International Criminal Court
Appeals Chamber
Situation: Republic of Uganda
In the case of The Prosecutor v. Dominic Ongwen - ICC-02/04-01/15
Presiding Judge Luz del Carmen Ibáñez Carranza, Judge Piotr Hofmanski, Judge Solomy Balungi Bossa,
Judge Reine Alapini-Gansou and Judge Gocha Lordkipanidze
Appeals Hearing - Courtroom 1
Wednesday, 16 February 2022
(The hearing starts in open session at 10.04 a.m.)
THE COURT USHER: [10:04:47] All rise. the International Criminal Court is now in session. Please be seated.
PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:05:28] Good morning. Court officer, please call the case.
THE COURT OFFICER: [10:05:39] Good morning, Madam President, good morning, your Honours.
This is the situation in the Republic of Uganda in the case of the Prosecutor v. Dominic Ongwen, case reference ICC-02/04-01/15.
And for the record, we are in open session
PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:05:57] Thank you.
Will the parties and participants please introduce themselves for the record, beginning with the Defence of Mr Ongwen.
MR AYENA ODONGO: [10:06:07] Good morning, Madam President, and your Honours. Madam President and your Honours, the Defence team is constituted as it was yesterday. I'm assisted by Chief Charles Achaleke Taku, and in

Court with me also, is Gordon Kifudde, assistant to counsel -- he is co-counsel -- Ashley Morganne and we have in court our client Dominic Ongwen, but we are also joined by link by Madam Lyons and Charles -- I mean, Mr Obhof, who you can see there, he's speaking from Ohio. Thank you, Madam President.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:07:07] Thank you. Indeed I note that Mr Dominic Ongwen is present in the courtroom.

Counsel for the Prosecution.

MS BRADY: [10:07:14] Good morning, your Honours. The appearances for the Prosecution are the same as the previous two days, but we have a slightly different line-up in the courtroom. Appearing with me -- beside me is Ms Priya Narayanan, appeals counsel; behind me is Ms Meritxell Regue, appeals counsel. Today, we're also joined in the courtroom by Mr Reinhold Gallmetzer, appeals counsel.

And on your screen, your Honours, from left to right, Mr Matteo Costi, appeals counsel; next to him, Ms Nivedha Thiru, associate appeals counsel; and then we have Mr George Mugwanya, appeals counsel, and Mr Matthew Cross, appeals counsel and I'm Helen Brady and I'm the senior appeals counsel for the Prosecution. Thank you.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:08:12] Thank you.

Now the representatives of the two groups of victims starting, please, with the victims' group 1.

MR COX: [10:08:22] Good morning, your Honours. With me are Mr James Mawira; on screen, co-counsel, Joseph Manoba and Anushka Sehmi and myself, Francisco Cox. Thank you.

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

Victims' group 2.

MS MASSIDDA: [10:08:38] Good morning, your Honours for the Common Legal

Representative team appearing today, Mr Orchlon Narantsetseg sitting behind me and myself, Paolina Massidda.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:08:48] Thank you.

Now the representatives for the amici curiae, please, starting with the National Institute of Military Justice.

MR ROSENBLATT: [10:09:00] Good morning, Madam President, your Honours. My name is Franklin Rosenblatt from the United States's non-governmental organisation, the National Institute of Military Justice and I'm joined by criminal law expert, Phil Cave also from our organisation.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:09:16] Thank you. Association of Defence Counsel Practising before the International Courts and Tribunals, please, Mr Chad Mair.

MR MAIR: [10:09:27] Good morning, Mr President, your Honours, Chad Mair appearing on behalf of the ADC-ICT.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:09:35] Thank you. Thank you. This is a remote appearance.

And then Dr Behrens, please.

MR BEHRENS: [10:09:42] Good morning, Madam President, your Honours, I'm Dr Paul Behrens from the University of Edinburgh in Scotland. Thank you.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:09:53] Thank you. I think there is someone else with you, no?

MR BEHRENS: [10:10:00] No, Madam President. This is a member of the National Institute of Military Justice team.

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

MR ROSENBLATT: [10:10:07] He is Giovanni Chiarini, a criminal law expert, also

part of our organisation. He will not be speaking.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:10:14] Thank you, thank you very much. Thank you.

Well, we have taken appearances from everyone, thank you very much. If the composition of the different teams were to change during the different sessions of today, I would like to ask the parties and participants to inform this at the beginning of each session.

MS GERRY: [10:10:34] Madam President, would you like us to give our appearances today or should we just observe?

PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:10:43] Sorry, yes, if you are present for the hearing, you need to give your appearances. So sorry, please go ahead.

MS GERRY: [10:10:46] Not at all.

Madam President, your Honours, I'm Felicity Gerry, Queen's Counsel. I'm here this morning with Anna McNeil, who is here, a criminal lawyer from Australia. Also present is Oliver Pateman, who is a pupil who's only observing, but will notify myself or Mr Douglas-Jones if you have any questions for us and we will make sure we appear at those points. Both Mr Douglas-Jones and I are in court at times elsewhere, but we will do our best to be here all day.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:11:23] Thank you. Thank you, Madam Gerry.

I will ask now if there is someone else because this is a virtual hearing. I cannot see anybody else, but if it's the case -- if it's the case, please introduce yourselves. No. Thank you very much.

Yes? There is someone else? No?

MR PATEMAN: [10:11:45] Good morning, Madam President, I'm Oliver Pateman, I

was the aforementioned pupil.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:11:54] Sorry? Can you repeat, please.

MR PATEMAN: [10:11:55] Good morning, Madam President --

MS GERRY: [10:11:56] Madam President, it's Mr Pateman, the pupil that I mentioned earlier. I'll make sure that he turns his camera off.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:12:08] Oh, okay. Thank you very much. Now we see you. Now we see you, Mr Oliver Pateman.

MS GERRY: [10:12:12] Pateman, yes.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:12:14] Okay. Thank you very much.

MS GERRY: [10:12:16] Thank you very much.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:12:17] Well, in light of the practice that we have followed in the past two days, which has proven to be more efficient, we have slightly amended the schedule for today.

We will start with the submissions of the amici on the issue of cumulative convictions. Then we will receive the responses by the parties and participating victims to the observations of the parties, participating victims and amici. This will be followed by questions by the Bench and we will then move to the next issues on the agenda, namely, indirect co-perpetration and any other issues on the remaining grounds of appeal.

Now we are going to listen to the submissions -- the amici's submissions on cumulative convictions. We will now hear the submissions of the amici in relation to the questions I read yesterday and that were included in the directions on the conduct of the hearing.

The order will be as follows, first, the National Institute of Military Justice; second, the Association of Defence Counsel Practicing before the International Courts and Tribunals; and third, Dr Behrens.

Each of you will have the floor for 10 minutes.

Mr Phil Cave and Franklin D. Rosenblatt representing the National Institute of Military Justice, please, you have 10 minutes, starting now.

MR CAVE: [10:13:53] Madam President, your Honours, the United States's military justice system -- as does international criminal law -- permits the use of the Blockburger elements test along with a conduct-based test, which we in the military call "unreasonable multiplication of charges", when looking to the question of what are cumulative convictions. The purpose, we think, is to help ensure a fair trial and ultimately a fair sentence.

Initially, the Prosecutor is favoured because she may allege multiple charges or allegations based on the same conduct, typically, because of concerns for contingencies or exigencies of proof. But she is limited or she has a narrow limit where she cannot sustain charges, the elements of which are fully duplicated in other charges.

Now, the unreasonable multiplication or the conduct-based test, or the acronym, UMC, this is a somewhat broader test. It's not anchored solely in the elements of each of the charges; it goes beyond that.

We do find in practice, however -- I'm a practitioner, a litigator, not an academic, we do find in practice that this becomes most relevant at the time of sentencing because it's at this point the Prosecutor has satisfied her burden of proof. The focus of the trial now turns to what is or what should be an appropriate sentence for the accused and his circumstances, along with what is the extent of his or her criminality.

For us, unreasonable multiplication is intended to be a bulwark or a barrier against an overreaching, overzealous prosecutor who wants to pile on charges - the idea being to make the accused look worse than they may already be - in addition, to guard against what may be considered exaggerated sentences.

As I mentioned, as a litigator, we like to have tests and we like to have some things that we can look at to try to analyse a particular problem, and, in our submission, we pointed the Court to the United States v. Quiroz in which the court laid out a non-exclusive list of factors that a trial judge and an appellate judge should consider when deciding whether or not the conduct and the charges result in a unreasonable multiplication or a problem.

The first is an objection. Did the Defence object at trial? This - keep in mind - is the first and best opportunity for the prosecutors and the victims to have their say on the issue, rather than later on appeal have to deal with it. I will say, however, that most of the litigation in this area happens surrounding the second and third factors that are listed in Quiroz and which are listed in our submission.

Is each charge aimed at a distinctly separate criminal act?

The third being, do the number of charges misrepresent or exaggerate the accused's criminality?

And there are several other factors, and, as I said, it's not an exclusive list. This is a discretionary decision by the trial judge.

If the trial judge finds that there is unreasonable multiplication, she may dismiss some of the charges or alternatively she may merge them into the other charges that remain. This - as you can imagine - affects the potential maximum punishment that the accused is exposed to when it comes time to announce a particular sentence.

One thing I should say is, all of the evidence that's been adduced or

introduced during the trial remains relevant. It's not ignored. It doesn't go away because a charge has been dismissed or merged for multiplicity; that evidence can still be used as aggravation against the accused.

Alternatively, and this happens, there might be extenuating or mitigation evidence that's been introduced which may favour the accused, again, at the time of sentencing, to decide what is what we call an appropriate sentence for the accused and for his criminality.

A final note from me, your Honours. On appeal, the judge's decision is reviewed for an abuse of discretion. She is given deference in her decision so long as it is not clearly erroneous as a matter of law or unsupported by the facts -- the facts or the evidence in the record. And with that, your Honours, I turn the floor to Mr Rosenblatt and I thank you.

MR ROSENBLATT: [10:20:22] Yesterday, it was suggested that the Appeals Chamber should only endorse the technical elements based test and extinguish any other possibility of the Court's inherent power to do justice.

We respectfully disagree with that. We find that to not be supported by human rights law, such as, ICCPR, Article 14, not supported by Article 78(3) of the Rome Statute, not supported by the traditions of common law or civil law countries and not supported by this Court's own history.

Your Honour, now is the time. The Appeals Chamber has appropriately raised how to endorse and talk about conduct-based sentence limitations on cumulative convictions. And your Honours, we ask that even if no relief is granted to this defendant, Mr Ongwen, that the time is still ripe, because in States Parties around the world, many of them are taking on these questions of both concurrent war crimes and crimes against humanity. Now is the time for the Court to lay out its series of

principles.

Thank you, your Honour.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:21:36] Thank you. You have concluded now? Yes, thank you.

Well, we are going to continue with Mr Chad Mair, please.

You have the floor for 10 minutes.

Mr Chad Mair?

MR MAIR: [10:21:56] Thank you, your Honours --

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

MR MAIR: [10:21:58] -- for allowing the ADC the opportunity of addressing the Court on this important issue.

At the outset we stand by our brief, both for our submissions on affirmative defences excluding criminal responsibility and for cumulative convictions, which we have been asked to address your Honours today.

I will not repeat our written submissions, but I will draw your Honours' attention to certain passages of our brief as parts of it address your Honours' concerns and questions more comprehensively and eloquently than I will likely do today.

I'd like to start with a couple of broad points before addressing the questions specifically. The first, is that I would wish to emphasise that for cumulative convictions, the consideration that should take priority in any analysis of these issues is the fairness to the accused. This is an international criminal tribunal and the fair trial rights of those accused before this Court must be respected and addressed first and foremost.

I recognise that there are other interested parties involved in these proceedings, but I would also argue that curtailing cumulative convictions does not negatively impact

the rights of those others involved.

The second broad point that I would wish to make, is, your Honours will certainly have noticed the ADC amicus observations derived from a perspective focused on the ad hoc tribunals. I raise this not to demonstrate allegiance to the jurisprudence of the ICTY and ICTR in particular, but to distinguish it.

One thread we noticed in several briefs on cumulative convictions was something akin to an argument that because the ad hoc tribunals had been following a legal theory for 15 or 20 years, it is the right and only way to do it.

Our observations highlighted the jurisprudence and statutory framework of the ad hoc tribunals not to blindly follow it, but to compare that framework with that of the ICC and to encourage critical analysis of whether the ad hoc jurisprudence is entirely applicable in every situation here.

This is a separate and independent Court with a unique legal framework and we submit that the issues before your Honours today present an ideal situation to rectify what, we argue, is an unfair and prejudicial approach to cumulative convictions.

That leads me to my final broad point before turning to the questions, which is that we suggest a conduct-based approach not only rectifies that unfair and prejudicial approach as seen in the ad hoc tribunals, but answers quite quickly many of your Honours' questions.

In this regard we suggest that a judgment should reflect the totality of the conduct, not the totality of the possible legal characterisations. As Judges's Hunt and Bennouna wrote at paragraph 27 of their separate and dissenting opinion in the Delalic, ("Celebici case"), quote:

"The fundamental function of the criminal law is to punish the accused for his criminal conduct, and only for his criminal conduct." End quote.

We find this approach to be the most logical and fair when it comes to the question of cumulative convictions.

The first question posed by your Honours inquires about the scope and purpose of cumulative convictions within the legal framework of the Rome Statute. Our brief at paragraphs 20 to 21 - and I think it seems to be the consensus - is that the Rome Statute does not directly address cumulative convictions.

With regards to Article 78(3), by its terms and with reference to the section of the Rome Statute in which it is located, addresses situations where a person has been convicted of more than one crime. At a basic level, the Article is not relevant and does not assist on the question of the permissibility of cumulative convictions. It applies at a later point in the proceedings.

At the same time it's clearly relevant to the question of sentencing, which I will briefly address at the end of my remarks.

As far as the interests protected, at a fundamental level the interests involved in the crimes controlled by the Rome Statute significantly overlap. At their core they are all designed to protect individuals and certain groups from violations of international humanitarian law during a conflict.

Again, Judges Hunt and Bennouna in their separate and dissenting opinion in Delalic, at paragraphs 17 and 18, note that these interests are not so genuinely different that they justify cumulative convictions for otherwise identical criminal conduct. We submit that that logic applies here and that it does so persuasively.

Similarly, if the focus is properly on the conduct involved, the principle of fair labelling is addressed directly within that context. The conduct-based approach results in the accused being convicted for the most applicable legal characterisation, thus by default fairly labelling the crime.

As I understand the principle, it's designed to create sufficient subdivisions within the law to most accurately reflect the culpability. It does not mean applying every one of the possible legal characterisations. To use an example, convicting for -- an individual for murder and wilful killing does not satisfy fair labelling.

Finally, the concepts of consumption and subsidiarity highlight the overlap between different crimes and the impropriety of multiple convictions for a single act. The concepts are certainly relevant in demonstrating the prejudicial aspect of cumulative convictions. At the same time, I would argue that the statutory framework for an international criminal tribunal, normally, cumulative convictions will not bring consumption or subsidiarity into play. More often the chamber will face a situation where the overlapping charges are derived from similar criminal characterisations from different articles of the Statute.

For example, what I just mentioned, crimes against humanity, Article 7, murder, and wilful killing is a war crime under Article 8. The concepts of consumption and subsidiarity do not really assist in determining cumulative convictions in those situations. But what they do demonstrate is the prejudice that can arise when a single set or set of actions is characterised and then punished multiple times over.

Turning to your Honours' second question and the principle of *ne bis in idem*, I would refer your Honours to our observations at paragraphs 21 to 23. We acknowledge that the prevailing thought is that *ne bis in idem* does not apply literally to the cumulative convictions, although there do appear to be some sources that support its application.

Even if it does not apply directly to the permissibility of cumulative convictions in the sense that double-jeopardy normally does not attach to criminal charges within a single trial, Article 20 certainly does guide the consideration of the permissibility of

cumulative convictions before this Court.

The driving force behind *ne bis in idem* is that it is prejudicial to allow multiple prosecutions. The Rome Statute in Article 20 clearly frames that fundamental principle with regard to the conduct of the accused. It is the conduct --

THE COURT OFFICER: [10:30:17] The amici -- my excuses, the amici has two minutes' left.

MR MAIR: [10:30:21] Thank you.

It is the conduct of the accused that determines the application of the principle, not the legal characterisation of the conduct itself. It's for this reason that we submit that the conduct-based approach to cumulative convictions is in line with *ne bis in idem* as framed by the Rome Statute, even if the Article itself does not directly apply.

The Article is revealing the intentions of the drafters of the Rome Statute when it comes to the determination of the question related to cumulative convictions. It is one component that should be included in the equation and not simply disregarded.

Your Honours, if I could just quickly turn to the question of cumulative conviction in sentencing as they are so closely intertwined.

I'm sure we've made clear our position that under the conduct-based approach, the criminal characterisation most applicable to the relevant conduct is that which should be sentenced. The sentence would then reflect the conduct determined to be the culpability and the most fair result for the accused.

The question your Honours posed, appears to imply cumulative convictions are permitted and for purposes of answering the question, I'll assume that that is the case.

The priority consideration then is that no prejudice arises to the accused by over punishing him or her for the concurrent convictions. And it's here that Article 78(3) comes into play. Each crime for which the accused is found culpable receives its

own sentence. But what Article 78(3) does not allow is the stacking of sentences based on a single act or set of actions. There shouldn't be no sentences more punitive than necessary.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:32:13] Amicus, you have 30 seconds to conclude, please.

MR MAIR: [10:32:17] Thank you.

