifestly recklessly, he should still be entitled to the protection of the international
15 community.

16 In the case of Dominic Ongwen, he more than fits the bidding of sympathetic
17 consideration about how he was left with the devil's choice all the time. First of all,
18 being left with the knowledge that even back at home, your mother is dead, your
19 father is dead by the very forces who exposed you to the vagaries of life that has
20 caused you so much damage in your life.

21 Ongwen is a father to many children. Not by design, but by imposition of Kony
22 because one of things that Kony was working for was to make these young men and
23 women instruments of re -- of re-procreate -- of procreation. First of all to establish
24 a new Acholi; and secondly, to replenish the stock of his soldiers.

25 Give Ongwen a chance to go home after 32 years. Whatever verdict you come with,

1 the sentence should be so mild. I mean, of course, I know that we have been reading
2 from the same page, and we pray that you acquit him. But in case he's not acquitted,
3 our prayers remain as we have already stated, give him a mild sentence.

4 We shall talk about this during the sentencing, but we have just forewarned you so
5 that you are forearmed.

6 I thank you, Mr President, and your Honours.

7 PRESIDING JUDGE SCHMITT: [16:12:23] Thank you, Mr Ayena, thank you,
8 Mr Taku, thank you, Ms Lyons.

9 The Chamber wishes to thank the parties and participants for their hard work
10 and industry to comply with the deadlines set by the Chamber throughout the trial.

11 This also concerns the timelines set by the Chamber as we have seen lastly -- and I
12 would even extend it to today, 15 minutes is not so much.

13 We also wish to remember our colleague who supported the common legal
14 representatives with her work from Kampala, and again transmit our sympathies to
15 her family.

16 Lastly, and also very important, the Chamber wishes to thank everybody in the
17 Registry - the interpreters, the people in the audio-video booth, the transcribers, the
18 court officers and the countless people working behind the scenes.

19 They did everything in their power to enable the flawless and smooth running of the
20 trial and showed great diligence in supporting the Chamber.

21 All in all, things went exceptionally well with all the work done by the Registry, and
22 the Chamber does not take that for granted. We are grateful for this.

23 This concludes the hearing.

24 THE COURT USHER: [4:13:47] All rise.

25 (The hearing ends in open session at 4.13 p.m.)