No sentence should be allowed that's more punitive than necessary based on the fact that a single set -- a single act or set of actions forming the particular conduct could be legally characterised in multiple ways. In other words, where cumulative convictions are accepted, it must not result in cumulative sentencing.

Madam President, that concludes my remarks. Thank you very much for the opportunity to address you.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:32:45] Thank you very much.

Now Dr Behrens, you have the floor for 10 minutes, starting now. Thank you.

MR BEHRENS: [10:32:51] Madam President, your Honours, I agree with Mr Mair that Article 20 cannot be literally applicable to multiple convictions in the same trial. I am, however, also sceptical about the wider applicability of Article 20 of *ne bis in idem* under customary international law, because for that to happen, we would have to show consistency of State practice and I submit that that is something that is quite difficult to adduce.

At the same time it seems to me that it may be all too easy to overstate the significance of that question because at the very least, we seem to be all agreed that there are certain circumstances where multiple convictions would be allowed.

If, for instance, A explodes a bomb in a crowded place, there would be few people who would say that A could not be charged for multiple murders for the various

victims that result from that. And, at the same time, we probably all agree that there must be some limitations to multiple convictions as well.

Judge Dolenc in the Semanza case tried to base that on the principle of criminal law as the *ultima ratio*.

Personally I feel that the principle of individual criminal responsibility comes a bit closer to that point for establishing limitations on multiple convictions because it means - at the very least - that the acts that the defendant is charged with must have some representation in the conduct of the defendant.

If we continue along those lines, your Honours, I would actually go a step further. I would say that the legal elements need to be reflected in some part of the *mens rea* of the defendant because it is that part of the conduct that carries the particular blameworthiness.

That seems to be an approach that comes quite close to the approach of Judges Hunt and Bennouna in the Celebici case, but there is one distinction that I would make. Hunt and Bennouna say that cumulative convictions could not well be based on analogous crimes against humanity and war crimes - they phrase it like that - that they could not be phrased on the chapeau element because they feel that the chapeau element does not have a corresponding element on the side of the conduct of the perpetrator.

Your Honours, in fact, it does. At least under the elements of crimes that this Court consults. The elements of crimes make it clear that there needs to be a mental element that attaches to the context in which the crimes are carried out.

The perpetrator needs at least to have known that the context exists, and, what is more, if you have knowledge -- positive knowledge that the context exists and you go ahead all the same, then you also have a volitional element that attaches to that, at

least, to that degree that you have made peace with the fact that your conduct forms part of that context.

With regards to the question of consumption, that has been discussed by Judge Dolenc in the Semanza case. It has been discussed by the Bemba Appeals Chamber as well. I feel it does not work quite that well in international criminal law as a principle limiting multiple convictions.

The reason for that is that consumption presupposes a hierarchy of crimes and that is quite difficult -- it is difficult to make that case in international criminal law. It might be useful in that context to remember the words of the Kayishema Appeals Chamber, which was very critical in even considering genocide as the crime of crimes. It said expressly, there is no hierarchy of crimes under its Statute.

Consumption might work quite well when we are talking about a lesser form of perpetration against a more serious form of perpetration, which consumes that for the same crime. But it does not work quite that well when we are talking about altogether different crimes.

Subsidiarity has been discussed where the relationship between enumerated crimes against humanity and the catch-all clause of other inhumane acts is at issue. But there are problems with that as well, because the way the Rome Statute approaches other inhumane acts is already fairly defined by comparison to the ICTY and the ICTR Statute.

What is more, any new member of that category would have to be interpreted in light of the *ejusdem generis* principle, and if we take into account also the findings of the SCSL in the Brima case, then members of other inhumane acts could only be considered if there's not a relationship where they are already subsumed by the enumerated nonetheless, so that logically, the question of subsidiarity does not seem

to arise in this crucial situation which is of concern to the Court as well.

It seems to be that subsidiarity works best when we are talking about preparatory acts for a particular crime that are meeting the full commission of the crime -- of the same crime. It does not work quite as well again if completely different crimes are at issue.

Your Honours, it seems to me that many problems that we have with multiple convictions stem from the fact that we often have cases where one of the same conduct may qualify for various crimes, but where the thrust of the action of the perpetrator is on one particular aspect of this -- these various crimes.

If I can give you one textbook example, a classical example.

A, hurls a stone at his enemy, B. B, is sitting behind his window in his own house and A wants to hit B. The window breaks, B is hit. A, may very well be liable both for damage -- criminal damage to the window and for grievous bodily harm where B is concerned. But the criminal energy that A brings to the act, the criminal energy is very much directed against B, and not against the window.

But your Honours, there is a particularly suitable way of taking criminal energy into account, and that is at the sentencing level. It is there where we can say: We give B a fairly low sentence for the breaking of the window because the criminal energy simply was not there. What is more, we can also opt to have the sentences run concurrently.

Where the conviction level is concerned, it is my opinion that every society is entitled to call the crimes by their proper name. Every society is entitled to protect its interests - in my case, both in the physical integrity of the person and the integrity of property - and there's no injustice done to a perpetrator who then has to carry the stigma of being an attacker of people as well as somebody who destroys property.

Acts have consequences. And the person who would embark on a course of action that violates various values is well advised to consider well in advance the consequences that arise if he wills himself to throw that fateful stone. Thank you.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:40:38] Thank you.

Now I will give the floor for the parties to present their observations to the submissions heard yesterday and today.

I give the floor to the Defence.

Counsel, please, you have five minutes, starting now.

MR TAKU: [10:40:58] Your Honours, let me just quickly reply to the last amici. The Trial Chamber already applied -- adopted the... Sorry.

The Trial Chamber adopted the consumption and subsidiarity. In other words, they looked at the conduct base and there's no appeal. The subject of this appeal is very limited. That they did not apply that decision comprehensively to the enumerated crimes which were listed in our trial brief and which we have repeated here.

So in that context, the submission of the last amici goes absolutely to no issue, because the application of those principles are not in issue any longer. They're not subject of our appeal.

Your Honours, I adopt the submissions of the other amici, ADC and the other amici.

Your Honours, the Prosecutor has submitted that adopting consumption would lead to an inconsistent result across the cases. My reply's the same. She did not appeal against this of the Trial Chamber. That is not the issue for this case any longer.

The issue we brought before your Honours, is, whether they applied it consistently and profoundly, they applied it to the enumerated situations, which we brought to attention for determination.

And the next issue is for your Honours to lay out the comprehensive jurisprudence on

this. To stop the chaotic application of multiple conviction, which Judge Dolenc brought to the attention of international criminal law in 2003, and which metaphors to the Celebici decision, which the learned author, which the Prosecutor cited yesterday, that is...

One minute, your Honours.

The learned author, just one minute.

I'm sorry, your Honours, it's here. The learned author, Stuckenberg, Stuckenberg, yes, Friedrich Stuckenberg, at paragraph 843, he was addressing apparent or false concurrences. Yesterday, the Prosecutor was talking about ideal concurrence - a citation from there - but she disregarded paragraph 843 on apparent or false concurrencies that deals with consumption and subsidiarity, which was applicable in this case, in addition to the speciality.

Indeed, the learned author went further, your Honours, at paragraph 858 to say that Celebici or the Blockburger approach, he described it as primitive, and said that Celebici, quote: "[...] seemed to stifle attempts of further elaboration of the law [...]"

End of quote.

And again, that, quote:

"[...] there are many more questions in this area of the law to be addressed beyond the 'logical inclusion' theory, to which the *Blockburger* and Celebici tests solely refer."

And two, in dismissing *ne bis in idem*, the Prosecutor does not explain how she wholly endorses the -- Blockburger and Celebici that also deals with double-jeopardy, and double-jeopardy relates to conduct.

Now your Honours, that said, let me make a few comments on the submission of Mr Cox yesterday.

Indeed, Mr Cox at page -- pages 131 and 132 of the transcript, Mr Cox - your Honour,

I am going to the paragraph - submitted that the Trial Chamber -- he submitted the Trial Chamber already adopted the subsidiarity --

THE COURT OFFICER: [10:46:20] Counsel's time is up.

MR TAKU: [10:46:21] Just let me conclude.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:46:22] I will give you one minute --

MR TAKU: [10:46:25] Thank you, your Honours.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:46:26] -- to conclude.

MR TAKU: [10:46:24] Yes, Mr Cox admitted, your Honours, that the subsidiarity, it was already adopted by the Trial Chamber. We agree entirely with him. We agree. But the question is that they did not apply it to the enumerated crimes that we pointed your attention to, and, therefore, your Honour, we submit that not only should we endorse those tests, but to lay out the clear principle on how other cases - or, this case and other cases we try - dismiss the paragraphs that this principle applies. Thanks.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:47:05] Thank you.

Now, counsel for the Prosecution, you have the floor for five minutes, starting now.

MS BRADY: [10:47:16] Thank you. Thank you, your Honour -- Honours. I'll address my remarks this morning mainly in response to the National Institute of Military Justice and those made by Mr Chad Mair for the ADC. What Dr Behrens has said, is, basically, we agree with, I might weave in a few points that I would like to stress.

But in relation to the submissions made by the National Institute of Military Justice, the Prosecution doesn't have a major response because, at the end of the day, their system does not seem so very different from here in terms of the outcome that is achieved. Because Mr Cave put very well that, you consider the elements first and

conduct is considered more for the sentencing, and that's fair and that's what happens here. And he said each charge is aimed at -- that the test involves finding that each charge is aimed at a separate criminal act, and do the charges fairly represent the accused's criminality.

And that's exactly what we say is covered by the elements. Because the elements test is not some abstract test, that we just apply this abstract legal element. It's because they require a proof of a different fact. So at the end of the day, the elements represent the conduct of the accused. That's why it's very fair in our opinion.

Now just generally a remark about the use of domestic approaches or US approaches or any domestic approach. In general, I think we need to take these with a grain of salt. Actually, quite a large grain of salt, and why? That was very well put by Dr Behrens. Domestic systems - and, I can only put it very crudely in comparison, but domestic systems often have a very strict gradation of crimes. There's a hierarchy and then there will be a set sentence -- a maximum sentence for each crime, and, here, we don't have that. That's not in our normative universe.

So I think that the approaches -- our submission is that the approaches of domestic are of less relevance.

I want to turn now to a comment that Mr Rosenblatt said. He said, Well, at the end of the day, we disagree with the comments we made about the discretionary approach and -- but again, we're not so far away from the position because in our submission, the Prosecution's submission, a discretion should be reserved to the sentence. Not to the stage of imposition of convictions.

It's important in this Court -- the drafters created a statute of different crimes that will be charged, it's important that the conviction should reflect the different interests, the different harms, the full culpability of the accused.

Mr Rosenblatt said something interesting; that the discretionary approach was more fair. It leads to fairness for the accused and it's more -- but we say that the approach here is actually more predictable for everyone, including the accused.

Having just conduct based at the conviction stage is actually less predictable, and, your Honours, I draw your attention to Article 14 of the ICCPR. That everyone should be treated equally. And Celebici ensures exactly predictability. The charges -- the accused faced with cumulative charges can know that if those charges have the different elements, that that could lead to separate crimes being imposed on him. Everyone knows that. The victims know that. The international community knows that.

Now, turning to some comments made by Mr Mair, again, he said that the number 1 consideration should be fairness to the accused. Yesterday I dealt quite a bit with the alleged risks, the prejudices to the accused at that point. I talked about the stigma. Well, the stigma for crimes is actually fair - as Dr Behrens said - when two distinct crimes are actually breached at the same time. The example of the window being broken and the person being hit.

THE COURT OFFICER: [10:52:23] Counsel's time is up.

MS BRADY: [10:52:25] Oh, my time's up.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:52:28] I will give you one minute --

MS BRADY: [10:52:32] Okay.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:52:32] -- to conclude.

MS BRADY: [10:52:33] And just a quick point on Mr Mair. We don't say stay with the Celebici test just because, you know, it's been in place for 20 years. But we say stay with it because it is the most correct and the fairest for an international arena, such as the ICC, with the types of crimes -- the crimes that we hear here, are, you

know, often -- well, multiple, overlapping, continuous. There are many. And that's why this approach can fairly reflect the actual acts and the actual criminality that took place.

Just one point from -- to highlight from Dr Behrens or to actually attach further to the submissions of Dr Behrens. He mentioned the mental state being important. I also want to remind your Honours that Judge Shahabudeen in Jelisic very well articulated why you need to take into account contextual elements, and the legislator has put those elements in for a reason and they should be duly taken into account. That's at Shahabudeen, Jelisic, separate opinion, at paragraph 42.

And one final comment. The Defence mentioned that we didn't appeal the Trial Chamber's use of consumption subsidiarity; that's because it was a harmless error, your Honours. We thought it was an error, but it had no impact. That's why we didn't appeal it. Thank you.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:54:07] Thank you.

Now please the Defence group -- victims' group 1. Dr Cox, please, you have five minutes.

MR COX: [10:54:21] Thank you, your Honour.

First, dealing with the direct reference to myself by my learned friend, Mr Taku. Yes, we agree. The fact is that they haven't proven the standard for an appeal.

Therefore, that's why it should be dismissed. They just disagree with the decision.

There's no concrete -- they have not satisfied the standard for an alleged -- a legal error; so that's the point.

The criteria used -- the principles that they would like to be used or the tests that they would like to be seen in the judgment is there, but they don't agree with it. So, to me, it's as simple as that.

I would briefly want to refer to Mr Mair's reference that the cumulative conviction does not affect the other interested parties or participants. That is not true. As I said yesterday, longstanding jurisprudence from the Inter-American Court of Human Rights establishes in the context of due process the right to truth. So the characterisation of what really happened is an interest of victims in this case and in every case of this nature. So there is an interest that is affected if you don't characterise what really happened.

As to the conduct based -- preferring the conduct based and not the legal characterisation, what's surprising to me is, if we go back to Hume, facts are neutral. It's only legal characterisation that makes something a crime or not and that's why we have a criminal system. It's that legal characterisation that's involved. So just focusing on facts without the legal aspect, to me, makes really no sense in a criminal-justice system.

So legal characterisation is what society's judgment -- or passes judgment of the facts -- over the facts, and that's why it's important. And this, I'll couple with the interests protected, that they overlap when it's a crime against humanity or war crimes.

I disagree with that because of what Dr Behrens said. There are contextual elements and it is -- it seems to me that this approach of interest overlapping is quite -- it's not taken into consideration the nature of the crimes that are here. It seems like it's still a very old-fashioned criminal approach where crimes were one and one, individuals. But here, it doesn't take into consideration the complexity of criminal activity.

And let me bring you another case. It's like corruption cases. It's not anymore kind of like the interest of my pocket. It's the interest of ... I don't know. The functioning of a political system. And this is what is in place here. It's not

only -- only how important it may be, it's not only the lives or the personal integrity of those killed or tortured or the sexual indemnity of those raped. It is the mass of nature. And when you distinguish between crimes against humanity -- there's a reason why we have legal distinction between crimes against humanity and war crimes. Because they have contextual elements that are different. One is an armed conflict, another is systematic and generalised. So they are different. And the international community wanted to capture those interests so there is interest.

And as I said yesterday, Mr Ongwen did not only take -- have knowledge, if we go to the subjective element of a crime, did not only have knowledge. He took active participation in creating those contextual elements, both the armed conflict, the systematic nature of the attacks and the generalised nature of these attacks.

So to me, even if you take these different approaches, it's still correct that cumulative convictions are in place both for crimes against humanity and war crimes.

Thank you, your Honour.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [10:59:31] Thank you.

Please now counsel representing victims' group 2, Mrs Paolina Massidda, you have five minutes, starting now.

MS MASSIDDA: [10:59:41] Thank you, Madam President.

Mr Cox has taken some of my arguments so I will limit myself to two remarks. One is a general remark on the brief and submission from the National Institute of Military Justice, I have a more sharper position than the one just presented by Ms Brady. The brief is essentially based on USA jurisprudence. Now with all due respect, I don't think that this practice is applicable at all before this Court, and I could put a full stop here, but why then? Because the Court has a clear legal framework and a correct interpretation in terms of cumulative convictions that we argue this Chamber should

uphold and apply. Now even *arguendo* -- just for the sake of a theoretical argument that this Chamber will need to apply Article 21(1)(c) and looking, therefore, at the national law, we are not talking about practice, then, in that case to infer general principle for national law, the Chamber should look if said principles are consistent with the Statute, and, in our assumption, the principle that eventually the Chamber will draw from that national practice and jurisdiction will not be consistent with the Statute.

The second remark, it goes to the argument of Mr Cave. Mr Cave was indicating these ... How can I put it, possibility on the Prosecution to pile-on charges, to make the accused look worse than they may already be.

Now, your Honours, multiple charges are the only purpose of reflecting the culpability of the accused, and, I add, the full extent of victimizations recognised. And I think that clearly the discussion we had yesterday on sexual and gender-based crimes is very illustrative here. Each crime has different legal elements, protect different interests and recognise specific harms, and this is exactly the exercise of cumulative convictions. Thank you.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [11:02:09] Thank you.

(Appeals Chamber confers)

PRESIDING JUDGE IBÁÑEZ CARRANZA: [11:02:15] Thank you.

Now, I will give the floor to my learned colleagues in case they have questions. I would like the parties, participants and amici, that you have approximately two minutes to respond to each question posed by the Chamber.

I would like to ask Judge Hofmanski. You have questions, Judge Hofmanski?

JUDGE HOFMANSKI: [11:02:44] Yes, thank you, Madam President. I would have one question.

Well, this is basically the question to the amici, to Mr Chad Mair and Dr Behrens. You have submitted that the Rome Statute does not address the issue of cumulative conviction at all, especially under Article 20 of the Statute concerns subsequent trials only and not crimes charged together during the same trial. It's correct, in my opinion, the result is that basically the Court has the carte blanche to interpret the issue of cumulative conviction.

As you know, there are some various systems in the world that resolves this issue, taking into account the need to cover the whole criminality of the conduct of the accused person.

You are also right that Article 78(3) of the Statute covers -- concerns the sentencing, so the different stage of the proceedings, but -- and, it is my question, would it be possible to argue that Article 78(3) of the Statute could lead us, because it refers to crimes and not to the conducts, and therefore results not only the multiplication on conviction for different behaviours and different conducts, but also convictions for different crimes based on the same conduct.

Would it be a good argument or not?

PRESIDING JUDGE IBÁÑEZ CARRANZA: [11:04:45] Amici, you have the floor. Who would like to answer first?

(Overlapping speakers)

MR MAIR: [11:05:06] Your Honour, I can go first.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [11:05:07] Dr Behrens, you have the floor for two minutes.

MR BEHRENS: [11:05:10] Thank you, your Honours.

Just very briefly, I do not actually suggest that the Court has carte blanche where multiple convictions are concerned. You may remember I referred to the principle of

individual criminal liability, which I think does apply and which forces us to say that there is -- has to be some kind of conduct that corresponds to the legal charges, and I was referring in that regard to the mental element, in particular, is particularly important.

But at the same time, I would also submit that there are certain principles in customary international law which do impose certain limitations.

I know I said I was very critical of the principle of consumption and subsidiarity, but there are some cases where these principles can still apply, i.e., when we are talking about the same crime and different forms of commissions, for instance, or the same crime where a preparatory act meets the full commission of the crime.

Similarly, the principle of speciality comes in - I've referred to that on several occasions in my written submission - and I think the Trial Chamber has quite correctly identified various cases of speciality where only a conviction for one particular crime would be permissible.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [11:06:37] Is there anyone other amici? Yes, please, you have the floor.

MR CAVE: [11:06:41] Madam President --

PRESIDING JUDGE IBÁÑEZ CARRANZA: [11:06:42] Two minutes.

MR CAVE: [11:06:43] Madam President, your Honour, if we look to the first principle of statutory interpretation, what are the words or what is the language used, then your hypothetical or your question, can it be interpreted as -- as what is the crimes, not the conduct, I think the answer is yes. That that would be a reasonable interpretation, again using what I think of in America as one of the first principles of statutory interpretation: What's the language say. Thank you.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [11:07:16] Thank you.

Is there any other amici? Yes, if there is no other amici, I will give the floor --
MR MAIR: [11:07:26] Yes.
PRESIDING JUDGE IBÁÑEZ CARRANZA: [11:07:27] Yes, who is it?
MR MAIR: [11:07:28] Yes, this is Chad Mair for the ADC, Madam President.
PRESIDING JUDGE IBÁÑEZ CARRANZA: [11:07:33] You have the floor for two minutes.
MR MAIR: [11:07:36] I'll be quick because I believe I've already answered this question in part -- in my submissions in which I said, for me, Article 78(3) really comes at a later stage in the proceedings and that's it. Well, I understand your Honour's question and focus on the word "crime". I think when you combine that with Article 20 and then focus on the word "conduct", there's a bit of a tension there, and so that's why we submitted that 78(3) really comes in after and the determination of cumulative convictions or not has already taken place. So in that regard I would suggest that it doesn't really assist in that determination.
PRESIDING JUDGE IBÁÑEZ CARRANZA: [11:08:24] Thank you.
I would give now the floor to the parties, if they would like to refer to this question. The Defence, you have the floor for two minutes, counsel.
MR TAKU: [11:08:35] Yes, your Honours. I'll react to the amici, I'm sorry I cannot obtain the name, who talked about the mental element and the conceptual element. The problem is, Ongwen is before this Court as a victim/perpetrator. You have to look at him in that context, and, therefore, he did not create the circumstances of the contextual elements, either the war or the widespread and systematic ... And therefore with regard to -- and look at the forms of liability for which he's punished. Look at this form of liability, the contextual element would have very little value in looking at -- would have very little impact in looking at his participation in this.

Secondly, looking at the sex and gender-based crimes committed by Ongwen himself with the women -- the women, the Prosecutor clearly says it was outside the policy, the organisational policy, and, therefore, the organisational policy for the crimes against humanity are not -- the requirements are not met. And you will see the number of women, they say seven. But within the time frame, you have two or three, and therefore were they committed in a widespread and -- a widespread or systematic to the women? No. The Prosecutor has no proof.

And two, even if you have the contextual element -- you must lead some evidence, some evidence on the record. You've got to connect them to the participation of Ongwen in this form of liability for which he was and -- as a victim/perpetrator. That was not done.

And also, look at the objections. The objections, the pleading requirements and the notice requirements, which were interjected and omitted in the confirmed charges. You will find that the contextual elements cannot be applicable to Ongwen.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [11:10:19] Thank you.

Any other parties would like to respond to this?

Prosecution counsel, you have two minutes.

MS BRADY: [11:10:26] Thank you. Thank you, Madam President. We would answer the question to Judge Hofmanski with a positive yes, 78(3) can lead to the test that we're advocating should be continued to apply, specifically because it actually does refer to pronouncing a sentence for each crime, first, and then the joint sentence - taking into account all of them - and we say that does support.

In terms of 78(3) being in the sentencing stage, well, we realise it's not precisely in the point -- it's not in the provisions on trial, but we say it actually should -- when thinking about cumulative convictions at trial, you should take that into account

because that provision -- the Statute has to be read as a whole and in context in accordance with the Vienna Convention on the Law of Treaties.

Finally, there's an interesting point when you look at 78(3) because at the ICTY, in the beginning, in the early days of the ICTY, the sentencing was basically given as concurrent sentences, and that's where Judge Hunt's and Bennouna's concern came in, because they said, Concurrent just doesn't take care of the prejudice properly. That was why -- that was a large part of their concern.

It moved then at the ICTY to be giving -- the sentences were given as a whole, you know, just one sentence for the totality without breaking it down to each particular component, each particular crime. But here, the drafters have given the safest - in some ways - option, which is that there is a conviction for each crime done at the first stage of the 78(3) sentencing phase, and then there's a joint sentence taking into account the universe of culpability, and it's at that stage where the overlapping conduct is considered and not double counted.

So we say that this actually supports why there should be distinct crimes imposed using the Celebici test. Thank you.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [11:12:49] Thank you.

Is there any other parties that would like to respond? Yes? No? No. Thank you.

Judge Hofmanski, are you satisfied, do you have another question?

JUDGE HOFMANSKI: [11:13:05] Thank you very much. No, thank you.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [11:13:08] Judge Bossa, do you have a question? No.

Judge Alapini, do you have questions?

JUDGE ALAPINI-GANSOU: [11:13:20](Interpretation) Thank you, your Honour, the Prosecution has responded to my concern. Thank you.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [11:13:25] Thank you.

Judge Lordkipanidze? No questions.

Then, I would like some clarification - and this is for the amici - in regards of the crimes with a complex characterisation. All your submissions today have been referred to -- it seems to me to ordinary crimes. You talk about double-jeopardy and whatever, but refer to ordinary crimes. What happens with complex characterisations, such as the crimes under the jurisdiction of the Court where the crimes are committed necessarily under some kind of context; namely, Article 7 of the Statute for crimes against humanity requires a systematic attack against the civilian population and with the knowledge of this attack. And Article 8 of the Statute for war crimes requires for the crimes to be committed as part of a plan, policy or large-scale commission of such crimes.

What happens in this case with the conducts? Because after looking to the material elements of the conduct or the crime, first, or at some point, you need to consider the context.

What happens in this case regarding the issue of cumulative convictions?

Thank you. Who would like to answer, first, please?

Yes, you have the floor for two minutes.

MR ROSENBLATT: [11:15:12] Thank you.

Your point is well taken and these are very complex crimes. They are a list of crimes that present -- you know, Articles 7 and 8, they present a very large range of options, and I think where this is most important for winnowing down and the possibility of some sort of judge-led solution at sentencing is because there are so many options. You may look at two cases that are exactly the same facts, but then you have two prosecutors who take very different strategies, very different levels of zeal, very

different levels of resources and all the other considerations that go into prosecutors. These facts do not automatically translate into any of those, you know, dozens of things that are listed in war crimes and crimes against humanity. That is where prosecutorial discretion comes in.

So because of that, that's where I think beyond the elements-based test, that is where a conduct-based test would be at its greatest legitimacy. When two similarly situated defendants face very different trial outcomes, then the conduct-based test would be a way of ensuring consistency in results.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [11:16:38] Thank you.

Is there another amici willing to answer this, please, or to refer to the issue?

Yes, Dr Behrens, please, you have the floor for two minutes.

MR BEHRENS: [11:16:53] Thank you. Your Honour, I agree that we are dealing with complex crimes in the Rome Statute. I would perhaps question whether that is exclusively within -- a problem within the domain of international criminal law because if you think of domestic law and crimes then committed by organised crime families, for instance, we might have a similar level of complexity there.

Where the complexity is taken into account in international criminal law though, at the context element that you are referring to - and that is a point that I would make towards one of the objections that the Defence has voiced as well - we are talking about something that has made it into the level of the legally defined conduct of the perpetrator as well. So I would really guard against the view that there's some strange contexts that hovers above the perpetrators. It has nothing to do with them. The fact remains, false imprisonment, for instance, is not by itself a crime under the jurisdiction of the Court. It becomes a crime because there is this context, plus there is a participation of the perpetrator in the context as characterised by the fact that he

knows fully well that the context exists, makes his peace with it and proceeds with the crime all the same.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [11:18:12] Thank you.

Is there another amicus who would like to intervene?

Yes, please go ahead, two minutes, please, amicus.

MR MAIR: [11:18:23] Just to briefly respond, I certainly agree that there is a fair amount of complexity here, and I think even within the conduct-based approach that we proposed, there's the availability for a nuanced methodology that would take into account, your Honour's question.

We certainly don't say don't assess the context, the war crimes or crimes against humanity elements. But once you have done that, then you would conduct a specificity test to determine which crime more appropriately applies, and I think with that you would take in both your Honour's question in terms of the complexity and still come to the most fair result to the accused.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [11:19:20] Thank you.

Is there any other amicus?

The parties would like intervene on this?

The Defence?

MR TAKU: [11:19:28] Yes, your Honours.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [11:19:30] You have two minutes, counsellor.

MR TAKU: [11:19:33] Yes, your Honours. The widespread or systematic attacks or the internal armed conflict - as the case may be - those are elements that permitted the requirements of awareness or knowledge. But they do not replace the corresponding Article 30 *mens rea* or the specific intent elements because, even under

the circumstances, even when they exist, there must be findings of fact to say that even under the circumstances, the *actus reus* -- the corresponding *mens rea*, I think the specific *mens rea* of the activity was met or the specific intent where specific intent is an element.

We should be careful, your Honours, not to assume that the indicia of just context alone is determinative of the fact that the activity -- *mens rea* requirements are met.

No, your Honours. They will still make for purposes -- for purposes of individual criminal responsibility. They will still make that determination, is a matter of fact. Not a matter of declaratory statements as is found in the judgment.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [11:20:39] Thank you.

Any other parties?

Prosecution counsellor, you have two minutes.

MS BRADY: [11:20:46] Thank you, your Honours. Just two points to make, your Honours. The premise of your question, Madam President, was in line with what we already noted in our submissions. In a word, complex crimes call for multiplication of offences or convictions being entered.

Just briefly on the point made by the National Institute for Military Justice. The concern about the overzealous prosecutor, I think that point might be fair and valid, more in -- for domestic prosecutions.

Here, of course, at the ICC, we have one prosecutor and that one prosecutor signs off, as it were, on all the arrest warrants, the documents containing the charges, the indictment as it were, and then it also goes through a pretrial process. So those are also curbs on the quote-unquote, zealous prosecutor. Less relevance in this Court, I would say. Thank you.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [11:21:56] Thank you very much.

Victims' group 1, Counsellor, you have two minutes.

MR COX: [11:22:02] Thank you, your Honour.

Your Honour, that was exactly what I was trying to make, and it just showed why your Honour is sitting there and I'm sitting here. But I would like to say that, exactly, if Celebici is primitive, conduct analysis is Stone Age because honestly, in this context, it doesn't take into account the evolution that criminal activity has taken. Not only -- and I completely agree with Mr Behrens, it's not only here. It's in organised crime, it's in cartels, it's in that kind of complexity. It's not judges, drafters or legislators that are kind of like creating these figures. It's that they are giving a legal meaning to the more complex criminal activity that is going on and the way it has evolved, and this is why we have this international criminal court for crimes against humanity and war crimes.

So I completely agree with your Honour, and it's actually, like I said, conduct based does not capture the complexity and the reality of the crimes that are being judged in a fora like this. Thank you.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [11:23:24] Thank you.

Any other parties? No.

Well, we have arrived to the end of this session. Now we will have a break, we will come back at 12.00 hours.

THE COURT USHER: [11:23:39] All rise.

(Recess taken at 11.23 a.m.)

(Upon resuming in open session at 12.05 p.m.)

THE COURT USHER: [12:05:56] All rise. Please be seated.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [12:06:23] Thank you. Welcome back.

We will now turn to the submissions on the grounds of appeal related to indirect

co-perpetration. The parties' and participants' submissions should be guided by the questions posed by the Appeals Chamber in its Directions issued on 28 January 2022. The questions are as follows:

i) The parties and participants raise several arguments concerning the LRA structure, its functioning and the roles of its members, in particular that of Mr Ongwen. Those arguments require an interpretation by the Appeals Chamber of indirect co-perpetration through an organised power apparatus as a particular form of indirect co-perpetration. What elements need to be established, and to what level of specificity, in order to convict an indirect co-perpetrator through an organised power apparatus, and how can they be established in the present case?

ii) What is the understanding of functional control in the context of indirect perpetration -- or indirect co-perpetration through an organised power apparatus?

Well, now I will give the floor to the parties.

Counsel for Mr Ongwen, you have the floor for 20 minutes. Starting now.

MR AYENA ODONGO: [12:08:19] Counsel Beth will handle this.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [12:08:22] Thank you.

Counsel Beth Lyons, are you with us?

MS LYONS: [12:08:24] Yes.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [12:08:25] Thank you. You have the floor for 20 minutes.

MS LYONS: [12:08:35] Okay. Thank you, your Honour. Good morning.

We start from the position that the problem in this case is that the prosecution of Mr Ongwen is, in fact, a prosecution of the LRA organisation for the heinous crimes that were committed under the leadership of Joseph Kony.

We've described this elsewhere as a, quote, proxy prosecution. The person who

should be in the dock is not Mr Ongwen, the abducted soldier, who was acting under duress and with mental illness. The person in the dock should be Joseph Kony. And I want to quote my client, Mr Ongwen, who said it most succinctly at the proceedings before the trial started. Mr Ongwen said, "I am not the LRA."

The general questions posed by the Appeals Chamber - and, I will get to them in specific - but deal with the problem of, does indirect co-perpetration as a mode of liability help us understand or place an individual's role within the organisation in terms of finding culpability? The Defence's answer is absolutely no.

Yet, we are in a situation where Mr Ongwen was charged with indirect co-perpetration for about 50 per cent of the charges or counts against him. It's also the mode of liability for almost 50 per cent of the convictions on which Mr Ongwen has been sentenced, so it's important that we consider it.

Now from the outset, let’s say that as a Defence attorney, I consider indirect co-perpetration in the same category as joint criminal enterprise, both conceptually, but also as a nightmare and as an albatross in many ways. Both concepts appear to be convoluted, neither is explicitly articulated within the applicable Statutes, and, lastly, both are defectively pleaded so that the accused does not have the notice that he or she deserves for the charge of mode of liability.

Now, the basic question is, how does a principle -- a basic principle of criminal law that there has to be a direct relationship or a link between the culpability of the individual and the criminal conduct fit into this mode of liability?

The submission is that it doesn't. The mode of liability is fraught with contortions, many of which have been addressed in law reviews and in many of the separate opinions in the Ntaganda appeals judgment.

Now the first question is, then, is the analysis or theory of an organised power

apparatus and functional control even applicable to 25(3)(a) and to the Ongwen case? The Defence generally agrees with the positions, for example, Judge Morrison's that put the rights of fair trial of the accused front and centre in this case.

Our understanding from reading both the majority opinion and other separate opinions is that the notion of indirect co-perpetration and the specific concepts of an organised power apparatus and functional control expand or stretch culpability for crimes resulting, in the end, in an extremely attenuated relationship between an individual who is charged and the criminal conduct which is alleged.

Now, I have honestly struggled with this question because I find it very difficult to understand the concept. I went back to the original article by Mr Roxin, Crimes as Part of Organized Structures, and I want to share with you some of my observations and whether or not they're applicable to the situation of the LRA.

The first point is that Mr Roxin's theory does not consider coercion or duress, which are clearly key elements both in the LRA environment, but also key elements in terms of how Mr Kony maintained control of those under him.

Now, Roxin's theory was based on the situation in Germany and he writes that for Nuremberg, there's not a single case where someone was shot for disobeying an order to shoot. The worst-case scenario, he describes, is, if a person disobeyed, there was a note put in the file, the person was denied a promotion or was reassigned.

This is not the reality of life in the LRA. You've heard already about the evidence -- I will not repeat it, but the treatment, the orders of killing of senior officials by Joseph Kony attest to this. This is not the practice.

Now the second point I want to raise is this issue of fungibility or interchangeability or replacement of persons. Roxin's theory seems to say that the organisation has a life of its own, a will of its own to act based on this idea that the persons within it

are replaceable. They're simply cogs or tools. This is a notion behind the idea of automatic organisational functioning. If this notion were to be applied to the LRA, it's important to look at how the replaceability actually happens, especially in the case of child soldiers. And, in this situation, it's our position that factors, such as, duress, coercion, punishment, brainwashing, indoctrination, cult-like organisation, all affect the replaceability.

An LRA child soldier, for example, would be replaceable because of the indoctrination and other factors which she or he has endured.

The last two points I want to make on Roxin's article are this, I think the terminology is extremely confusing. Roxin talks about people, quote, behind the scenes, as the indirect perpetrators. As applied to the Ongwen case, this would mean that Kony is an indirect perpetrator and Mr Ongwen on the ground is the direct perpetrator.

The point is, if these theories were to be applied, it's imperative to clarify the roles of Joseph Kony, Mr Ongwen and others involved in the criminal -- in the alleged criminal conduct. This is also an issue of notice and fair trial.

And to add to the confusion, I think, is the possibility that there's even a third layer - as Judge Morrison suggests - of mid-level commanders that somehow fits in between the direct and indirect perpetrators. But the basis of the confusion is, if Joseph Kony is the indirect perpetrator behind the scenes, we still have Ongwen who has been convicted of indirect perpetration. So I don't quite understand how the terminology and concepts are being applied to the actual conduct on the ground.

The last point I want to make on this is whether the Roxin theory runs afoul to or counter to the Lubanga, Katanga requirements for control of the crime.

A key requirement for control over the crime under this jurisprudence is that a crime would not be committed but for - in this case - Mr Ongwen's essential contribution.

My basic question is, do replaceable tools, for example, Mr Ongwen in this case, make essential contributions?

How can you argue that an essential contribution, which would frustrate the crime, is made by someone who is simply a tool or is an interchangeable part of the organisation? These are pieces of it I don't understand.

Now, yesterday -- I'm moving on -- yesterday, there was a lot of discussion about fair labelling. In our view, the indirect co-perpetration is a prime example of unfair labelling. As I've said, it's convoluted and does not provide notice.

Judge Morrison stresses in his separate opinion that the person - him or herself who is charged - must understand what the charges are and why the charge -- the acts, which are charged, attract criminal responsibility.

We would add that the level of specificity, which the presiding judge raised again in the questions this morning, is -- must be to the highest level based on Article 67(1)(a), the right to be informed in detail to prepare his or her case.

Now, I've said that the notions of indirect co-perpetration is an attenuated notion. It really makes no sense. But especially in this situation, I think that the fair trial right of notice becomes even more important. In other words, the more attenuated the notion is, that if the notion is to be applied, it has to be in detail and specific.

And here, we rely on Judge Dolenc in his Ntagerura trial judgment, paragraph 21, where he outlines what questions the material elements have to -- have to raise, have to talk about.

Who's the perpetrator? Where? When? What? Who is the victim? By what means and why?

In addition, as Judge Fulford has said in Lubanga, the defendant needs to be aware of the legal elements -- the legal framework that provides the outline against which the

facts will be determined.

Now we've briefed a number of these issues, but let me say here, just for the argument, that the COC defines the elements of indirect co-perpetration in paragraphs 38 to 39. As we have noted in our appeal brief, paragraphs 106 to 137, the required elements - agreement, essential contribution, power to frustrate the crime, control over the crime and the *mens rea* elements - are not pleaded.

Now, very often the Prosecution's pleading -- sorry, the COC's pleading of the elements reflect the error which happened in Muvunyi, which is the language, for example, for Article 30, *mens rea*, intent and knowledge, simply tracks the Statute. The Muvunyi Appeals Chamber held in 2008, in paragraph 44, that the tracking of statutory language without factual allegations does not provide notice as required to the defendant.

Now, the Trial Chamber concludes that Mr Ongwen had control over the crimes at Pajule, Odek, had control over the sexual and gender-based crimes and conscription of soldiers. However, the elements of the common plan are not defined. What is essential about Mr Ongwen's contribution is not defined, and there's no notice that without Mr Ongwen's contribution in this situation, the crime would be frustrated. And, lastly, the *mens rea* of his awareness the crime would be frustrated is not pleaded.

The lessons of the J -- the joint criminal enterprise litigation, one of the important lessons about litigation was that notice must be applied to avert a situation where a JCE would result in guilt by association. We submit that with respect to the pleading, in respect to the use of indirect co-perpetration, we must apply the same lesson. There is a danger that indirect co-perpetration will result in a guilt by association from culpability, which would be unfair to the Defence, but also violate

any of the norms and regulations and rules concerning fair trial and the jurisprudence on fair trial.

Now, in respect --

THE COURT OFFICER: [12:24:46] Counsel has five minutes.

MS LYONS: [12:24:50] Yes, thank you.

In respect to the question of, is the LRA an organised power apparatus? We would say no. The LRA -- it requires that there be a hierarchy in order for an organised power apparatus to exist.

The LRA is not hierarchically organised. In our view, it's more accurate to say there's Joseph Kony on top and then everybody else. The point is, even if there were ranks, we've argued the LRA was not a conventional army. That Joseph Kony can skip the chain of command, he can argue that either he or the spirits have motivated this jumping of the line -- jumping of the chain of command, and therefore while it may look like one thing, the reality on the ground is very different. And for that reason, the concept of an organised power apparatus cannot be applied to the LRA.

Now, on the point of functional control and automatic functioning, I want to refer to the presiding judge's separate decision [in Ntaganda] at paragraph 13, where I understand it to mean that there are two perpetrators responsible for crimes. There's the direct replaceable perpetrator and the second one is the perpetrator behind the scenes or the indirect perpetrator. The separate opinion states that:

"[...] the indirect perpetrator [has] functional control over the functioning of the organisation and thus, over the crimes."

Now, it seems to me that these roles need to be specifically detailed in terms of the situation, the LRA. And as I've said before, Joseph Kony, in our view, is the direct overall perpetrator.

Now, whether the -- the subsidiary question is whether the LRA enjoys automatic functioning? We're not honestly clear exactly what this means, but at the most fundamental level, we submit that the organisation does not have a life of its own. The idea that the LRA could function on its own without Joseph Kony is an oxymoron. The LRA was Joseph Kony. The power of Joseph Kony, his omnipotence is described in the confirmation of charges decision, and its character, its cult-like character is captured in the expert report of Dr Musisi.

The LRA was dependent on a single leader and could not function without that. We reject the view that the LRA was some kind of a collective project as the Trial Chamber concludes in paragraph 873. That there was Joseph Kony, when he was absent geographically, then others at different levels took the initiative. That's not true. Our view is that Kony was always present or people believed he was always present, and, in fact, he was able to get information through his surveillance about what was going on and exercise his control.

The third point on this question in the separate opinion is in paragraph 255, quoting Katanga, which says that the functional automatism also appears to have an aspect that makes the personal ties between the direct perpetrator and perpetrator by means or perpetrator behind the scenes to be ultimately inconsequential.

This is definitely not the reality. This is not the evidence based on the LRA. This is not the evidence at trial.

The personal ties between not only between Joseph Kony and Mr Ongwen, but Joseph Kony and other persons in the LRA, the kind of control that he exerted over them, which was quite personal, even if he wasn't standing next to somebody, those were extremely important. It was an extremely important relationship that needs to be considered in evaluating who is a perpetrator, who is direct, who is indirect.

Lastly, I want to talk about the notion of *mens rea*, again, based on paragraphs 355 and 356 in the presiding judge's separate opinion.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [12:30:29] Counsellor, your time has expired, but I will give you two minutes to conclude, please. Try to stick, please

(Overlapping speakers)

MS LYONS: [12:30:37] Okay. Okay. Your Honour, I'm going to leave -- I'll leave that to a question for another time.

Let me just sum-up.

Our general position is that the concepts of indirect perpetration, including the requirements of functional control and an organised power apparatus, do not assist in holding an organisation like the LRA for its crimes and that its application to Mr Ongwen in this case violates his right to fair trial and his -- fair trial, and -- and we oppose it. Thank you.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [12:31:24] Thank you.

Counsel for the Prosecution, you have the floor for 20 minutes, please.

MR GALLMETZER: [12:31:35] Mr Ongwen was convicted as an indirect co-perpetrator for the crimes in Pajule and Odek, for SGBC and for child soldier offences, and he was convicted as an indirect perpetrator for crimes in Lukodi and Abok.

Your Honour, I will address you on questions regarding indirect perpetration and indirect co-perpetration. You're asking what elements need to be established, and to what level of specificity for indirect co-perpetration through an organisation. You also inquire how these elements may be established in this case, and about the notion of functional control over the crime in the context of indirect co-perpetration through an organisation.

Your Honours, the Appeals Chamber has already pronounced itself on these issues in three Article 81 conviction appeals judgments; namely, in the Lubanga appeals judgment, in the appeals judgment in Bemba et al., and most recently in the Ntaganda appeals judgment. As I will elaborate in a moment, these judgments address many aspects of indirect perpetration and indirect co-perpetration. They set out a framework for the interpretation of the elements, including when the crimes are committed through an organisation. They also address the notion of functional control.

Under Article 21(2) of the Statute, the Appeals Chamber is not obliged to follow its previous interpretations of the law through binding *stare decisis*. However, as the Appeals Chamber has previously held, absent convincing reasons, it will not depart from its previous decisions. Thus, while the Appeals Chamber has the discretion to depart from its previous jurisprudence, it held that it will not readily do so given the need to ensure predictability of the law and the fairness of adjudication. We submit that exactly for these reasons, the Appeals Chamber should follow its previous decisions on indirect perpetration and indirect co-perpetration.

The jurisprudence of Pre-Trial Chambers and Trial Chambers provides further guidance on the interpretation of the elements of these modes of liability. While some judges have issued dissenting views, the Court's decisions have taken a clear and consistent position on these issues.

So during the next minutes, I will set out the elements of these modes of liability as they emerge from the jurisprudence. I will further identify the means of proof used in previous decisions to establish the elements. And then, I will demonstrate how in this case the Trial Chamber correctly held that the evidence established each of the elements. References to support my submissions are included in the list of

authorities.

Article 25(3)(a) provides that a person may commit a crime as an individual, jointly with another or through another person. Indirect co-perpetration is a form of co-perpetration where the co-perpetrators act through another person or through an organisation.

For the purpose of this hearing, however, I will focus on indirect co-perpetration through an organisation.

The following are the objective elements of indirect co-perpetration through an organisation:

(a) the existence of an agreement or common plan;

(b) the material elements of the crime were carried out through a hierarchically organised power structure controlled by the co-perpetrators; and

(c) the accused made an essential contribution.

The objective elements for indirect perpetration through an organisation require proof that the accused carries out the material elements of the crime through an organisation that he controls.

I will now elaborate on each of these elements in more detail.

First, the Prosecution must establish the existence of a common plan or agreement between two or more persons, including the accused. This plan ties the co-perpetrators together and justifies their reciprocal attribution of their respective acts. The plan itself does not have to be directed at a crime, as long as it includes a critical element of criminality; namely, that its implementation will, in the ordinary course of events, result in the commission of the crime.

The common plan can be expressed or implied and it may materialise extemporaneously. It may be inferred from evidence of crimes being committed by

the organisation, evidence of meetings, specific orders and instructions to troops, and from evidence of subsequent concerted action.

When making its findings on the Pajule and Odek common plans, the Trial Chamber correctly relied on evidence regarding prior meetings; the selecting of fighters and commanders; orders to commit crimes and reporting and other communications after the crimes. The SGBC and child soldier common plans were inferred from a coordinated and methodical action by the co-perpetrators and their subordinates to commit the crimes.

The second objective element is that the perpetrators used the hierarchically organised power structure - an organisation - to carry out the crimes. This requirement applies both to indirect perpetration and to indirect co-perpetration, and it has two components.

The first concerns the nature of the organisation. It must be such that the commission of the crime is independent from the intent of the organisation's individual members and cannot be compromised by any subordinate's failure to comply. The physical perpetrators are interchangeable and fungible within the organisation, and, this, your Honours, is referred to as "functional automatism". It is shown, for example, through the specific features of an organisation, such as a large enough size or the existence of intensive, strict and violent training and disciplinary regimes. The second component is that it must be shown that the principle perpetrator had control over the organisation. This means that he must have the ability to subjugate the will of the direct perpetrators and to ensure compliance -- automatic compliance with his orders. Thus, the principle perpetrator uses the organisation as a mere tool and is able to steer it towards the commission of the crimes.

As a matter of evidence, control over the organisation will hinge on the nature of the organisation and the accused's role within it. In the case of indirect co-perpetration, control is exercised collectively by all the co-perpetrators and not necessarily by each co-perpetrator individually. In addition, not all physical perpetrators must necessarily be members of the organisation, as long as they are controlled by the principle perpetrators.

In this case, the Trial Chamber correctly found that the LRA had a hierarchical structure with several mechanisms to ensure compliance with the orders of the commanders, including Ongwen's. Thus, the will of their subordinates was immaterial and LRA commanders could commit the crimes through their subordinates. The relevant factors were the abduction and recruitment of children, the training regime, the arming of fighters, the lack of training to distinguish between military and civilians, and the violent disciplinary regime.

The Trial Chamber further found that Ongwen controlled a portion of the LRA; namely, those LRA fighters who committed the material elements of the crimes for which he was found responsible.

The third objective element is that the accused made an essential contribution to the crimes within the framework of the common plan. This means that causation can be established either by a direct contribution to the crime or by a contribution to the common plan, the implementation of which results in the commission of the crime.

By contributing to a common plan, the accused is liable for all the crimes that occur within its framework, as long as his overall contribution to the plan is essential to its implementation.

In assessing whether a contribution is essential requires a normative assessment of the accused's overall role in the implementation of the common plan. The key question

is whether the accused's contributions were such that without them the crime would not have been committed or it would have been committed in a significantly different way.

This is based on a cumulative assessment of all relevant contributions of the accused and not in each contribution in isolation. The contributions need not be criminal in nature and they may be made at any stage, including the planning, preparation and execution stage of the plan.

Thus, the accused's presence at the scene of the crime is not required for a contribution to be essential. An essential contribution through an organisation may exist in activating the organisation, which leads to the commission of the crime. Similarly, supplying weapons, moving troops to the field or coordinating their activities may also be essential contributions.

In this case, the Trial Chamber correctly found that Ongwen's contributions to the crimes in Pajule were essential. He was involved in maintaining the LRA's capacity to attack, and contributed to the planning and perpetration of the attack on Pajule. Ongwen essentially contributed to the crimes in Odek by designing the attack, by giving instructions and by setting the attack in motion. He essentially contributed to SGBC by helping to define and sustain a system of abduction and victimization of women and girls over a protracted period.

Finally, he essentially contributed to child soldier offences by maintaining a policy to commit such offences by instructing and using soldiers under his control to commit the crimes and by committing some of those crimes personally.

Turning to the subjective elements, the Prosecution must show that the accused acted within intent and knowledge pursuant to Article 30. These elements need to be interpreted in light of the modes of liability of indirect perpetration and indirect

co-perpetration.

So for intent for indirect co-perpetration, the Prosecution must show that the accused acted intentionally and that he was at least aware that implementing the common plan would, in the ordinary course of events, result in the commission of the crimes.

Likewise for indirect perpetration, it must be shown that the accused acted intentionally and that he either meant the crimes to be committed or was aware that the crimes will be committed in the ordinary course of events.

Under both modes of liability, it is not necessary that the accused was aware of the specific crimes that resulted from the implementation of the common plan or from acting through another. Instead, he must only be aware that implementing the common plan or acting through another, would, in the ordinary course of events, result in the commission of the type of crimes charged. In this case, these are crimes of murder, rape, child soldier offences and others.

Turning to knowledge, for indirect co-perpetration through an organisation, the Prosecution must establish that the accused was aware --

(a) that the common plan involved an element of criminality;

(b) of the fundamental features of the organisation that enabled him to control the organisation; and

(c) of the factual circumstance that enabled him, together with other co-perpetrators, to exercise functional control over the crime. This latter aspect is established by showing that the accused was aware of his critical role in the implementation of the plan and his ability to frustrate its commission.

THE COURT OFFICER: [12:46:45] Counsel has five minutes.

MR GALLMETZER: [12:46:49] Thank you.

For indirect perpetration, the Prosecution must show that the accused was aware of

the factual circumstances that enabled him to control the organisation, which includes the awareness of the fundamental features of the organisation and his ability to act through it.

Like the accused's contribution, his *mens rea* must be assessed in a holistic way, based on all facts cumulative. The accused's conduct after the crime may also be considered.

In this case, the Trial Chamber inferred Ongwen's intent and knowledge from the totality of the conduct and its context. This includes Ongwen's role within the LRA, his interactions with his co-perpetrators and subordinates prior to, during and after the commission of the crimes; and his acts contributing to each of the crimes, including contributions to the planning, preparation and execution of the crimes and the actual commission of the crimes itself.

In sum, the Trial Chamber applied the correct legal elements of indirect perpetration and indirect co-perpetration and it correctly found that each of these elements was established by the evidence before it.

Your Honours, I will spend the final minutes talking about the notion of functional control over the crime.

The control over the crime theory is the appropriate tool to distinguish principle perpetrators - i.e., those who commit the crimes within the meaning of Article 25(3)(a) - from accessories. This is important for the accurate labelling of a person's conduct, but it does not establish a hierarchy among modes of liability. Indeed, accessories are not necessarily less blameworthy than principals.

Thus, control over the crime is not an element of the modes of liability, but rather a key feature for principle perpetration. To summarise my previous submissions on this point, for co-perpetration, control over the crimes means that by virtue of the

accused's essential contribution, he has the power to frustrate the commission of the crimes. This mean that, if it was not for his contribution, the crime would not have been committed, or it would be been committed in a significantly different way.

For indirect perpetration, control over the crime means that the accused controlled the will of the members of the organisation who are interchangeable. He could use the organisation as a mere tool and steer it towards the commission of the crimes.

Indirect perpetration combines the two. Thus, control over the crime requires proof of both that the accused provided an essential contribution, and that he, together with the other co-perpetrators, controlled the organisation through which they commit the crimes.

The Trial Chamber correctly applied these notions, both when setting out the applicable law, and when applying it to the facts of this case.

The Defence, your Honours, raises a number of factual issues, which we have all addressed in full in our written response and I refer you to our response to grounds 64 to 69 and 74 to 82. And I think I will not take any further time to repeat our response, and this concludes my submissions. Thank you

PRESIDING JUDGE IBÁÑEZ CARRANZA: [12:50:28] Thank you. Thank you, Counsellor.

Now please, counsel for victims' group 1, Mr Cox you have the floor for 10 minutes.

MR COX: [12:50:42] Thank you, your Honour. I'll be sounding like a broken record. Once again, there's little to add to what the OTP has already said, but I think -- and I would like to make a footnote, if, speaking you can make a footnote, but I think the good news is that at least one ground that the Defence has raised has completely gone out the window. Ms Beth Lyons quoted her client to address this issue - one of the main issues of the trial, indirect co-perpetration through an organisation - she quoted

the exact words of Mr Ongwen, saying, "I am not the LRA."

What does this mean? That Mr Ongwen completely understands the charges that have been brought against him. He understands them so well that his lawyer follows his lead to address this question, uses exactly the same words to dismiss this whole reasoning of co-perpetration through -- indirect co-perpetration through an organisation.

Having said that, it's interesting to me to hear that it's not in the Statute, that indirect co-perpetration through an organisation is not in the Statute, and it's interesting to me because the -- to me, the reason why Article 25(3)(a) has this wording --

"[...] or through another person, regardless of whether that other person is criminally responsible;"

-- exactly deals with this issue.

As you, your Honours, are well aware, you could act through another person and that usually, in classical penal theory, would mean that that person would become an instrument that was not capable of criminal responsibility. That's the way you would act through another person.

The fact that they have added regardless if that person is culpable, means exactly that you are acting through. You're not acting with. So that's why it's interesting because it says through. So once you say through, and that the other members of that -- that participate with you in the crime are criminally responsible, means exactly that this is indirect co-perpetration through an organisation which is composed of people.

As to the element of a power structure, it's really shocking to hear that the LRA was not a power structure and at the same time that Joseph Kony had absolute control of thousands of people - this is well established in the evidence, that there was a power

structure - mentioning that because Joseph Kony would sometimes jump the chain of command would mean that the power structure would disappear, to me, is shocking. And I'm sorry to bring -- and I know lawyers are not to bring evidence, but just to share an experience. Anybody who has lived under dictatorship knows that the dictatorship does not always gives his orders through the chain of commands. Sometime they'll jump, and this does not mean that the power structure is eliminated. And just to point you to where in the judgment all this power structure is aligned and mentioned by the judgment, I refer you to paragraphs 126 till 138, or 852, also 873. The aspect of fungibility is dealt with in paragraph 865 clearly. It says:

"Finally in this context, the Chamber notes that witness testimonies have indicated that movement of people from one unit to another, including between brigades, was a relatively common occurrence in the LRA."

So they exchanged, but the whole notion of abduction, what it does, is -- actually in the policy, is to have elements, pieces, persons, parts of this power structure, to exchange and move around. So can it be -- and, I would say one can ask, "Well, how is it that Joseph Kony is in the power structure?"

Well, he has other structures. And how can Joseph Kony be the direct perpetrator from Sudan? It's clear that there is an apparatus, there is fungibility and there is control.

I would also refer you, your Honours, to control over the common criminal plan to paragraphs 872 and 873. And it's similar to what I quoted before in the sense that, and, if I may quote:

"In addition, many of Joseph Kony's orders were general, such as orders to conduct attacks, or to abduct. For much of the relevant period of the charges, Joseph Kony was also in Sudan, while LRA units were in Uganda, communicating mostly by radio

and in person only during occasional visits from the units operating in Uganda. As a result, it fell upon the commanders closer to the units on the ground to transmit these general orders into concrete acts. This necessitated that the commanders display a degree of initiative."

And, at 873:

"In sum, the Chamber finds that the LRA had a functioning hierarchy, but that it relied also on the independent actions and initiatives of commanders at division, brigade and battalion levels. For the organisation to operate and sustain itself, coordinated action by its leadership, including the brigade and battalion commanders, was necessary. In other words, the LRA was a collective project, and the Chamber does not accept the proposition of the Defence that the LRA should be equated with Joseph Kony alone, and all its actions attributed only to him." To me, it's clear that this deals with the issue of having control over the final decision or the implementation of the common criminal plan.

And, your Honour, I think as to the common criminal plan, I refer you to paragraph 1084 where it exactly says the policies of the LRA. That is all. Thank you, your Honour.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [12:58:09] Thank you. Thank you, Counsellor.

Now, counsel for representatives for victims' group 2, Mrs Paolina Massidda, you have the floor for 10 minutes.

MS MASSIDDA: [12:58:23] Thank you, your Honours.

Since I have been left without theoretical arguments, I was thinking of doing something different. In response to the last prong of your question 4, 5, you were asking, how can the elements be established in the present case? And we have heard

about how theoretically in which way the law has to be interpreted.

Now, I will try to make an effort in this now nine minutes to have a look at the facts of this case and the evidence which actually covered the theoretical description made by Mr Gallmetzer and Mr Cox.

For the benefit of the interpreters, I will start at page 2 and please be aware that I will quote from the footnotes. Thank you.

Now for the purpose of answering question 4, in relation to the element of the organised power apparatus, this element has been established via evidence demonstrating that between, at least, 1 July 2002 and the end of December 2005, the LRA was a military organisation in the meaning of Article 7(2)(a) of the Statute, headed by Joseph Kony, with headquarters, a division, brigades, battalions, companies, with a commander, a deputy commander assigned to each unit.

Please, your Honours, you can have a look at the evidence of witness 59, transcript 36, starting at page 44 and just another example, witness 70, transcript 105, starting at page 56.

Orders were issued by Kony and other leaders to the brigade commanders, who passed them to the battalion commanders, who, in turn, passed them to their subordinates. Evidence in the case record of witness 70, transcript 105, starting at page 56.

The LRA fighters obeyed superiors' orders and followed orders. The LRA maintained a violent disciplinary system that guaranteed adherence to orders and rules to which Mr Ongwen contributed via his own initiatives, behaviours and actions.

Again, witness 70, transcript 106, starting page 41.

The Sinia brigade was one of the four LRA brigades, consisted of a brigade headquarters and a number of battalions and coys. And again, witness 70, transcript

105, starting at page 58.

Between 1st July 2002 and the end of December 2005, Mr Ongwen was a military commander in the LRA. He commanded a battalion in the Sinia brigade for much of mid-2002 to March 2004, and then on or about 5 March 2004, became the commander of the Sinia brigade. Evidence in the case record: P-54, transcript 93, starting at page 11; P-59, transcript 36, starting on page 44; P-0231, transcript 122, starting at page 32; witness 330, transcript 53, starting at page 52, and I can go on and on. It's just not only one evidence, and it's corroborated.

Mr Ongwen knew about the common plan to attack Acholis. Witness 70, transcript 105, page 58; witness 231, transcript 122, page 32; and again, here, I have at least eight more witnesses on the same matter.

Mr Ongwen participated in meetings to plan the attacks charged, gave orders to his subordinates to conduct the attacks against the civilian population in Odek, Abok, Pajule and Lukodi.

He ordered the looting and destruction of properties, murders, torture, cruel and inhumane treatment, abduction and enslavement of adults and children, perpetration of sexual and gender-based crimes, including rape, sexual slavery, forced marriage and forced pregnancy.

And for this, your Honours, all these elements, I refer to the judgment, paragraph 129 until 211, which also includes the relevant witness evidence.

In conclusion, and briefly, your Honour, the evidence in the record of the case shows that Mr Ongwen took active part in maintaining and enforcing the system of terror that the LRA operated. He had an important role in the LRA during the period of the charges, as is shown by his progressive promotions through the military hierarchy within the LRA, his participation in the Control Altar, representing the core

leadership of the movement responsible for devising and implementing its strategy, including issuing clear orders to attack and brutalise the civilian population and reporting to Kony about it. Thank you.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [13:05:30] Thank you. Thank you, counsellor.

Now, we are going to take our lunch break. We will reconvene by 1400 hours.

THE COURT USHER: [13:05:41] All rise.

(Recess taken at 1.05 p.m.)

(Upon resuming in open session at 2.02 p.m.)

THE COURT USHER: [14:02:14] All rise. Please be seated.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:02:35] Welcome back.

Now we are going to proceed with the responses to submissions on indirect co-perpetration.

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

MS LYONS: [14:03:17] Thank you, your Honour.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:03:18] Wait a minute, please.

MS LYONS: [14:03:19] Can you hear me, your Honour?

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:03:20] Yes --

MS LYONS: [14:03:20] Can you hear me, your Honour? Okay, all right --

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:03:24] Wait a minute, Mrs Lyons, I'm going to give the floor to Ms Brady.

MS BRADY: [14:03:33] Thank you, and sorry --

MS LYONS: [14:03:33] I'm sorry, okay.

MS BRADY: [14:03:34] -- to interrupt your Honour.

I just wanted to introduce -- we have two other people, our appearances are the same, but there's a different line-up in the courtroom. Together with me, Mr Gallmetzer and Ms Regue, but today -- this afternoon, we're also joined by Mr Nivedha Thiru, associate appeals counsel, and Mr George Mugwanya, appeals counsel and they will be speaking in the next session. Thank you.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:04:05] Thank you. This is noted for the record.

Now, counsel for the Defence, Ms Beth Lyons, you have the floor for five minutes.

MS LYONS: [14:04:14] Thank you very much, your Honour.

There's been a lot of -- the term -- different terms were thrown around this morning about piling on charges, overzealous prosecutors. I'm not going to take up my time on that, but I want to say objectively, we are dealing with a defence of Mr Ongwen, who was charged with 70 charges, convicted of 61, he was charged with eight modes of liability, convicted of two. This is the largest number of charges and convictions for a single defendant in this Court. I haven't checked all the other international courts, but I think that's where we start from.

Now in response to -- to counsel, we have already briefed the evidentiary issues in response to -- to the points they have raised. I will not repeat them. But I want to talk about what I think is a predicate issue before you even get to evidence. The issue really isn't the law. Yes, the Defence disagrees with the law, okay? But we have to live with the decisions of the various chambers on the law.

The problem is, the law on individual -- I'm sorry, in indirect co-perpetration as well as other elements was not properly pleaded and the client has an absolute right to notice and to have specific pleading. So that even before the -- a chamber reaches the evidentiary issues, the first issue is pleading. And as the Ntagerura Appeals

Chamber judgment at the ICTR upheld, that was in pleading fair trial, the appellate errors, this was upheld by this Court as well, but they are the starting point. You can't even talk about the evidence if, in the very beginning, the person charged is not properly notified of the details of the charges and the modes of liability in a language that he or she understands.

Now secondly, we've already dealt with examples of this, I refer you to our briefs and to defect series number 2, but I want to just make one point. There was a lot of discussion about elements today, this morning. Now if you were to look at the sexual gender-based crimes in section 9, paragraph 123 of the COC as well as the count 69 and 70 at paragraph 129, nowhere to be found is the term "essential task". Nowhere is to be found that Mr Ongwen's essential task frustrated -- or, if he didn't do it, it would frustrate the crime.

What does it say? It says: Dominic Ongwen contributed to the realisation of the common plan. This is not essential task. This doesn't deal with the required elements the Prosecution laid out of frustrating the crime. This doesn't deal with the jurisprudence in Katanga, Ntaganda, Lubanga on the requirements. This simply -- the language isn't there and the factual allegations to support the legal elements are missing, and, on this basis, the -- the -- and the basis of defects of the charging instrument, we have asked repeatedly that the instrument -- that the -- that the counts be dismissed. So that we ask you again to consider this. It's the predicate issue. It's not the end of the line issue, which is the evidence.

One moment.

In terms of the other comments, we're not going to respond at this moment to -- to what the victims said. I don't have enough time, but I think that the issue that we want to make -- to present, is, that you can't consider, as you've said in your

appeals judgment to us, you can't consider the issue of defects in pleading and make a decision about that. It's within the Appeals Chamber's powers and authority and its jurisprudence - both from this Court as well as from the ad hocs - to support the notion that fair trial starts with an indictment or a confirmation of charges decision, which -- which --

THE COURT OFFICER: [14:09:48] Counsel's time is up.

MS LYONS: [14:09:48] -- explains in detail...

One minute, okay (Overlapping speakers)

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:09:50] Ms Lyons, I will give you one minute to conclude, please. One minute more.

MS LYONS: [14:09:55] Thank you, your Honour, which explains in detail and gives -- provides notice, which is -- which is what is required from Article 66 -- 67(1)(a) and from the international conventions and covenants, which everyone probably -- of which everyone is probably aware. Thank you.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:10:19] Thank you.

Now, Prosecution, counsel for the Prosecution, you have five minutes, please, to respond.

MR GALLMETZER: [14:10:23] Thank you, your Honours. The arguments that we've heard from the Defence this morning and also now this afternoon merely repeat arguments that the Defence has already made in its written appeal, and, indeed, already during trial and that were dismissed by the Trial Chamber. So we fully respond to all of those arguments in our written briefs where you will find all the details and the authorities supporting our position.

I just want to highlight a few things.

Counsel started her presentation this morning saying that this is a prosecution of the

LRA. It is it not. This is a prosecution of Dominic Ongwen and it's about his individual criminal responsibility for the crimes. And the Chamber -- the Trial Chamber correctly approached it exactly as that.

The Trial Chamber assessed the position of authority that Dominic Ongwen had within the LRA; it assessed the conduct of Mr Ongwen, the causal link between his conduct and the commission of the crime, and assessed his intent and knowledge. As such, what is really at the centre of this case is Mr Ongwen and his criminal responsibility.

Second, the Defence argues that the LRA is not a power apparatus within the meaning of Article 25(3)(a). This is incorrect. The Chamber correctly set out the law and applied that law to the facts of this case. It made all the necessary findings about the fungibility of the members, the functional automatism of the organisation and of the power that Ongwen had over his subordinates to direct them to commit the crimes.

The Defence argues that this theory of indirect co-perpetration should only be applicable to state authorities and this is absolutely incorrect. What matters is whether an organisation meets the legal requirement and that is a legal -- a normative assessment that the Chamber will make based on the facts before it.

And, as a matter of fact, this Court in all confirmation decisions, trial judgments and Appeals Chamber judgments has never applied the theory of indirect co-perpetration to anything other than non-state organisations.

And not only the ICC. National authorities are doing the same. For instance, the case before the Supreme Court of Peru against Guzmán. That is a case against a non-state organisation, the Sendero Luminoso. So there is absolutely no reason why it should be limited to formalistic concepts of a state authority. It is a factual

determination and not a formal one.

Also, the Defence raises the hypothetical issue of whether the LRA could be sustained in the absence of Mr Kony. This is an entirely hypothetical situation and is irrelevant to this case. What the Chamber did, is, it applied the law to the facts of this case and it focused on Ongwen's individual criminal responsibility. It did so correctly, and all of its findings are abundantly supported by credible evidence before the Chamber.

Finally, the Defence argues that there is an issue of notice of the charges. We will talk about this in a bit more detail in the next session, but here, I only want to mention one thing. The Defence argues that it was not sufficiently noticed of the theory of control over the crime, and as we have argued in our written response, this is untrue. What the Defence does is they confuse the -- or misunderstands the notion of control over the crime. As I've argued earlier, control over the crime means that the person is able to frustrate the commission of the crime by means of the contributions. So what is central to giving notice is, what are the contributions that an accused gave to the crime or to the common plan as a result of which - and as a consequence of a normative assessment - the Chamber would then conclude that the person had control over the crime?

This is what a person needs to be informed of and not of the legal and normative assessment that the Chamber will make as a result. Thank you very much.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:15:31] Thank you.

Victims' group 1, you have the floor for five minutes.

MR COX: [14:15:38] Your Honour, actually, I have no further comments, so I won't use the time. Thank you.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:15:43] Thank you. Victims' group 2, you have the floor (Overlapping speakers). Yes.

MS MASSIDDA: [14:15:49] Apologies again, overlapping.
Just one brief comment. This morning, Ms Lyons was referring to the Musisi report, the report of the expert called by victims in the case, and, if I recall well, she was using the report to support the conclusion that Kony was the LRA.
Now, the only remark that I have on that is that, actually, the Musisi report was an interplay of Acholi culture and trauma suffered by victims. So in order to make any conclusion or observation in relation to that, Professor Musisi made some background information in relation to the LRA system itself. Now this does not mean that that report can be used in the terms pleaded by the Defence, because the report had a completely different purpose. And I wanted to make this clear because it's quite important for the relevance of the victimization and the extent of the victimization for our clients.
Thank you very much.
PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:17:11] Thank you.
I will now give the floor to my learned colleagues in case they have questions. I would like to remind the parties and participants that you have two minutes to respond to each question posed by the Chamber.
Judge Hofmanski, you have questions?
JUDGE HOFMANSKI: [14:17:41] Thank you. I have no question.
PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:17:43] Thank you.
Judge Bossa, do you have questions?
JUDGE BOSSA: [14:17:48] I have one question, Madam President.
PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:17:56] Go ahead, Judge Bossa.
JUDGE BOSSA: [14:17:58] Thank you.
My question goes to the Defence.

I've heard arguments - and I hope I've heard you correctly - that Joseph Kony is solely responsible for the crimes committed by the Lord's Resistance Army.

I would like to know from your perspective, does Mr Ongwen have any individual criminal responsibility in this case that you can point to?

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:18:44] Thank you.

And the Defence has two minutes to respond. Thank you.

MR AYENA ODONGO: [14:18:49] Thank you, Madam President, and your Honours.

To that question the answer is simple: Joseph Kony was the alpha and the omega. We begin from the premise of how he emerged as the leader of that organisation. He came as a messiah from God and that was his strength. Throughout the vicissitudes and the vacillations of the LRA atrocities, Kony was right in the middle of it. And there was no organised meetings where he consulted his people and so on and so forth. In fact, evidence is abound on record that Kony instead was in constant consultation with the spirits and the spirits were vast and many in control of intelligence, in control of command and so on and so forth -- even those who were in control of women's affairs, information.

So the short and long of it is that arising from that control -- centralised control of the LRA, nobody, not even Dominic Ongwen - who only came to prominence at the tail end of the war in Northern Uganda - had any role at all. So for that matter, Ongwen was a mere appendage to the system and he played no role. He was an agent of the spirits first and foremost, and, ultimately, an agent of Joseph Kony. So whatever he committed, he committed on behalf of Joseph Kony.

But most telling, you know, there is an attempt to force him into indirect co-perpetration, but nowhere in the charges -- in the pleadings will you find that

Ongwen's hand, any -- any blood on Ongwen's hand. Ongwen did not kill anybody in the bush. Under LRA, Ongwen -- as a matter of fact, like I said, was only being used as an instrument.

For instance, when you talk about widespread, you know, attack on the civilian population, Ongwen only came into the LRA as a child at the age of nine years. He had to wait for nine years and became -- before he became 18 and ...

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:21:39] Counsellor, try to respond to the question of the judge, especially the last part. Do you recognise any responsibility in Mr Ongwen or no?

MR AYENA ODONGO: [14:21:50] I do not recognise any responsibility of Ongwen as a person at all.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:21:55] Thank you.

Judge Bossa are you satisfied with the answer?

JUDGE BOSSA: [14:22:02] Yes, Madam President. Thank you.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:22:05] Do you have any other questions?

JUDGE BOSSA: [14:22:08] No.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:22:10] Judge Alapini-Gansou, do you have any question? Thank you. Please, go ahead.

JUDGE ALAPINI-GANSOU: [14:22:15](Interpretation) Yes, I do have a question, Madam President, and it's a two-pronged question.

I would like the Defence to answer the first prong of the question before I move on to the second.

Now, once again, following up on the question put by Judge Bossa, my colleague, I would like the Defence to try to assess with us the kind of -- how -- what kind of

commander Mr Ongwen was. What -- what kind of commander would you say? What kind of command did he receive within the chain of command?

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:23:12] Defence, two minutes please.

MR TAKU: [14:23:14] May it please, your Honours.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:23:17] (Overlapping speakers) your mask.

MR TAKU: [14:23:18] Yes. Your Honours, the title of commander actually had no practical importance as long as Joseph Kony could use anybody within the organisation.

Secondly, in 2000 -- shortly after they came back to Uganda, Iron Fist, Ongwen was injured. He was in the sickbay for so many months until he was arrested because of Salim Saleh.

So those positions -- although he had a position, but the position were not effective. As lead counsel explained thereafter, even in sick -- in the Control Altar, he was not a commander. He had a title, but he was not effective. He was there as a prisoner, and, thereafter, when they appointed him deputy commander to Sinia brigade, Kony again says he could not -- because he was sick until 2004, March. These other crimes are within a period of two months -- or less than two months, about the attacks, the ones about the women and the children. Your Honours, Ongwen -- because of the rules, Ongwen had nothing formulating the whole laws and the policies. So the question of commanding was not effective, wasn't of being a commander you have over 150 or 250 people. A brigade, as we know, is about 2,500. So again, the title of commander had no effect because the policy was executed by Kony. He ordered when -- when abduction would take place and when it will not take place. He disciplined everyone. So the title of commander was just there for no practical effect.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:25:08] Thank you.

Are you satisfied?

JUDGE ALAPINI-GANSOU: [14:25:12](Interpretation) My second sub-question. Now, was he proud of being a commander? Was he proud of that title? According to your explanations, his portfolio was almost empty. He had the title of commander, but according to you, this was really just an empty shell.

Was he proud? Was he proud of being a commander?

MR TAKU: [14:25:38](Overlapping speakers) Your Honours, look at the record. He wasn't because at the end of the day, Ongwen was reduced -- demoted to a private and given 297 strokes, was about to be executed.

Secondly, the UPDF intelligence report that we cited yesterday said that he should be executed, and two officers gave evidence that Okwonga Alero was sent -- was -- escort -- to execute him. So Odek, you will see that, although they say he was a brigade commander, Kony talked to Ben Achellam, who was, as far as he knew, to lead the attack in Odek. Ongwen wasn't on the spot in Odek. Ongwen wasn't on the spot in Abok. Kony again gave instructions to Kalalang to be there. So he was given that position merely for Kony to use when he wanted, but not pract- -- in a commander that we know under normal military discipline.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:26:42] Thank you.

JUDGE ALAPINI-GANSOU: [14:26:43](Interpretation) This is a subjective question I'm putting to you, Counsel. This is a subjective matter. Perhaps he -- yes, he was demoted, but when he was appointed commander, during that period of time, was he proud of being a commander? Yes or no?

MR TAKU: [14:27:01] (Overlapping speakers) He wasn't because he was not allowed to exercise that position in any context whatsoever. And you -- you heard about

Pajule. Vincent Otti was there. How could the commanders -- the Prosecutor said that Ongwen was in a common plan with Kony when the second-in-command was there on the spot, and he was just an ordinary person.

Lead counsel wants to say...

One minute, your Honour, we beg your indulgence.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:27:32] Thank you.

Judge Alapini are you satisfied?

JUDGE ALAPINI-GANSOU: [14:27:36](Interpretation) Noted.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:27:40] Judge Lordkipanidze, you have questions? Yes, please go ahead.

JUDGE LORDKIPANIDZE: [14:27:48] (Overlapping speakers)... I beg your pardon.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:27:49] You would like --

MR AYENA ODONGO: [14:27:50] Yes --

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:27:50] Wait a minute, you would like to also respond?

MR AYENA ODONGO: [14:27:50] Yes --

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:27:50] -- to complement, one minute.

MR AYENA ODONGO: [14:27:51] -- to complement.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:27:51] Thank you.

MR AYENA ODONGO: [14:27:52] The question is whether he was -- whether or not he was happy as a commander, notwithstanding all the humiliations and so on and so forth. You know, if you're talking about the charged period, this is a period of bitterness for Dominic Ongwen, starting from the injury that he talked about, going to the issue of superimposing, you know, lower-ranked commanders over him. Giving

instructions above him and so on and so forth. You look at the way he was in Odek, of course, I shall talk about it in detail later. When you look at his alleged contribution in -- in Pajule, he was not there. Actually, he was a prisoner. You come to Odek. Odek, instead of him going there, somebody else was sent there. And that was the same thing with Abok. Even in Lukodi, there was -- the only contribution that is -- you know, his soldiers, soldiers under his command made was because somehow they had strayed near where the operation was going to be made. So somebody detected it and said, "Okay, in that case, go and conscript Dominic Ongwen's soldiers to come and help you in executing that plan."

So with that kind of scenario, no reasonable person would be happy as a commander. I don't know whether he was --

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:29:25] Counsellor --

MR AYENA ODONGO: [14:29:26] Yes, please.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:29:27] -- we are not talking about no reasonable person. Only about Mr Ongwen. Please stick your answer to this --

MR AYENA ODONGO: [14:29:34] Oh, yes.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:29:34] Yes.

MR AYENA ODONGO: [14:29:35] So what I'm saying is that Ongwen at this time was an aggrieved person, was an aggrieved person, because he was not being taken seriously anymore.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:29:42] Thank you. Thank you. Judge Lordkipanidze, you have the floor.

MR GALLMETZER: [14:29:50] Your Honour, I apologise --

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:29:51] Sorry, yes? You would like to --

MR GALLMETZER: [14:29:52] I would like to have a (Overlapping speakers)

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:29:56] I'm so sorry, Judge Lordkipanidze.

Please, yes, go ahead.

MR GALLMETZER: [14:29:57] Thank you very much.

I would like to point out that what the Defence does is reargue its position on trial, but this position is not based on any evidence and it does not show any error in the Trial Chamber's finding. And it's very important it does -- because these are factual arguments, these arguments that we hear today do not reach the threshold for appellate review of errors of fact and this is how the Trial Chamber -- the Appeals Chamber, I apologise, should approach it.

And this applies to many of the factual arguments. We are simply hearing the same positions over and over again that are not based on any evidence. In addition, the Defence specifically argues that Ongwen was indisposed by arrest or physical injury, and, again, they simply reargue what we have heard during trial and again we have seen in the written briefs.

The Chamber in this trial -- the Trial Chamber in its judgment reasonably concluded that Ongwen's alleged arrest by Otti and his physical injury did not render him inactive. From at least December 2002, which is nine months before the Pajule IDP attack, Ongwen exercised his authority as a commander. Ongwen participated in the planning and execution of the attack as was established by multiple evidence.

And I refer you to the trial judgment at paragraphs 1183 and following.

Finally, in relation to Odek, again, the Defence assumes that simply by not being physically present it renders Dominic Ongwen not guilty for the crimes that he has committed. But the Chamber correctly and reasonably found that Ongwen designed

the attack, he gave instructions, he appointed a subordinate to carry out the attack and he set the attack in motion. And I can refer you to the trial judgment at paragraph 2917.

The Defence does not show any error in those findings. Thank you.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:32:28] Thank you. Thank you.

Now Judge Lordkipanidze, please, you have the floor.

JUDGE LORDKIPANIDZE: [14:32:34] Thank you, Madam President, with this question I intend to take further discussion on the questions posed by my colleagues, and this is a question to all parties and participants.

Even assuming that the -- as the Defence suggests that Mr Ongwen was an instrument or a cog at the disposal of Joseph Kony and thus replaceable, would it automatically exclude Mr Ongwen's individual criminal responsibility as found by the Trial Chamber in the conviction decision?

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:33:23] The Defence counsel, please, to respond? You have the floor for two minutes.

MS LYONS: [14:33:26] Your Honour, can I respond?

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:33:27] Yes, Counsellor Lyons, you have the floor for two minutes.

MS LYONS: [14:33:33] Yes, thank you. What I would like to respond to this question, and also to the questions asked prior, is this, what's being left out from this discussion is the defence -- the affirmative defences of mental disease or defect and duress. In addition to the arguments my colleagues have raised, for all of these time periods, whatever Mr Ongwen is doing according to the trial judgment, whatever conclusions they reach about his conduct, that conduct was the result of duress and -- he was under and suffering from mental disease.

These are two important elements that are superimposed on this whole discussion, in addition to the specifics of what happened at various crime sites and the conclusions. And I don't think we can have this discussion without considering what was the role of the mental disease on Mr Ongwen and the situation, what was the role of the duress. Because if you accept these two affirmative defences, it supports our position that Mr Ongwen had no criminal responsibility as lead counsel, Ayena, said a few moments ago.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:35:10] Thank you.

Judge Lordkipanidze, are you satisfied with the response?

JUDGE LORDKIPANIDZE: [14:35:16] Thank you.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:35:17] Thank you.

MR GALLMETZER: [14:35:19] Sorry, I understand that the judge wanted to hear from all parties?

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:35:24] Yes, but -- yes, I was about to think Mrs Paolina asked the floor before -- before you.

Please. No?

Mr Cox, you have the floor for two minutes.

MR COX: [14:35:42] Thank you, your Honour, very quickly. On the arrested -- I mean, we completely agree with what the OTP has said. This is an appellate session or chamber. It's not a trial. So keep the threshold in mind. And these are errors of fact, and, as we said before, you -- they have to prove -- the Defence has to prove either that it lacked common sense, it went against logic or scientific knowledge. None of this has been proven.

And that response -- Mrs Lyons's to the question, they have not shown... They disagree. There were different medical reports. The Trial Chamber said, "We prefer

these ones." They gave their reasons, they gave the scientific support for their reasoning, they gave the logical process. Therefore, there's no ground for the appeal. And on facts, the facts are misplaced. The arrest, what did the Trial Chamber determine? It determined that the arrest consisted of taking away his escorts. That was the arrest. That was the amount of the arrest. That was the punishment of -- the arrest, taking away some of his privilege and his escort. The witnesses, I've quoted them many times where they show that Mr Ongwen had control and wasn't just an instrument.

However, if he was fungible, the only consequence of that would be a different modality of participation. He would be a direct perpetrator. He would not be -- because it would be taking place, he would be contributing directly. Even if he could be exchanged, his contribution would still be essential.

As to the UPDF report, the Trial Chamber also deals with that and it said that it dismissed it because the claim of the execution hadn't -- in the report, that's in the report, but the Trial Chamber says, "We can't take that into account because there's no source for that information, so we can't test it if it's real or not. And nobody else gave testimony about the execution."

That's again a determination of fact. That has not -- the Defence has not reached the threshold.

And I think with that, I give back (Overlapping speakers)

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:38:14] Thank you.

Mr Paolina Massidda, you would like to intervene? Thank you. You have two minutes.

MS MASSIDDA: [14:38:20] May I have three, I will respond to two questions. I will try in two. Thank you, Madam President. (Interpretation) I wanted to add a few

elements to the question asked by Judge Alapini-Gansou, the two prongs of her question. The first being promotion, when it comes to promotion, the factual -- the facts of the case are very clear. Promotion in the LRA is by merit and performance. There are many witnesses who have testified to this effect, [D]-0032 and D-0018, which is on the transcript of 200, page 32; (Speaks English) transcript (Interpretation) 185, page 68, and there are other witnesses who have given the same information. And the second prong was, how was Mr Ongwen as a commander? Was he proud of himself as such?

Madam President, there are -- your Honour, there are lots of witnesses who testified that Kony praised Ongwen because he performed very well the tasks he had. He was an effective commander and others should emulate him. These are witnesses 0003, a Prosecution witness, and also Prosecution witness [00]59. If you wish to see the evidence in more detail for [0]003, it's transcript 43, from page 41 and for witness [00]59, transcript 37, from page 13.

(Speaks English) Two words on the question by Judge Lordkipanidze - hopefully, I have pronounced his name correctly - apologies for that. My answer is clearly no. We are discussing here individual criminal liability and this is what the Chamber actually assessed. Thank you.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:41:03] Thank you. Now counsel for the Prosecution, two minutes, please.

MR GALLMETZER: [14:41:06] Thank you. So your Honour's question, I think there is a legal and a factual response to your question. As a matter of law, I take you straight to Article 25(3)(a), which in the relevant part says that a person may commit a crime "through another person, regardless of whether that other person is criminally responsible".

That means, even if a person is under the control of someone else, that does not exclude that person's criminal responsibility. It could not be clearer as a matter of law.

As a matter of fact, we have seen how the Trial Chamber dealt with it. It focused on Ongwen's position within the LRA, his authority over LRA fighters, his conduct that led to the commission of the crime, and it specifically assessed the autonomy that Joseph Kony -- had to take his own decision to interpret policies and instructions that he received from Kony. And therefore, there is no question that as a matter of law and fact, he was correctly held responsible for the crimes.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:42:24] Thank you.

Any other party or participant?

Well, Judge Lordkipanidze, are you satisfied?

JUDGE LORDKIPANIDZE: [14:42:35] Thank you.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:42:36] Thank you. Thank you.

I would like to ask a question for the Defence.

We have heard during this session that the Defence states that the Lord's Resistance Army was not an organisation. But I would like you to describe then, what was this Lord's Resistance Army, because as we can see from the judgment -- from the Trial Chamber's judgment and from the evidence, this structure was with a certain hierarchy. At the top, Joseph Kony, and then Vincent Otti in Control Altar. Then we had brigades, several brigades, Stockree, Gilva, Trinkle. Division, Jogo. Then we have battalions, Oka battalion, Terwanga, Siba, others. Then we had companies, several companies, then we have soldiers.

So with this, how could you describe the Lord's Resistance Army if it's not a structural organised power apparatus, would it be a gang or a group or -- whatever?

Please.

MR TAKU: [14:43:48] Your Honours, I will put your question within the context of Iron Fist, who I have been talking here every time, but we should look at the findings of Operation Iron Fist. The Lord's Resistance Army was in Sudan, and, when in Sudan, they benefited from the assistance of the government of Sudan -- they benefited from Sudan to organise themselves, and in most of Central Africa, Congo and other places. But due to systematic bombardments, it decapitated them completely. So this particular portion, the functions, and these were no longer there. You have to see how, when the judges were trying to -- and, of course, all the peace talks, when they tried to do the peace talks and find that who were the people there, most of the commanders were killed, Raska Lukwiya, Charles Tabuley and (indiscernible).

So during Iron Fist, it was no longer -- and you look at the number of them that were there, if you look at the evidence of the lawyer, Timothy Kanyogonya and also Balikuddembe, who was the commander of the UPDF, and they asked, "Oh, Dominic, a brigadier?" He said: "No. We don't recognise them as a brigadier. They are not. These are people here who give themselves titles." They don't. Balikuddembe was the most senior officer --

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:45:13] Counsellor --

MR TAKU: [14:45:13] -- therefore --

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:45:14] -- your definition of --

MR TAKU: [14:45:15] Yes.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:45:16] Your description of the -- of the -- you know, group? Gang? What -- what is -- what was it?

MR TAKU: [14:45:24] Yes, yes, the minister said at that time, they were just calling

them this group of bandits, because the structures that were built in Sudan, Iron Fist, systematically -- bombardment. And that's why the national assembly, the Minister of -- the Minister of Defence said that, "We have completely annihilated, and, are just bands here and there, attacking in search of food."

So within the charged period -- your Honours, you have to look at the period. It was not an organisation as such practically on the ground, and the evidence is there from the UPDF, the Ugandan Defence Forces, two of your commanders from the chief of military intelligence, from the commander in Northern Uganda, Balikuddembe, and everyone, and the number of them that were there, all over the territory, there were no more than 214 any longer in order to meet this organisational structure that they're talking about. It is because we are looking at all this outside the structure of what was Operation Iron Fist, and what did it do, and how did it transform the LRA? It transformed the LRA just to a band of individuals, running up and down for survival and attacking to --

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:46:35] Thank -- thank you --

MR TAKU: [14:46:35] -- in search of food.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:46:35] -- counsellor. It's just your definition because you stated this this morning, because for other means, we have all the evidence in the record.

But also, I would like to ask you in line with those definitions, I can see from the record and from the evidence and from the judgment of the Trial Chamber, that - unless you can correct me - that during the period 1 July 2002 till 17 September 2003, Mr Ongwen was a battalion commander, and then, during the period 17 September 2003 to 3 March 2004, Ongwen was second in command. And then from 4 March 2004 till 31 December 2005, Mr Ongwen was a brigade commander, and as

a commander, Ongwen had at his disposal an intelligence officer, a brigade major and the support commander. He also commanded several hundreds of soldiers. Could you -- with all of this information, could you tell us then, Mr Ongwen was a commander of bandits? Is this your statement today? And with this, I will leave it there. Thank you.

MR TAKU: [14:48:10] Your Honours, Ongwen was set up. They came back to Uganda, they say, for the charged period from 2nd of July 2002. By October, Ongwen was wounded. He was in the sickbay for about nine months. Within this time, the evidence shows he was relieved of command as a battalion commander and one commander called Celest was appointed.

Now, he was arrested because of Salim Saleh and taken to Control Altar. You'll find your Honours at paragraphs 2140 until 141. Now while in Control Altar, they said that Ongwen has been appointed as second-in-command of Sinia, but they -- both Kony, they said, "But since he is still sick, Lapanyikwara should act."

The next day, Kony called Vincent Otti, but that Lapanyikwara or (indiscernible) was second-in-command of Sinia brigade to which Dominic Ongwen was provided because he, Ongwen, is still sick. The next time you hear about Ongwen after this -- an attack from (indiscernible) in August as honourable (Mr Taku points to Mr Ayena Odongo) will prove, the intelligence report from the UPDF said that they had wanted to execute him, but he was placed (indiscernible). But --

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:49:37] Counsellor --

MR TAKU: [14:49:38] -- one minute, your Honour. Witness 205, who was one of the key witnesses for the Prosecution, said he was instructed to assemble a squad to kill Ongwen. And that's why I say for the whole of 2003, the UPDF, in a

report -- said in a report, which a witness -- an intercept witness gave, Ongwen was nowhere. But --

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:50:06] Counsellor --

MR TAKU: [14:50:07] Yes.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:50:07] -- Counsellor, the only question here --

MR TAKU: [14:50:08] Yes.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:50:09] Because your statement today is that whether you consider that your client was a commander of bandits, because all the other details are in the judgment to be considered for the Appeals Division. The only thing is I would like you -- because this was your statement, was he a commander of bandits?

MR TAKU: [14:50:29] No, your Honour. The word "bandits" came from Balikuddembe, what the UPDF considered. And that the position they have given themselves, these positions are invalid. They do not consider them as a correct position. But whether it is a bandit or not, the UPDF said this was a band of people, less than 2- -- more than 214 individuals, and, therefore, they were not validly a brigade --

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:50:55] Counsellor --

MR TAKU: [14:50:55] -- brigadier --

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:50:56] -- we have those elements in the evidence. Thirty seconds to conclude.

MR TAKU: [14:50:59] Okay.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:51:00] Thirty seconds to conclude, please.

MR AYENA ODONGO: [14:51:05] Madam President, can I give it a shot?
PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:51:09] Yes, please.
MR AYENA ODONGO: [14:51:11] Yes. Madam President, the issue is, was he now a commander of bandits? This is what I have to say, Madam President and your Honours. You know, at that point, after the Iron Fist, it was survival of the fittest, each one for himself, God for us all, and let the devil take the hindmost. Now, in this case, when you are left to a survival arrangement, there shall be some statements made about some form of -- a way to survive. That does not negate the fact that they were actually bandits, because the organisational cobweb that was binding them together was no longer there, and, then above all, to support what my colleague was saying, you know, even if it were true that at that time they were still an organisation, they were so disjointed. And in the case of Ongwen, in particular, Ongwen was so sidelined - first of all, because he was no longer trusted; and secondly, he was sick anyway to the extent that as far as we are concerned, a band of bandits who still found themselves in Uganda anyway, under Otti, who were trying to, you know, make some pretence of presence as a matter of survival.
PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:52:48] Thank you. Thank you, Counsellor.
Judge Alapini, you have a question. You have the floor, please.
JUDGE ALAPINI-GANSOU: [14:52:56](Interpretation) Madam President, I would like, if I may, for the Court to take note of what the counsel of Mr Ongwen has said, which is that the members of this group were considered to be bandits. I feel that this is an important point, because that's what I have seen in the transcript. They've quoted this. So they considered themselves to be bandits.
I feel that that is an important point, if I may.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:53:45] (Overlapping speakers) Judge Alapini, are you asking the Bench to ask Mr Ongwen?

(Appeals Chamber confers)

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:53:55] I'm afraid that this is more a legal debate. Mr Ongwen will have the time to say what he deems necessary on the last day of this hearing. But still -- well, you have already had enough time, but I will give you one minute to conclude, counsellor for the Defence.

MR TAKU: [14:54:21] Your Honour, I'm referring to the debate, the Hansard, when you went in parliament, what is said, characterised them. I'm saying what UPDF, the opponents -- Balikuddembe said, what the lawyer, Timothy Kanyogonya, or the chief of military intelligence said, and what the opinions of other people.

This label of "bandit" is not what Ongwen committed himself. But the decapitation by Iron Fist, they end up a group of individuals who were running up and down in Northern Uganda for purposes of survival. And the evidence shows Otti went to Teso, went to other places. Ongwen was confined in one environment, your Honours.

So this is not Ongwen whose lawyer said that Ongwen was a bandit. Ongwen has not been a bandit. But it is what I'm saying that officially, in official records - and even in this case - they said that Iron Fist decapitated them, and they were running up and down in different parts of Northern Uganda for survival and that's why they come to attack in order to get food --

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:55:18] Thank you.

MR TAKU: [14:55:18] -- it's not to kill people.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:55:19] Thank you, counsellor.

Do the other parties would like to answer? To say something in response to this

question?

OTP? Counsel for the OTP, two minutes, please.

MR GALLMETZER: [14:55:33] I just would like to point out that a lot of what the Defence is saying now is not based on evidence on the record, and, in any event, the Defence does not show an appealable error of fact.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:55:49] Thank you.

Counsel, Mr Cox, counsel for the victims.

MR COX: [14:55:51] Very shortly. I think it's fascinating that another grounds of appeal has just left the Court. That one of the incapacities of leaving the LRA, the capacity to run away, that he did not go back to his family because of all this structure. On their own grounds, if it's a group of bandits, then where was all this power? All this structure that impeded or made it impossible for Mr Ongwen to leave the LRA? So maybe if we keep on, all grounds will leave through the window.

Thank you, your Honour.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:56:31] Thank you, counsellor.

Someone else? No.

MR AYENA ODONGO: [14:56:35](Microphone not activated)

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:56:39] Well, counsellor for the Defence, you have had enough time, but I will give you one minute, the last minute, okay? To conclude. Thank you.

MR AYENA ODONGO: [14:56:52] Very benevolent.

Madam President, answering what he has said, you know, what we have now said should not be construed as negating the fact that Ongwen was under duress. We are saying even in -- gangsters, you know, drug lords and so on and so forth, they still have some level of control over those under them.

In this case, Ongwen - in particular, especially after the incidents we have expatiated upon, the meeting with the top commander of the Ugandan government forces - was all the time under surveillance. Even -- remember at this point in time, Vincent Otti, the second-in-command of the LRA was directly monitoring what was going on.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:57:48] Counsellor, we have already exhausted yesterday the issue -- on Monday, the issue of duress. So this session is for indirect co-perpetration. I would like - if you know - to know if you any other thing to add to the topic of indirect co-perpetration or the structure of power that was the LRA? If not, it's okay.

MR AYENA ODONGO: [14:58:14] You know, I rose up to answer to what he was saying, because he's suggesting --

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:58:21] You have made your point, Counsellor.

MR AYENA ODONGO: [14:58:25] Very well.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:58:26] Thank you very much.

MR AYENA ODONGO: [14:58:26] Thank you.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:58:28] We have exhausted this session. We are taking our break. We will back by 15:30 hours. 15:30.

THE COURT USHER: [14:58:35] All rise.

(Recess taken at 2.58 p.m.)

(Upon resuming in open session at 3.33 p.m.)

THE COURT USHER: [15:33:37] All rise. Please be seated.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [15:34:03] Welcome back.

Before we continue, I would like to put on the record that I have just signed an order to redact four or five lines of the transcript of this last session which appear to contain

confidential information.

MS MASSIDDA: [15:34:43] Madam President, with your indulgence --

PRESIDING JUDGE IBÁÑEZ CARRANZA: [15:34:45] Yes?

MS MASSIDDA: [15:34:46] During the break, we managed to check the corresponding transcript of the testimony of a witness, which is transcript 109, if I'm not wrong, and, in that transcript, the name of the witness does not appear anymore. Redacted. So there is no need for redaction. I'm sorry for that, but we acted cautiously. The member -- in the situation of a witness, I will further check the name is not redacted. Thank you very much.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [15:35:16] Thank you. Thank you for your diligence, Counsel. Thank you.

Well, now we have -- the session will be on submissions on any other issues on the remaining grounds of appeal. The parties and participants, are you prepared for the submissions? Starting with the counsel for Mr Ongwen, you have the floor for 15 minutes.

MR AYENA ODONGO: [15:36:05] Good afternoon again, Madam President and Your Honours.

Madam President, the central issue in our appeal is about failure of the Court to properly evaluate evidence on record. It is scarcely about the fact that it was not considered by the Court. I'm saying this in response to my learned brother on the other side, Mr Cox, when he said the issue of Salim Saleh, for instance, was properly canvassed and dealt with by the judges -- I mean, by the trial court, save for the fact that we disagree with the findings.

This is far from the truth. If it were not for the reason that we said all this and they were ignored, we would not have made any appeal about this and I shall -- for the

benefit of this Court, I think it's necessary to go through the progression of what happened in respect to Ongwen's contact with Salim Saleh. On the 20th, Madam President and your Honours, there was a radio communication that Dominic Ongwen had been discovered as having had a communication with Salim Saleh and he had gotten some items of goods, including a telephone from Salim Saleh.

On the 21st, this was followed by an order from Kony to have Dominic Ongwen arrested. This was on the 21st of April 2003. It is instructive, my Lords, to remember that Ongwen had just been seriously injured in November 2002. So by that time, when he had contact with Salim Saleh in the sickbay, he was at least isolated away from the mainstream LRA.

Now, that is important to note. And when he made this contact, somewhere in the judgment because of lack of proper evaluation, the judges said there is no evidence to prove that the reason why Dominic Ongwen went to Salim Saleh was not necessarily for escape. They disregarded the possibility that he did it because he wanted to escape.

This was ridiculous to say the least, my Lords.

You know, the kind of person we are talking about, General Salim Saleh, is, actually, almost an alternative president in Uganda, and, if it were not for a reason more serious than just getting the telephone and so on and so forth, no reasonable person would hypothesize and say, you know, there is no evidence that he wanted to escape.

But in any case, his escorts said so much, and there are so many witnesses who attested to the fact that Dominic Ongwen as a matter of fact made an attempt to reach out to General Salim Saleh in order to escape.

And my Lords, I want you to appreciate that escape in the LRA -- and, in particular, you know, it is common sense that I think this Court must take judicial notice of,

contacting, you know, forces of -- an enemy force, it's almost a treasonable -- it's actually a treasonable offence, and it is in that context that I will elucidate to you that things that happened thereafter was that Dominic Ongwen was arrested from the sickbay on the orders of Joseph Kony and he was taken and placed at the Control Altar. The Control Altar was the highest, you know, so to speak -- in other speak, they say it is the command post where the control of an organisation is maintained from.

Now, he was under Otti. That was on the 21st. But you see, my Lords, there is no record anywhere whether Dominic Ongwen was arrested, the kind of sentence that he was given, until it emerged on the 17th of August of the same year that there was a report by UPDF, the government, you know, armed forces, to say that Ongwen narrowly escaped being executed.

In context, my Lords, it can only lead to one thing: Ongwen for all this time - from the 21st of April up to this date - must have been waiting for execution. And I think he was just saved by the loud noise that was made by the government intelligence report. I think they got shy and did not execute him.

And it is in that context that we are saying, if properly assessed, if properly evaluated, no trier of facts would have arrived at any conclusion other than the fact that the man was attempting to escape. How will you -- how else would somebody want to take such a risk just to get a telephone? That is unreasonable.

And from an enemy? An enemy would give you a telephone in exchange for something - certainly, at least to lure you to get out - and the initiative was from Dominic Ongwen.

My Lords, there is scarcely time to say a lot of things, but of course we have divided our role into two. Madam Beth is going to take the next seven minutes after I've

finished eight minutes, but may I request that you give me, maybe, one extra minute? My Lord, the other thing that I wanted you to take cognizance of was the definition -- I mean, giving explanation to Ongwen's own statement. When he said, "I am not LRA", according to my colleagues on the other side, that did not mean that Ongwen did not understand the charges. As a matter of fact, that underscores or underpins the fact that he actually understood it, but if I said -- if you put two things, black and white, and I point to black as if it were white, have I understood your question? If you asked me, "Can you tell me which one is white and which one is black?" And instead of saying that is white, I tell you it is actually black, it means I have actually not understood it.

Ongwen, in effect, was saying: "You people, you are trying a hypothetical person. You are not trying Dominic Ongwen because, as far as I'm concerned, I have not committed any of these. What I understand is that, yes, maybe, since I was part of that group, I know that some of these things you're saying, you're saying about the organisation, but not me."

That underscores the fact that Ongwen did not understand the charges. It is not the other way around. And, you see, the fact that Dominic Ongwen tried to escape, but he did not manage, should have been put on his credit side, rather than on his debit side in this case.

So my Lords, I want to persuade you to accept the position of the Defence that, as a matter of fact, Dominic Ongwen, first of all, did not understand the charges; and secondly, Dominic Ongwen took all the chances that he had, and, in particular, when he was now isolated from the mainstream group to contact the most likely person who would help him to escape, General Salim Saleh. I thank you, my Lords.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [15:46:20] Thank you.

MR AYENA ODONGO: [15:46:21] I now hand over to counsel, lead co-counsel, Beth Lyons.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [15:46:21] Counsel Lyons, you have the floor for the remaining time, please.

MS LYONS: [15:46:30] Okay. Thank you, your Honour. Thank you, honourable…

Yesterday, I believe Judge Bossa asked us to talk more about our request that the Appeals Chamber make a de novo review of the Defence experts.

Now, in our appellate brief, we've detailed each of the Trial Chamber's conclusions on unreliability. We have refuted this. This is the evidence we're talking about. The purpose was to determine whether the Trial Chamber applied the correct burden of proof and whether they made a reasonable assessment.

Now, I answered her in terms of authority when she asked for authority in terms of Article 81(1)(b)(iv), and I just wanted to add quickly a few additional authorities to a request for review, particularly of facts.

Now our objections, originally, are both factual in terms of how the Trial Chamber interpreted and the evidence, but it's also legal. So it's a mixed -- it's a mixed -- it's mixed.

The additional authorities I want to raise are -- or to add are Bemba appeal judgment, paragraph 6, which talks about factual errors. We have identified sources of doubt about the accuracy of the Trial Chamber's findings.

The second reference I would like to add on de novo review is paragraph 25 of the Lubanga judgment, where the standard is an unreasonable assessment of the facts which may have occasioned a miscarriage of justice. This is what we believe happened. I will not take up the time to -- with the arguments now, I don't have it.

And thirdly, I would like to add the authority of the Muvunyi Appeals Chamber decision, 2008, where the Chamber rejects -- dismissed the Prosecution's appeal, granted Muvunyi's request on a number grounds because of the egregious pleading in defects in the indictment.

Now, let me move to my second point.

The second point I wanted to make, which I think got lost on Monday morning, was that the issue of mental disease and defect and mental disability have been raised by the Defence in three different areas, each of which has it's (Overlapping speakers)

THE COURT OFFICER: [15:49:27] Counsel has two minutes.

MS LYONS: [15:49:28] Okay. One is affirmative defence, which is a reasonable doubt standard. The second is reasonable accommodation, which is a prima facie showing and mitigation of sentence, which is a diminished capacity under Rule 145, a balance of probability standard. And in respect to the latter, we want to point out paragraphs 92 to 94 in the sentencing judgment where the Trial Chamber specifically made its finding that there was no diminished capacity, not based on a balance of probabilities, but based on a reference to paragraph 2580, which is a conclusion rejecting the 31(a) defence based on proof beyond a reasonable doubt.

The last point I want to make is the issue of Rule 135, which we talk about in our brief, but I want to point out that Mr Ongwen particularly was prejudiced by the third request for Rule 135, which was denied by the -- the Trial Chamber's denial of the third request. This was a request that the Defence made prior to -- as the case was ending. The Defence wanted an independent impartial examination from a court-appointed psychiatrist on whether Mr Ongwen, given his mental disease -- given the diagnosis of his mental disease, whether he was able to make an informed decision on should he testify -- or could he testify or not.

Now, Mr Ongwen did not testify in this case. He was never in a position where we understood that he could make an informed decision because no assessment was made of his mental health. That's what we asked for based on the years and records, not just of -- from the Defence experts, but also from the detention centre and also from Professor de Jong, records which the Trial Chamber had access to. And this is major violation of fair trial.

I will note that the Trial Chamber did not respond in the trial judgment to this error, to this and this -- this error of fair trial. I cannot therefore cite a trial judgment paragraph, but the issue of prejudice and what it means, he was denied his right to fully participate because there wasn't a Rule 135 request granted to make an impartial assessment.

Do I have any more time?

PRESIDING JUDGE IBÁÑEZ CARRANZA: [15:52:40] I will give you one minute to conclude.

MS LYONS: [15:52:44] Okay. The last conclusion -- thank you, your Honour. The last point I want to make is that our position is that -- that -- so it's clear, that Mr Ongwen could not formulate the intent required, which the -- for the legal element of intent required due to his mental disability.

The position that one's legal capacity -- ability to formulate intent has been supported by a number of authorities we submitted to you. I quote Grover, I quote Eser in Triffterer, as well as the Beijing Rules on juvenile justice, Rule 4.1. Your Honour has access to all of these, but I think it's important to link this point on intent and the intent -- and his lack of maturity due to his mental disease.

Thank you, your Honour.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [15:53:54] Thank you.

Now counsel for the Prosecution, please. You have 15 minutes. Starting now.

MS THIRU: [15:54:12] Thank you, Madam President, your Honours. I'm Nivedha Thiru. I will respond to some of the alleged fair trial violations that the Defence have raised in this hearing regarding the allegedly defective charges and also the Chamber's failure to order the Rule 135 examinations, and I will then hand over to my colleague, Mr Mugwanya, who will address you on some of the arguments about the Chamber's evidentiary assessment and intercept evidence.

Your Honours, in relation to the standard of review that applies here, the Ntaganda appeals judgment has already clarified the deferential standard of review that applies for factual errors, and if the Defence are alleging that their grounds of appeal instead arise from Article 81(1)(b)(iv), then they must demonstrate that any violations they allege affected the fairness of the proceedings in a way that affected the reliability of the conviction.

(Overlapping speakers)

THE INTERPRETER: [15:55:07] Message from the interpreters: Excessive speed.

MS THIRU: [15:55:12] They have not done so.

Your Honours, on Monday and today, counsel for Mr Ongwen criticised the Trial Chamber's summary dismissal of the Defence motion alleging defects in the charges, the defects motions, if you will. The Defence argued that the Appeals Chamber granted them leave to raise those issues again on appeal, and, indeed, the Appeals Chamber did state that the Defence could raise these arguments in its closing brief, and, ultimately, in their appeal against the conviction.

However, the Defence didn't properly raise those issues in their closing brief. In fact, in the words of the Trial Chamber: They did not develop their submissions in any detail. They incorporated prior submissions or reiterated previous filings.

If the Defence had done differently, clearly stated that --

PRESIDING JUDGE IBÁÑEZ CARRANZA: [15:56:12] Counsellor, please slow down --

MS THIRU: [15:56:14] My apologies to the interpreters.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [15:56:15] -- for the interpretation.

MS THIRU: [15:56:16] Thank you.

If the Defence had done differently, clearly stated its position, developed their arguments in the closing brief, then the Trial Chamber might have ruled upon the merits of those arguments in its judgment. But the Defence did not do so. So the Trial Chamber's decision was wholly reasonable in the circumstances.

But regardless of that, your Honours, there is no merit to the Defence's allegations on appeal about the defective charges.

We've already explained this in detail in paragraphs 74 to 98 of our response brief. I will just make three points on that today.

First, many of Mr Ongwen's criticisms relate to the non-operative part of the confirmation decision, the part that contains the Pre-Trial Chamber's reasoning and its assessment of the evidence. It's not the part that contains the charges; that is what's binding on the Trial Chamber.

The Trial Chamber was therefore correct to find that issues relating to the Pre-Trial Chamber's reasoning were unrelated to the question of whether the charges were adequately pleaded.

Second, the Pre-Trial Chamber did, in fact, provide adequate reasoning. It explained the basis of its conclusions, it referred to relevant evidence and it gave its legal interpretation on novel and contested issues.

Third, the charges were sufficiently specific. As the Appeals Chamber confirmed in

Yekatom and Ngaïssona, the charges don't need to contain specific terminology, contrary to what Ms Lyons said earlier today.

What matters is that the facts underlying the elements of crimes and the modes of liability are adequately pleaded, and they were in this case.

Coming now to the Defence's allegations regarding Mr Ongwen's mental health and the Chamber's failure to order a Rule 135 medical examination.

The Defence claimed that this resulted in two -- two aspects of prejudice for Mr Ongwen. First, that he entered a plea at the start of trial which was on the basis of charges he did not understand; and second, that this prevented him in 2019 from making an informed decision about whether or not to testify.

Your Honours, there was no violation in either case.

I will make four points on this.

First, when the Defence first raised the issue of Mr Ongwen's mental health, it did so on the day before the start of trial and it did not produce any evidence or concrete substantiation for this, even though it had obtained preliminary reports on the issue over one year earlier. And when it did provide its expert report, that report said nothing about Mr Ongwen's fitness to stand trial. Instead, it focused on a separate matter, that of the Article 31(1) defences.

Second, the Trial Chamber correctly found that the question of fitness is not whether Mr Ongwen suffers from a medical condition, it's whether despite that condition he can meaningfully exercise his fair trial rights. He did not need to have the same capacity as a trained lawyer. He only needed to make an informed decision with the advice and help of his lawyers, which he had.

Third, there was no evidence before the Chamber to indicate that Mr Ongwen did not understand the charges. To the contrary, Professor de Jong found that Mr Ongwen's

consciousness was clear; he was orientated in time and in relation to his environment and himself; he had a good attention span and concentration after hours of interviewing; and his intelligence was higher than average.

This was consistent with the Defence's own experts. The Trial Chamber found that their report showed that Mr Ongwen was articulate, able to communicate well-structured thoughts about his time in the LRA, and he was able to give an account of the acts with which he was charged.

Later in 2019, when the Defence filed its third request for a Rule 135 medical examination, the detention centre's medical officer said Mr Ongwen was medically fit to resume the trial process. And, furthermore, the Trial Chamber throughout the trial had observed for itself Mr Ongwen actively participating in the hearings, listening, reacting to witness testimony, calling his counsel to instruct them during testimony.

His Defence was therefore clearly capable of advising him on the charges and receiving his instructions.

Indeed, even this morning, you have heard Mr Ongwen contest liability on the basis that quote, "I am not the LRA", indicating - as Mr Cox suggested earlier - that he does indeed understand the charges.

And finally, your Honours, the Chamber did not ignore Mr Ongwen's mental health issues. It took them seriously. It appointed Professor de Jong to assess his condition and recommend any treatment. It adjourned the hearing whenever it was warranted. It sought updates from the detention centre as to Mr Ongwen's condition, and it accommodated Mr Ongwen's health and treatment needs by ensuring the hearing schedule did not include any five-day hearing weeks, after receiving the medical officer's recommendation to that effect.

So the Chamber reasonably found, your Honours, there was insufficient indicia to warrant a Rule 135 examination and it reasonably took into account his medical health issues.

With your leave, I will hand over to my colleague, Mr Mugwanya.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [16:02:43] Thank you. Counsellor, you can continue for the remaining time.

MR MUGWANYA: [16:02:49] I will briefly start by commenting on some submissions which Mr Ongwen has just made, before I return to a response to his challenges to the Chamber's assessment of intercept evidence.

As we have just heard today, Mr Ongwen makes a generalised assertion that the Trial Chamber erred in assessing evidence, including by actually leaving out his evidence. He refers in this regard to the Salim Saleh issue, you know, where he claims, when Salim Saleh had made contact with Ongwen and he had tried to escape, he was arrested.

Your Lordships, we have covered this issue in the Prosecutor's conviction response brief at paragraphs 338 to 341 and we are not going to repeat the arguments there. We are satisfied with the submissions there.

But I want to make two points.

One, Ongwen makes a wrong assertion regarding witness D-13's testimony regarding Ongwen's arrest in 2003. The witness does not suggest that Ongwen's life was threatened. In fact, the Chamber found that Ongwen's arrest followed contact with the government forces and not as D-13 testified, because he had tried to escape while in the sickbay.

But having said all this, there's one thread that runs across Ongwen's factual allegations or allegations that the Trial Chamber erred in assessing evidence.

Overall, he merely disagrees with the Trial Chamber's assessment without showing any error. He repeats his failed trial arguments without showing that the Chamber made any error. He repeatedly second-guesses the Chamber's reasonable assessment of the evidence, often selectively or misleadingly. He often also speculates on alternative and largely unsupported interpretations of the evidence. In multiple instances, he misused the trial judgment.

So we would just simply say, he does not meet any threshold that will be justified as an intervention in the Trial Chamber's reasonable assessment of evidence.

Now, I would briefly -- I think my time is very short, I will briefly comment on his allegations concerning the Trial Chamber's error in assessing intercept evidence. The Prosecutor has again addressed these allegations comprehensively in the Prosecution's response brief at paragraphs 452 to 537. We are not going to repeat them here. But we want also to underscore the deficiencies that run through Ongwen's submissions, and I would want mainly to focus on the submissions Mr Ongwen made yesterday, where he alleged that the Trial Chamber erred in assessing intercept evidence.

First of all, Mr Ongwen claimed that the Prosecutor asserted at the beginning of the trial that nearly half of its evidence was intercept evidence. But the Prosecutor never made this assertion anywhere in his submissions. The Prosecutor simply underscored the importance of intercept evidence and this intercept evidence was not limited to audio recordings --

THE COURT OFFICER: [16:07:20] Counsel has two minutes --

MR MUGWANYA: [16:07:24] -- but also encompassed logbooks and interceptors who would testify to this evidence.

Secondly, Mr Ongwen asserted that the Trial Chamber threw out most of the audio

recordings, meaning that the Chamber dismissed it because it was not translated into the language of the Court. He thereby questions how the case was proved beyond a reasonable doubt.

Firstly, the Chamber did not dismiss the untranslated audio recordings as Ongwen suggests, but simply focused its review on the audio recordings, which could be understood in the working language of the Court. That's trial judgment paragraph 643. The Prosecutor ensured that all relevant parts of the audio records were translated into English. Those untranslated were readily available to Mr Ongwen. It was up to him, if he thought they were relevant to his case, to have them translated and adduced in evidence.

Secondly, the audio recordings were a small part of the overall intercept evidence of the Prosecutor. Much of this evidence was logbook entries. So it is wrong for Ongwen to claim that much of this evidence was audio recordings, but much of it was intercept -- much of it was logbook entries.

Now, before I conclude, I think my time is running out, he makes a (Overlapping speakers)

PRESIDING JUDGE IBÁÑEZ CARRANZA: [16:09:00] I will give you another minute to conclude after your time (Overlapping speakers)

MR MUGWANYA: [16:09:03] Yes. He makes an argument that the logbook entries were not -- couldn't be relied on because -- and because the Chamber had discounted the audios, it was not to rely on the logbook entries. But the Chamber was meticulous in assessing these logbook entries. They were a contemporaneous record of the audio recordings. They were also authenticated by witnesses. The interceptors also testified in the court in this regard. These persons were also trained and skilled, and all these logbook entries were properly stored, so there was a proper

chain of custody.

So the Chamber could reasonably rely on them to convict -- to convict Ongwen. But most critical also, the Chamber didn't rely on these logbook entries independently all alone in convicting. It only relied on them to corroborate witness testimonies, including those ones who had witnessed the events on the ground.

Finally -- finally, my Lord, I would urge you -- or we would urge you that the Prosecutor discharged his burden of proof and the Trial Chamber reasonably convicted Mr Ongwen. It did not rely only on intercept evidence, but it relied on a large body of evidence, including witnesses.

This burden was, therefore, correctly discharged. In this regard, we pray that Mr Ongwen's submissions be dismissed.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [16:10:41] Thank you.

Now, Mr Cox, representing victims' group 1, please. You have the floor for five minutes.

MR COX: [16:10:49] Your Honour, more than arguing new grounds, could I comment on what has been said?

PRESIDING JUDGE IBÁÑEZ CARRANZA: [16:11:00] Yes, of course. You have five minutes.

MR COX: [16:11:02] Thank you, your Honour.

I would like to address the allegations of Mr Ayena. He says: I think they got shy of killing him because he tried to escape because of the pressure of the government. Do we have any evidence of that? No. Can you use that? No. What do we have that was really used by the Trial Chamber?

We have the testimony of P-359. When was this testimony about -- or when was the temporal feature of this testimony referred to? 2006. This alleged trying to escape

was in 20 -- April 2003.

Three years later, 359 says, "Dominic, leave with us." This is in the peace talks, your Honour. The band of bandits was in peace talks with the government, a low-ranking member of the band of bandits was having conversations with the highest-ranking general - as Mr Ayena has said - and he decided not to leave. So we have an actual fact that illuminates the allegation made in 2003 or the thought of Mr Ayena of what happened.

Let me comment what illuminates this episode. It also illuminates the absence of duress. It always -- it always -- it also, sorry, illuminates the absence of a child-like person. A child-like person is negotiating with a general. He's talking with a general. He's in negotiation with a general. He is getting out of this mind control, spiritual control and going against the will of this brainwasher, Mr Kony.

He is really capable of making his own decisions. This is what all this information that has been brought up by the Defence shows. Nothing else.

Thank, your Honour.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [16:13:46] Thank you.

Now counsel for victims' group 2, Ms Paolina Massidda, you have five minutes

MS MASSIDDA: [16:13:55] I have no submissions on other grounds. Thank you very much.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [16:14:00] Well, thank you very much. It appears that with this, we have now reached the end of third day of hearing. I thank --

MR AYENA ODONGO: [16:14:11] Excuse me --

PRESIDING JUDGE IBÁÑEZ CARRANZA: [16:14:12] Yes.

MR AYENA ODONGO: [16:14:13] -- my Lord. There is something that I wanted to

respond to with your leave.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [16:14:15] It was not supposed -- the responses, but I will give you two minutes to respond with this and we will finalise. Thank you.

MR AYENA ODONGO: [16:14:23] It is very dangerous to leave the apparent misunderstanding of what my colleague said in respect to what happened to the group -- to the splinter group that was in Uganda after the Iron Fist.

Your Lordships, it doesn't matter what I say here more than the facts which are on record, and I'm sure there will come a time when you will hear from the horse's mouth himself about what the situation was like. The position that my colleague was talking about and I think, you know, in the spur of the moment, sometimes you go overboard and say certain things that, you know, you mix a few things.

What, in effect, he was saying - and he tried to explain it later - when this group was severed from the main group, which remained in Sudan with Joseph Kony, they were really more or less alienated, and he was reporting the impression that was given by the government of Uganda.

First of all, through Balikuddembe, who was the division commander of Northern Uganda, where the -- which was the epicentre of the conflict between the government of Uganda and Joseph Kony's LRA and then, again, somebody else. In fact, the answer of the Parliament of Uganda, where, mercifully I was a member, and they were saying: What now remains are disjointed bands of people who are surviving.

So I think when my colleague stood up, he was -- his mind was informed by the statement of the government of Uganda. But the fact of the situation will be established from the facts on record. That is what I invite this Court to rely on. But not what I have said, not what he has said in passing, but on the record, and perhaps

what - when he has an opportunity - he would say about it.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [16:17:00] Thank you. Thank you. Well, because of equality of arms, if any of the parties would like to make any submissions about this intervention of the Defence, I will allow two minutes. No? No, it's okay. Then we have reached --

MR TAKU: [16:17:19] Your Honour, may I correct the record in one thing?

PRESIDING JUDGE IBÁÑEZ CARRANZA: [16:17:23] Wait a minute, the Defence has been allowed too much time. What would you like to correct? What has been said is said and it's understood.

MR TAKU: [16:17:32] Yes, your Honour, it's just that the confirmation decision, the operative part actually says that they incorporate the modes of liability and they reserve part by reference as part of the operative part --

PRESIDING JUDGE IBÁÑEZ CARRANZA: [16:17:43] Okay.

MR TAKU: [16:17:43] -- paragraph -- paragraph 14, right to the end. So our criticism targeting the operative part, the modes of liability is true. What is different from the confirmation decision of Yekatom, this one incorporates by reference the operative -- the operative part incorporates by reference in each of the charges the reasoning part and the contextual part, which we challenge, and where our objections are based.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [16:18:13] Thank you.

MR TAKU: [16:18:14] I just wanted to make that clarification.

PRESIDING JUDGE IBÁÑEZ CARRANZA: [16:18:19] Thank you. Thank you, Counsellor.

Now finally, we have reached the end of the third day of the hearing and I thank the amici, who are not present now, but because they have assisted us on the issues

concerning cumulative convictions, your contributions will certainly assist the Chamber in reaching its determination of the matter.

We will reconvene tomorrow at 10:30.

The hearing is now adjourned until then.

THE COURT USHER: [16:18:50] All rise.

(The hearing ends in open session at 4.18 p.m.)